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The Restatement (Second): Some Not So Fine Tuning for a Restatement (Third): A Very Well-Curried Leflar over Reese with Korn on the Side (Or Is It Cob?)

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The Restatement (Second): Some Not So Fine Tuning for a Restatement (Third): A Very Well-Curried Leflar over Reese with Korn on the Side (Or Is It Cob?)

BRUCE POSNAK*

INTRODUCTION

This Symposium deals with two questions: Is a Restatement (Third) of Conflict of Laws needed, and if so what should it include? Although reasonable people differ about whether the time is ripe to actually adopt a new restatement, most agree that we should at least start talking about it. Although this Article is devoted to the second question,¹ in the interest of full disclosure, I should say that I am in the camp of those who believe that we need a third restatement sooner rather than later. Ideally, however, the American Law Institute should adopt a model act for choice of law to replace the *Restatement (Second) of Conflict of Laws*² ("*Second Restatement*") because whatever we come up with will almost certainly not *restate* the conflicts law of any place known to woman. Although this did not deter the drafters of the *Second Restatement*,³ to be honest and avoid misleading, our product should not be called a restatement.

Although the *Second Restatement* was criticized even while it was in the Reporter's, Professor Reese's, womb⁴ (where the gestation period was longer than that of a herd of elephants, 1953-1971) and continues to be challenged by many commentators,⁵ if not judges,⁶ it adopted the correct basic approach. The *Second Restatement* combined rules that do not take the policies of the forum or the content of the competing laws into account (jurisdiction-selecting rules) with an analysis that

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1. The questions, of course, are intertwined. If one can see a significantly better solution to choice-of-law problems than the *Second Restatement* provides, one is more likely to answer the first question in the positive; whereas, if one cannot, then one would be likely to answer negatively.

2. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter SECOND RESTATEMENT].

3. See Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1237 (1997).

4. See, e.g., David F. Cavers, *Re-Restating the Conflict of Laws: The Chapter on Contracts*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 349, 349-50 (Kurt H. Hadelman et al. eds., 1961); Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230, 1230 (1965); Russell J. Weintraub, *The Contracts Proposals of the Second Restatement of Conflict of Laws—A Critique*, 46 IOWA L. REV. 713, 713, 718-21 (1961).

5. See, e.g., Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 466, 486-89 (1991); Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 77 (1989).

6. See ROGER C. CRAMTON ET AL., CONFLICT OF LAWS 132 (5th ed. 1993).

does.⁷ The combining of jurisdiction-selecting rules with choice influencing factors brought together the best of both worlds: the flexibility of an “ad hoc” approach necessary for desirable results in individual cases, and the certainty, predictability, ease of judicial administration, and uniformity of result that rules tend to bring about.⁸ The *Second Restatement*, however, needs some serious adjustments. It should contain *no* rigid rules. It should eliminate contact identification and characterization as we know them. It should contain only two presumption-raising, jurisdiction-selecting rules. It should require the conflict on an issue to be identified as true, false, or unprovided for, and require all false conflicts to be resolved à la Currie.⁹ We should add anti-discrimination and the better law to the existing seven choice-influencing factors, and make those nine factors exclusive. Finally, the third restatement should prohibit the weighing of “Currie interests” in true conflicts.

NO! RIGID RULES

All of the *Second Restatement*'s rigid rules must go,¹⁰ including the sacrosanct situs rule for real property issues¹¹ and the rule to apply forum law to all procedural

7. These factors or choice-influencing considerations were first identified in Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 981 (1952), as the factors that courts actually used to resolve choice-of-law problems regardless of the approach they purported to follow.

8. See Bruce Posnak, *Choice of Law—Rules vs. Analysis: A More Workable Marriage Than the Second Restatement; A Very Well-Curried Leflar over Reese Approach*, 40 MERCER L. REV. 869, 886 (1989).

9. Apply the law of the state with the only “Currie interest.” Bruce Posnak, *Choice of Law—Interest Analysis: They Still Don't Get It*, 40 WAYNE L. REV. 1121, 1122 n.4 (1994). This, in effect, eliminates section 90 of the *Second Restatement*. This section provides that the forum need not apply a foreign law, even though the foreign state has the most significant relationship with the particular issue if the foreign law violates the forum's public policy. See SECOND RESTATEMENT, *supra* note 2, § 90. It is about time that this hoariest and most malleable of all the escape devices bites the dust. See *infra* text accompanying notes 50-66.

