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Restating Conflicts Again: A Cure for Schizophrenia?†

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Professor Shreve's open-ended invitation to "comment on any aspect of the proposal for a third restatement of conflicts which interests you" provides an opportunity which I welcome for several reasons. First, his generous offer is broad enough to include a response with an absolute minimum of footnotes—which is something I have always wanted to do.¹

Second, and more importantly, it has provided an opportunity for me to reflect on some conclusions reached in the process of almost forty years of teaching this subject, and to try to articulate those conclusions no less for myself than for others. As always, such a process generates more questions than answers. In doing so it demonstrates the validity of one proposition about legal learning to which many of us subscribe, however, that asking the right questions is more important than getting the right answers. The sticky part, of course, is in establishing which questions are "right."

I.

I begin with an observation about the perennial schizophrenia of the American Law Institute ("ALI") with respect to the role of the restatements. Are they properly only a reflection of existing practice and theory in the field in question, as the name "restatement" suggests, or can they appropriately be "prestatements," charting a course for that which the law ought to become? Or can they be both, in some undetermined proportion? Most restatements have, without doubt, tried to combine both roles, in varying proportions in different subject fields. One most striking example of prestatement occurred in the original formulation of section 90 of the *Restatement of the Law of Contracts*, concerning promissory estoppel, based on mere straws in the wind in existing case law,² but presaging the incredible growth of "reliance theory" in the American cases and the huge importance if not dominance

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1. I recognize that footnotes are sometimes an aid to further research, and are a courteous method of attributing ideas to their appropriate sources. Nevertheless, it seems to me that the almost compulsive footnoting by American legal writers tends to interrupt and fragment the reasoning process. As to the need for attribution, I frankly confess that I have had very few original ideas in my lifetime. Almost all of the thoughts I have on this subject (including those in this Comment) are attributable to colleagues and other writers on this subject, to a host of judicial authors whose opinions I have tried to digest over the years, and to the critical responses of thousands of students. I therefore disclaim any originality in what follows, but I am also at a loss to identify all of the sources of the ideas expressed, since they have come together in my own thinking in a kind of composite without a lot of footnotes. Readers who find it curious that I should explain my aversion to footnotes in a footnote are referred to the Holmesian aphorism that "All generalizations are false, including this one."

2. See *Greiner v. Greiner*, 293 P. 759 (Kan. 1930); *Devecmon v. Shaw*, 14 A. 464 (Md. 1888); *Rickets v. Scothorn*, 77 N.W. 365 (Neb. 1898); *Siegal v. Spear & Co.*, 138 N.E. 414 (N.Y. 1923); *In re Taylor's Estate*, 167 N.E. 434 (N.Y. 1929).

of the reliance concept in various parts of the *Restatement (Second) of the Law of Contracts*.³ Similar examples can probably be found in the *Restatement of the Law of Torts*, although the burgeoning theories of liability for personal injury that have appeared in the last forty years appear to be more a product of judicial innovation than a result of the influence and prestige of the ALI.⁴ No doubt some examples of prestatement can be found in virtually all of the *Restatements*.

As for the *Restatement (Second) of Conflict of Laws* ("Second Restatement"), it seems to me that the Reporter, Professor Willis Reese, was strongly committed to the basic goal of restating, but the case law and academic theory were changing so rapidly during the process of drafting that he was shooting at a constantly moving target. Ample evidence of that can be found, for anyone who needs it, in the constant succession of drafts which emerged during the seventeen years it took to produce the final version of the *Second Restatement*. To be sure, the "principles underlying conflict of laws" which he had formulated with Professor Elliott Cheatham at the middle of the century were important parameters in his approach to the project,⁵ and most of these principles survived to become the section 6 principles of the *Second Restatement*.⁶ But as I understand their earlier formulation, these principles were perceived as already embodied in case law, and resided there like Michelangelo's slaves, simply waiting to be released from the surrounding stone. If that is true then even section 6 is faithful to the restatement function.

II.