10. Although the *Second Restatement* primarily contains rules that merely raise rebuttable presumptions of the law to apply, there are still some rigid rules carried over from the original restatement that are supposed to lead ineluctably to the law to apply. See RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934) [hereinafter FIRST RESTATEMENT]; see also Posnak, *supra* note 8, at 883 n.80. Dean Symeonides's squishy rigid rules should also be included in this category. The good Dean would have the court in some situations apply a “rigid” jurisdiction-selecting rule unless “exceptional” circumstances exist. Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 IND. L.J. 437, 447 (2000). In addition to the obvious problem of identifying “exceptional circumstances,” it seems to me that this approach merely legitimizes a giant escape device that destroys the purposes of having a rule.

11. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS §§ 8-22, at 460 (3d ed. 1986); see also William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417, 425 (2000); Russell J. Weintraub, *At Least Do No Harm: Does the Second Restatement of Conflicts Meet the Hippocratic Standard?*, 56 MD. L. REV. 1284, 1307 (1997) [hereinafter Weintraub, *Do No Harm*].

issues.¹² Rigid rules are the antithesis of a functional,¹³ flexible approach; they cannot coexist. If the major goals are rational,¹⁴ desirable results in individual cases, then we cannot have rigid rules. Rigid rules sacrifice such results in an attempt to achieve certainty, predictability, ease of administration, and uniformity of result.¹⁵ Eliminating rigid rules and the characterization that goes with them in the *Second Restatement*¹⁶ will also avoid placing judges in no-win situations. Judges can characterize sincerely, but arrive at a result that does not make sense, or they can “fudge” to reach a desirable result.¹⁷ Finally, eliminating all rigid rules would resolve some ambiguities in the *Second Restatement*. Because the *Second Restatement* contains both rigid and presumption-raising rules, and because its language is often ambiguous, it is not always clear whether a particular rule is one or the other.¹⁸ Furthermore, the presence of some rigid rules raises the fear and reality that some judges will treat an intended presumptive rule as if it were rigid.¹⁹

CONTACTS AND CHARACTERIZATION ELIMINATED

After eliminating all the rigid rules, the contact identification step exemplified by sections 145 and 188 of the *Second Restatement*, should be eliminated. The only office this step seems to serve is to limit the universe of states whose law may apply. It seems to this author that it is more trouble than it is worth. There is also the possibility that judges, especially those steeped in the *First Restatement*, will resolve the conflict by merely toting up these contacts without performing a section 6 analysis.

12. See Weintraub, *Do No Harm*, *supra* note 11, at 1300. Forum law, however, should apply to issues that are not even arguably substantive.

13. A functional approach is one that takes the content of the competing laws into account as well as other choice-influencing factors. It should be contrasted with a formalistic approach like the *First Restatement* that ignores these factors.

14. Rational in terms of the content of the competing laws and the facts of the case. See Bruce Posnak, *Choice of Law: Interest Analysis and Its “New Critics”*, 36 AM. J. COMP. L. 681, 686-88 (1988).

15. See *id.*; see also William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1390-93, 1397, 1398-1400 (1997). As Professor Peterson said, “[T]he fact and law permutations of conflicts cases are so numerous and variable that they defy intelligent forecasting of the problems which rigid rules may encounter.” Courtland H. Peterson, *Private International Law at the End of the Twentieth Century: Progress or Regress*, 46 AM. J. COMP. L. 197, 213 (1998).