It seems useful to consider the proposal for a third restatement in the light of this dichotomy of functions, but the consideration goes beyond the simple duality of restatement and prestatement functions. On the restatement side at least two primary objectives, or some combination of them, are apparently driving the proposal. The first is that we ought to restate the decisional law of conflicts, but this time we ought to "get it right." The second is that, conceding the utility of the central approach of the *Second Restatement*, we ought to "clean it up," pruning the parts that were inaccurate from the outset and abandoning the excess baggage that has not been used by the courts.

3. E.g., *RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS* §§ 38 cmt. a, 88, 89(c), 90, 139, 150 (1981). This phenomenon led one renowned scholar to conclude that reliance has replaced bargain as the central basis for enforcing promises. See GRANT GILMORE, *THE DEATH OF CONTRACT* 72 (1974).

4. See generally 1 *AMERICAN LAW INST., REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY* 14-19 (1991). The exception proving the rule is section 402A of the *RESTATEMENT OF TORTS (SECOND)* (1965), which is itself probably properly viewed as an example of prestatement establishing strict liability for defective products.

5. Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 *COLUM. L. REV.* 959 (1952).

6. See Courtland H. Peterson, *Private International Law at the End of the Twentieth Century: Progress or Regress?*, 46 *AM. J. COMP. L.* 197, 204-05 (Supp. 1998). The nonsurvivor, of course, was what Cheatham and Reese originally called "justice in the individual case," which was later revived as the "better law" theory. *Id.* at 205.

As for “getting it right,” several authors have suggested that the time is ripe for empirical studies,⁷ of the kind already begun by Dean Patrick Borchers and others,⁸ to determine what it is the courts are in fact doing. Presumably this would differ from the normal process of collecting, analyzing, and classifying the cases—a process traditionally involved in all restatements. The traditional method assumes, with few exceptions, that judicial opinions mean what they say and that they accurately reflect not only the result reached but also the reasoning process used in getting there. The necessity of “empirical studies” presumably arises from suspicion that opinions do not mean what they say, or do not accurately reflect the reasoning of the opinion writer, and in either case may be misleading at least for precedential purposes.

There may indeed be a consensus that such a sorry state of affairs exists in the general run of conflicts cases. I am much inclined to accept that unhappy conclusion, but less sanguine than others about the potential of empirical studies as a remedy for the situation. There are truly formidable difficulties. First, if restatement is supposed to reflect actual practice, and if we *really* want to get it right, we need to look not only at the behavior of judges but also at the behavior of lawyers and their clients. It is a virtual certainty that the latter often settle controversies involving conflicts questions precisely because the outcome of litigation would be unpredictable. How does one restate that practice? And even as to settlements which occur because the resolution of the conflicts issues was thought to be predictable, how does one accumulate the data to make such a study? I am reminded of the difficulties encountered by the early Realists, and particularly of the efforts of Professor Underhill Moore to analyze the actual practices of banks in discounting notes of their customers. Anyone who doubts that empirical studies of this kind are enormously labor intensive should revisit the series of articles Moore published in the *Yale Law Journal* from 1929 to 1931.⁹ Anyone who does read them will find them pretty heavy going.

Moore was also quite critical of the limited success of less scientific empirical approaches, which he accounted for as a failure to attempt to correlate judicial behavior with any events except the “facts of the case.” In his view the lawyer’s

persistent pursuit of his laws in the “facts of the case” may be explained by the fact that the judges and administrators themselves in their opinions began quite irrelevantly and ambiguously to say that their behavior was the necessary consequence of these laws. From necessary logical deduction to necessary behavior was an easy step, and the transformation of scientific generalizations into Law was complete. Whether this new and puissant being was the daughter of God,

7. See William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417 (2000).

8. See Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357 (1992); Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989).

9. Underhill Moore & Theodore S. Hope, Jr., *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L.J. 703 (1929); Underhill Moore & Gilbert Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts* (pts. 1-6), 40 YALE L.J. 381, 555, 752, 928, 1055, 1219 (1930-31).

of nature, or of the state, her will had been ascertained by correlating judicial behavior with the facts of the case, and should therefore continue to be so ascertained.¹⁰

Moore thought that the field of inquiry had to be extended systematically to include not only the facts of the case but also the relation between judicial behavior and the institutional ways of behaving in the contemporary culture of the place where the facts occurred and the decision was made.¹¹ For our purposes that seems to me to be an impossible task. I do not know how far we should go in pursuit of the *systematic* study which Moore envisioned, but I am less critical than he of attempts to determine existing *law* simply in terms of outcomes of judicial behavior, especially if only limited reliance is placed on the articulated reasons for decision. In any event it seems to me this is probably about the best that we can hope for from empirical studies in this area.