16. See *infra* text accompanying notes 19-28.

17. See Posnak, *supra* note 8, at 889.

18. See *id.* at 890.

19. See Weintraub, *Do No Harm*, *supra* note 11, at 1289.

The characterization step should also be eliminated.²⁰ It does not advance the choice-of-law inquiry to know that an issue smells like a tort rather than a contract.²¹ Not only has the *Second Restatement* not reduced the characterization problems associated with the *First Restatement*,²² it has made them worse. There are more, finer gradations of characterization required,²³ yet the *Second Restatement* provided no better tools for determining the pigeon hole.²⁴ This dearth is because there is no principled way to determine whether an issue belongs in a particular area of law.²⁵ Moreover, there are many issues that are hybrids—they contain elements from two areas of the law. For example, vicarious liability has arguably equal elements of torts and contracts. Therefore, reasonable people will differ.²⁶ In addition, the candle of characterization is not worth the flame.²⁷ One must go through numerous time consuming, brain-wrenching, tortuous contortions to characterize and come up with a problematic rule that merely raises an easily rebutted presumption of the law to apply. In fact, the rule that was so difficult to determine does nothing more than allocate the burden of production.²⁸ More fundamentally, in the twenty-first century should who wins a flesh and blood case depend, even in part, upon into which area of the law an issue happens to fit?

JUST TWO

Although getting rid of rigid rules and the extra baggage of characterization are important, this author's most dramatic recommendation is to substitute just two presumption-raising, jurisdiction-selecting rules (which are not tied to any area of the

20. Characterization is the determination of what area of law the case or issue "sounds in." Although arguably the recommended approach also requires a type of characterization—for example, whether it is a "common domicile" case. See *infra* text accompanying notes 29-41. This "characterization" is of a different order than departmentalization into an area of law. More importantly, this type of "characterization" is not only simpler and more certain, it is more likely to point toward the correct choice-of-law. See *infra* text accompanying notes 37-41.

21. See Posnak, *supra* note 8, at 889.

22. See CRAMTON ET AL., *supra* note 6, at 43-48.

23. See, e.g., *Bryant v. Silverman*, 703 P.2d 1190, 1191-93 (Ariz. 1985) (in banc); *Wood Bros. Homes, Inc. v. Walker Adjustment Bureau*, 601 P.2d 1369, 1372 & nn.3-4 (Colo. 1979) (en banc).

24. Actually, neither *Restatement* supplies any helpful criteria to guide in the characterization process; therefore, I cannot cite to any provision in the *Second Restatement*.

25. See Posnak, *supra* note 8, at 889.

26. See *id.*

27. Indeed, the *Restatement* has a Rube Goldbergish flavor to it. (Those who are too young to know about Rube, ask your elders.) See Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L.J. 475, 477 (2000).

28. That is to say that when a *Second Restatement* court decides which presumption raising rule to apply it merely places the burden of overcoming this presumption by way of the section 6 factors on the party disfavored by the presumption. As everyone who is familiar with these factors knows, there is, in the vast majority of cases, at least a colorable argument that the factors point away from the presumption, thus arguably shifting the burden back to the party who was favored by the characterization step.

law so that they do not require that type of characterization) for the hundreds of rules in the *Second Restatement*.²⁹ Not only would this greatly simplify the task, these two rules are at least as likely to point to the desirable law in terms of the traditionally recognized choice-influencing factors³⁰ as the hundreds of rules they would replace. In fact the hundreds of rules would usually lead to the same presumption as the two I suggest, albeit with a great deal more ado. Before getting to these two rules,³¹ one should note that if the party wishing to displace forum law cannot persuade the court that either rule is applicable, the forum law would apply to that issue. The first rule is that if both parties³² are from the same state,³³ its laws presumptively apply to all issues in the case.³⁴ The only other rule is that if the parties are not from the same state but a significant portion of the probative facts³⁵ took place in the home state of *only* one of the parties, its laws should presumptively apply to all the issues.³⁶

Both of the suggested rules, like Cavers's principles of preference, are based on experience.³⁷ The vast majority of "common domicile" cases will not only turn out to be false conflicts with the common state having the only Currie-interest,³⁸ that state will almost always be the one to which, in the aggregate, the other choice-influencing factors point.³⁹ Although the issues covered by the "split domicile" rule will not usually be false conflicts,⁴⁰ the presumptive rule will more often than not, and more

29. I now proffer my third head for chopping off. See Posnak, *supra* note 8, at 875 n.36. Although I have consistently maintained that the initial presumption be that forum law should apply, see Bruce Posnak, *Choice of Law: A Very Well-Curried Leflar Approach*, 34 MERCER L. REV. 731 (1983), I originally suggested that there should be no jurisdiction-selecting rules, and that the party disfavored by the initial presumption carry the burden of showing that the choice-influencing factors point away from forum law. See *id.* at 777-83. Then I suggested the use of the jurisdiction-selecting rules of the *Second Restatement* to raise the presumptions that could overcome the forum law presumption. See Posnak, *supra* note 8, at 875. But now I have chopped off that head too by suggesting that there be only two rules.