Although more such modest studies would of course be helpful if not essential to the restatement function of a third restatement, that useful enterprise is not dependent on the decision to construct a third restatement. Surely most of us would applaud further efforts at such clarification, quite apart from the undertaking of a third edition.

I would not go so far as my friend Professor Friedrich Juenger, in asserting that one should not try to restate the unrepeatable.¹² But I do agree with Professor William Richman that any decision to assemble a new restatement presupposes at least some substantial consensus about what is to be restated.¹³ In my view it is most doubtful that any such consensus yet exists, at least as to the *Second Restatement's* choice-of-law regime. Empirical studies may help in time to achieve such a consensus, and they should surely go forward, with all the diversity which investigators with different theoretical orientations will bring to the task. But to identify a single Reporter, or to begin drafting at this stage, seems premature. To do so would either constitute a prejudgment about the primacy of one of the various theoretical positions still in competition—presumably the view held by the Reporter selected for the job—or else it would impose on the new Reporter the same burden of eclecticism which Professor Reese struggled so mightily to fulfill.

Turning to the alternative objective of a new restatement, namely, that of cleaning up the *Second Restatement*, somewhat similar observations must be made. The necessity or desirability of a consensus still exists, even if mere revision is undertaken, but in some areas it might be possible to find one. I am intrigued by the possibility, for example, that even modestly structured empirical research might develop a consensus supporting some parts of Professor Louise Weinberg's proposed revision of section 6. Her proposed revision contemplates admittedly radical surgery, restoring "better law" to the principles of section 6, deleting the reference to "needs of the interstate and international system," adding an antidiscrimination principle to

10. Moore & Hope, *supra* note 9, at 704.

11. *See id.* at 705.

12. *See* Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403, 415-16 (2000).

13. *See* Richman & Reynolds, *supra* note 7, at 427.

that section, and “cutting to the chase” (section 6) for the real keys to decisionmaking.¹⁴ Her provocative description makes fascinating reading, but I do not understand her to claim a consensus for her view.

III.

The necessity or at least desirability of a consensus before a restatement is undertaken is a question worth pursuing. If no significant consensus exists, as apparently it did not at the time the original *Restatement of the Law of Conflict of Laws* (“*First Restatement*”) was undertaken by Professor Joseph Beale, then the issuance of a restatement clearly invites a deluge of criticism. Beale’s *First Restatement* did just that, with Professor Walter Wheeler Cook leading the charge, and other critics close behind.¹⁵ These critiques were devastating, but unfortunately offered no persuasive theoretical alternatives. And what of the courts? So far as I can tell, they welcomed the mechanical jurisprudence of the *First Restatement* with open arms, and over the twenty years which passed before the decision to initiate a *Second Restatement* only a handful of decisions—mostly proposing a center-of-gravity theory—overtly challenged the vested-rights approach proposed by Beale.¹⁶

Could one then say that there was a consensus favoring a *Second Restatement* when that decision was taken in 1953? Hardly, if by consensus we mean agreement about the law to be restated. But there was a sort of consensus, not about what to do, but that something needed to be done: the scholars had overtly challenged the vested-rights theory, while the courts had covertly challenged it by avoiding unpalatable results through the array of escape devices exposed by the scholarly critics.¹⁷

Several of the principal authors in this Symposium have noted that the *Second Restatement* was conceived as a “transitional” document, and that even Professor Reese viewed it in that light. Again, as with the *First Restatement*, scholarly critics quickly emerged, this time led by Professors Brainerd Currie and Albert Ehrenzweig. This time, however, the critics were offering alternatives. Currie and Ehrenzweig both preached the primacy of forum law, although from very different starting points.¹⁸ They were joined, over time, by a platoon of other scholars offering a menu of alternatives, ranging from “functional” theories¹⁹ to “choice-influencing”

14. Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L.J. 475, 485 (2000).

15. Cook’s articles were ultimately collected in book form as WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942). See also Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924).

16. Notably, *W.H. Barber Co. v. Hughes*, 63 N.E.2d 417 (Ind. 1945), and *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954).

17. Law school casebooks on conflict of laws typically include a section under the heading of “Escape Devices” (or some equivalent of this), detailing how the courts have avoided unacceptable results through manipulation of characterization, renvoi, and dépeçage. For a recent example, see SYMEON C. SYMEONIDES, WENDY COLLINS PERDUE & ARTHUR T. VON MEHREN, *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL* 40-99 (1998).

18. See EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* 15-23 (2d ed. 1992).

19. *Id.* at 23-29.

considerations.²⁰ As already noted, Professor Reese responded to this barrage of new theory by incorporating important parts of it in the *Second Restatement* in a series of drafts that evolved over more than seventeen years.

Many of us, as observers of these efforts, thought he was trying to put the same saddle on several horses moving in different directions. I once described it as an attempt at ecumenicalism in an era of "true believers."²¹ The document he produced, however, and which the ALI approved, turned out to be surprisingly persuasive to many of the appellate courts in this country. As Dean Symeonides's surveys have demonstrated over the past decade, no single theory is dominant in the United States, but the *Second Restatement* has attracted many more adherents than any of the other theoretical "approaches," and these now outnumber the states clinging to the "traditional" vested-rights theory of the *First Restatement*.²² It may well be true, as Professor Juenger has suggested, that it was precisely this eclectic indeterminacy of the *Second Restatement* that made judges like it and academics detest it.²³

What does this thumbnail sketch of the American "conflicts revolution" tell us about the necessity or desirability of consensus? It may be fair to say that the *First Restatement* lacked any real consensus except common acceptance of the goal of predictability, but it was the "only game in town," and ultimately failed when uniformity of result regardless of forum was shown to be unattainable. The *Second Restatement* started with a consensus that something ought to be done, but without any common understanding of what should be done. It has failed to satisfy scholarly aspirations because there are now too many games in town, and in part because it has tried to be responsive to too many competing theories. At least superficially there is a partial consensus among American courts, based on an asserted adherence to the *Second Restatement*, but that may well come unglued as empirical studies demonstrate the variety of different outcomes that are being produced in the name of the same theory. Moreover, as Professor Juenger points out, judicial eclecticism often treats disparate doctrines as interchangeable.²⁴

If there is no significant consensus about what should be restated, is it at least true (as was the case with the decision to undertake the *Second Restatement*) that agreement exists that *something* ought to be done? If the views of the principal authors of this Symposium are any measure, then even that limited consensus is lacking. Dean Symeonides thinks we ought to begin a third restatement and has even started drafting. Professor Juenger thinks any restatement at this point would be a waste of paper. Professor Richman thinks a new restatement at this point would be premature, but that the ALI should lay the groundwork for such a future effort by creating a study group. Professor Weinberg would go forward now, not by a complete departure from the *Second Restatement*, but by cleaning it up through radical surgery,

20. *Id.* at 29-31.

21. Courtland H. Peterson, *Weighing Contacts in Conflicts Cases: The Handmaiden Axiom*, 9 DUQ. L. REV. 436, 441 & n.30 (1971).

22. *E.g.*, Symeon C. Symeonides, *Choice of Law in the American Courts in 1997*, 46 AM. J. COMP. L. 233, 266 (1998). The most recent survey cites all 11 of the preceding surveys. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 1998: Twelfth Annual Survey*, 47 AM. J. COMP. L. 327, 328 n.5 (1999).

23. *See* Juenger, *supra* note 12, at 404-05.

24. *See id.* at 411.

including transplants. Certainly the views of the principal authors, taken as a whole, do not reflect any consensus which I am able to identify.

I do not profess to know how much of a consensus we need before launching a third restatement. The history of the first two *Restatements* may be an inadequate guide, but it seems to me that if there are any lessons to be learned from them, they teach that we do not yet have clear enough common ground to begin again. On balance I come down about where Professors Richman and Reynolds do, that the ALI should appoint a study group to work for the next few years, as systematically as possible, in identifying the extent to which there is common ground.²⁵ I could not possibly improve on their suggestion of two people to lead such a group, namely Deans Symeonides and Borchers.²⁶ I would urge, however, that the group include broad representation of various viewpoints, and that an even broader advisory group be invited to comment as the work progresses.

IV.

The absence of a present consensus again calls into question the tension between restatement and prestatement. An important aspect of that tension is cast in sharp relief by recent pronouncements of the Supreme Court which have clarified some of the ambiguities surrounding both venue and jurisdiction, and the relationship between these and choice of law.²⁷ Some of these "clarifications" seem to me to be very wrongheaded, and they pose a real test of character for me. I now know, for example, that states may acquire personal jurisdiction by service of process on transients within their territory, even though they have no other connection with the parties or the case, and notwithstanding some hopeful earlier signs that this archaic rule was to be abandoned.²⁸ (Individual states may, of course, decline to exercise this power, but are not likely to do so in the absence of constitutional compulsion.) Should a revision cast this clarification in stone, as a matter of restatement, or should we indulge in a prestatement reflecting the prevailing academic view, that this is an ugly and unnecessary rule rejected by most of the legal systems of the civilized world?²⁹

Thus even in areas where consensus can be found, pure restatement may be unpalatable and prestatement tempting. There are no clear benchmarks by which we can judge the propriety of prestatement, or the extent to which we can or should yield to that temptation. One strong impression I have, which I cannot document and would not even know how to document, is that restatements are most influential when their basic thrust is mainly confined to analyzing, organizing, and clarifying existing

25. See Richman & Reynolds, *supra* note 7, at 434.

26. See *id.* at 434 n.85.

27. See generally Courtland H. Peterson, *Proposals of Marriage Between Jurisdiction and Choice of Law*, 14 U.C. DAVIS L. REV. 869 (1981) (discussing relationship between jurisdiction and choice of law).

28. See *Burnham v. Superior Court*, 495 U.S. 604, 621 (1990) (rejecting the earlier dictum in *Shaffer v. Heitner*, 433 U.S. 186, 209 (1977), which emphasized the relationship of the defendant and the cause of action to the forum, and held that the presence of property alone, unrelated to the cause of action, would not support state jurisdiction).

29. See *The Future of Personal Jurisdiction: A Symposium on Burnham v. Superior Court*, 22 RUTGERS L.J. 559 (1991).

decisional law, and when their prestatements occur only in critical areas of need or uncertainty which are exposed by the more traditional process. It seems probable that prestatement is likely to succeed only if two preconditions are met: first, that the law in question is uncertain, and second, that the proposed revision appeals to a common conception of fairness. The "gotcha" jurisdiction revision would meet the second of these tests but not the first.

Would the undertaking of a third restatement offer any cure for the schizophrenia of the ALI about restatement as opposed to prestatement? In my view it would not, and it may well exacerbate the problem if we again proceed on the assumption that *something* needs to be done, even though we do not know what it is.

V.

One of the virtues of a study group would be that it does not require commitment to either a third restatement or a revision of *Second Restatement*. Decision to do either of these things could be deferred pending an evaluation of what the study produces. Moreover, the study may well give us some further information that would permit an informed decision about the extent to which prestatement would be feasible, if, as I have suggested, feasibility depends on a combined double test of uncertainty and an appeal to fairness.

For example, Professor Weinberg's proposal of an antidiscrimination principle might well meet both tests.³⁰ Her suggested resurrection of a "better law" principle may meet both tests,³¹ at least if its use were limited to situations where the law is otherwise uncertain. Perhaps an agenda addressed to this subject would even enlist the invaluable support of Professor Juenger.

What are some of the other subjects which should be addressed? There are, of course, many possibilities. In what follows I mention only a few which seem to me to be essential.

Some authors have suggested that much of the conflicts revolution was dominated by such matters as "guest" statutes, damages limitations in wrongful death cases, and charitable immunity—that these are now dead issues, and that we should move on. In my view nothing could be further from the truth. The wave of "tort reform" legislation that has swept over the country in the past dozen years has replaced whatever gains were made in repealing the archaic statutes or rules which produced those issues, and the new legislation is not only more pervasive but continues to present precisely the same kinds of problems which were grist for the mill of the "revolution."

Let me suggest a few examples taken from my own state. Colorado was, to be sure, one of the two or three states in which the tort reformers (primarily insurance companies) were most successful in selling the legislature their product, but similar examples of some of these "reforms" can be found in a majority of other states. Although Colorado did repeal its guest statute and some of the limitations on wrongful death damages, since 1986 more than forty other pieces of legislation have

30. See Weinberg, *supra* note 14, at 503-06.

31. *Id.* at 501.

been enacted which, primarily through limitations on remedies, present potential conflicts issues.

We now have limitations on damages on a variety of fronts. Damages for noneconomic harm (pain and suffering and the like) are limited to \$250,000 for most cases, and \$500,000 for extraordinary cases.³² Punitive damages are limited to an amount equal to the "actual" damages awarded,³³ and evidence of the income or net worth of a defendant shall not be considered in determining the appropriateness or amount of such damages.³⁴ Common law dramshop liability is abolished but liability of vendors of alcoholic beverages is limited to \$150,000, and liability is further limited by a "willfully and knowingly" standard of proof.³⁵ Damages recoverable against health care providers are limited to a total of one million dollars, with some exceptions, but are limited to \$250,000 for noneconomic harm (including derivative claims).³⁶ Governmental immunity is partially waived, but liability for entities' or employees' acts is limited to \$150,000 per claimant and \$600,000 per occurrence.³⁷ The list of defendants entitled to full or partial immunity from tort liability also grew exponentially, to include not only good samaritans in general,³⁸ donors of food,³⁹ directors and officers of nonprofit corporations,⁴⁰ corporate directors and officers who were not personally involved in the commission of a tort by a corporate employee,⁴¹ and mental health care providers for violent acts of their patients,⁴² but also gun manufacturers.⁴³ Especially noteworthy recipients of immunity or partial immunity status, in the conflicts setting, are entrepreneurs whose activities are specifically aimed at tourists—including operators of ski resorts,⁴⁴ providers of professional baseball games,⁴⁵ and sponsors of equine activities.⁴⁶ Although provisions for the latter were originally aimed at protecting operators of stables renting saddle horses, in the interests of fairness the statute has been amended to include llamas, alpacas, guanacos, and vicunas.⁴⁷

Added to the lists of shortened statutes of limitations were a number of "statutes of repose," aimed at barring not only the action but liability itself, for a number of

32. COLO. REV. STAT. ANN. § 13-21-102.5(3)(a) (West 1997 & Supp. 1999).

33. *Id.* § 13-21-102(1)(a) (West 1997).

34. *See id.* § 13-21-102(6).

35. *Id.* § 12-47-801 (West Supp. 1999).

36. *See id.* § 13-64-302(1) (West 1997 & Supp. 1999).

37. *See id.* § 24-10-114(1)(a)-(b) (West 1990 & Supp. 1999).

38. *See id.* § 13-21-108 (West 1997).

39. *See id.* § 13-21-113.

40. *See id.* § 13-21-116.

41. *See id.* § 7-108-402 (West 1999).

42. *See id.* § 13-21-117 (West 1997).

43. *See id.* § 13-21-501.

44. *See id.* §§ 33-44-112 to -113 (West 1998).

45. *See id.* § 13-21-120 (West 1997).

46. *See id.* § 13-21-119.

47. *See id.* § 13-21-119(f.1).

actors. Included are most manufacturers and sellers⁴⁸ for product liability (two years),⁴⁹ doctors accused of medical malpractice (three years),⁵⁰ architects and builders (six years),⁵¹ and land surveyors (ten years).⁵²

To those of us who “cut our conflicts teeth” on guest statutes and damages limitations, this looks like Yogi Berra’s “déjà vu all over again.” Not only have these problems not gone away, but in fact these statutes may introduce some new ones as well, at least in terms of the policies implicated by some of the new and innovative protections offered by such provisions. In any event a study of current conflicts problems should consider in detail the problems presented by this new wave of legislation, and the cases which are beginning to deal with them. The *Second Restatement*, of course, leaves many of the problems generated by “tort reform” wholly at large.

Another area deserving attention by a study group, in my opinion, is the principle of protecting justified expectations of the parties. This has often gotten lost in past analyses, especially in the search for, or invention of, state interests. Expectation is, of course, the centerpiece of party autonomy in the contracts area, but justified expectations may also play a role in some of the efforts to formulate more precise choice rules. For example, the fairness of imposing a common-domicile rule on the parties, and of making a distinction between conduct-regulation and loss-distribution issues—both of which Dean Symeonides incorporates in his tentative proposals⁵³—seem to me to rest on an expectations rationale. Limits on expectations, especially examining the use of adhesion contracts to produce what is essentially a one-party choice of law or forum, also need further exploration.

VI.

I conclude with a brief reference to the role of governmental interest analysis, and its relationship to the future development of conflict of laws. Like Professors Kramer and Juenger, I find most of the current judicial opinions in this area both disappointing and confusing.⁵⁴ Like Juenger I am especially troubled by the assumption indulged by some courts, including the United States Supreme Court, that “interests” and “contacts” are the same thing, or at least closely related.⁵⁵ Like many writers I am surprised that the subject of interest analysis continues to dominate so much of academic discussion in the area of conflicts, notwithstanding the fact that so few courts have expressly adopted this approach after forty years of its elaboration.⁵⁶ One possible explanation, of course, is that a number of courts, while professing

48. See *id.* § 13-80-107 (West 1997).

49. See *id.* § 13-80-106.

50. See *id.* § 13-80-102.5 (West 1997 & Supp. 1999).

51. See *id.* § 13-80-104.

52. See *id.* § 13-80-105 (West 1997).

53. See Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 IND. L.J. 437, 459-63, 452-58.

54. See Juenger, *supra* note 12, at 405-06; Larry Kramer, *On the Need for Uniform Choice of Code*, 89 MICH. L. REV. 2134, 2149 (1991).

55. See Juenger, *supra* note 12, at 403 nn.2, 4.

56. See Symposium, *Choice of Law: How It Ought To Be*, 48 MERCER L. REV. 623 (1997).

adherence to the *Second Restatement*, have gone straight to the “interest” principles of section 6 to solve difficult problems, and have thus used interest analysis without appropriate attribution.

I have an alternative explanation. I believe that the survival of interest analysis as a dominant aspect of conflicts theory is a result of the fact that law professors use it to teach the subject of conflict of laws—even if they do not personally subscribe to its methodology. It catches students’ attention, intrigues them, and provides a vehicle with amazing explanatory power to get them interested in the jurisprudential aspects of the conflict of laws. I also believe that most students, having been taken on this trip, reject interest analysis as too unpredictable, too much lacking in hard edges, too inefficient, and too little concerned with justice in the individual case. I am not unhappy with that result, but I have always used interest analysis as a teaching tool because I think that the trip is highly educational. One may hope, however, that if a study group is formed to explore the current state of conflicts law, it will not become bogged down in interest analysis, and will not let that topic dominate the inquiry.

Professor Juenger has chided me for expressing the hope that we can find principled rules for the future,⁵⁷ and I confess to having cited the common-domicile concept and the conduct-regulation, loss-distribution distinction as hopeful signs of development.⁵⁸ (I also confess to having cited the conflicts provisions of the ALI Complex Litigation Project, but I firmly deny having done so with approval.⁵⁹) In professing this hope, as I still do, I am also guided by what I perceive to be the collective view of my students, over time. Together we *are* concerned about the results of cases, and whatever system is developed must make room for considerations of fairness. Reference to the “better law” as a tie breaker may be a way to accomplish this, but it will not solve all problems. If there are to be rules we want them to be policy driven rather than arbitrary, if that is possible. But we recognize that there is value in judicial efficiency, and in predictability, and if push comes to shove we would rather have an arbitrary rule than no guidance at all.

57. See Juenger, *supra* note 12, at 408 nn. 46-47

58. See Peterson, *supra* note 6, at 226.

59. See *id.* at 227 n.147. I called it “important,” which it is, but not “hopeful,” which it is not. *Id.* at 227.