30. See generally Cheatham & Reese, *supra* note 7 (describing the traditional choice-influencing factors).

31. I must confess that the inspiration for the content of these two rules came from Professor Korn despite the fact that we are poles apart. See Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 800-01 (1983); see also Posnak, *supra* note 14, at 691-727 (supporting proposition that the author and Professor Korn are miles apart).

32. Or in a multiparty case, if the majority of plaintiffs and the majority of defendants are from the same state.

33. I will leave the delineation of this to future scholars.

34. I would make an exception for those issues that are not even arguably substantive, realizing that this will breed litigation.

35. I will also leave defining the contours of this phrase to future scholars.

36. An analogous rule would apply to multiparty cases. See *supra* note 32.

37. See DAVID F. CAVERS, *THE CHOICE OF LAW PROCESS* 121-22, 139-59, 181-94 (1965).

38. See Posnak, *supra* note 14, at 702-08.

39. See, e.g., *Babcock v. Jackson* 191 N.E.2d 279 (N.Y. 1963); *Hammshild v. Continental Cas. Co.*, 95 N.W.2d 814, 818-20 (Wis. 1959).

40. They will usually be either true conflicts—if each party's state's law favored her—or unprovided for—if the converse were true.

often than just applying forum law, point to the more desirable law in terms of the choice-influencing factors.⁴¹

Many commentators, including the author,⁴² have argued that there should not be any presumption-raising or rigid jurisdiction-selecting rules.⁴³ Some of these commentators maintain that the court should presume that forum law applies and that the party disfavored by forum law must show that the other state has the only interest.⁴⁴ Other commentators argue that the party disfavored by the presumption of forum law should go immediately to the choice-influencing factors like those in section 6 and carry the burden of demonstrating that these factors point away from forum law on the issue.⁴⁵ This author, however, suggests that the party disfavored by forum law be given the opportunity to show that one of the two recommended jurisdiction-selecting rules is satisfied in order to reallocate the burden of proof. In order to encourage judges not to treat these rules as dispositive, the fact that they merely affect the burden of production should be emphasized.

Because there are only two rules, and because they are relatively straightforward, this step should not be onerous or very time consuming⁴⁶ and is recommended over going immediately to the factors. More importantly, if a party can show that either of the rules applies and is contrary to the forum's law, then the burden of production *should* shift to the opposing party. In such cases, applying the law called for by either of the rules, instead of just applying forum law, is more likely to lead to results rational in terms of the competing laws and the facts of the case, and results more consistent with the choice-influencing factors.⁴⁷

CONFLICTS IDENTIFIED

As described above, the *Second Restatement* contains too much,⁴⁸ but in some ways it does not contain enough. Although some courts that apply the *Second Restatement* put each issue through a Currie-type interest analysis and determine whether the issue is false, true or unprovided for,⁴⁹ the *Second Restatement* does not require this.⁵⁰ If a

41. *But cf.* Korn, *supra* note 31, at 801, 967.

42. *See* Posnak, *supra* note 29, at 777-83.

43. *See, e.g.*, BRAINERD CURRIE, *Married Women's Contracts: A Study in Conflict-of-Law Method*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 77, 119-27 (1963) [hereinafter CURRIE, *Married Women's Contracts*]; BRAINERD CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, *supra*, at 185 [hereinafter CURRIE, *Notes on Methods and Objectives*]; Moffatt Hancock, *Torts Problems in Conflict of Laws Resolved by Statutory Construction: The Halley and Other Older Cases Revisited*, 18 U. TORONTO L.J. 331, 350 (1968); Weinberg, *supra* note 27, at 478-79.

44. *See, e.g.*, Posnak, *supra* note 29.

45. *See, e.g.*, Weinberg, *supra* note 27, at 507-08.

46. That is not to say, however, that reasonable people sometimes might disagree about whether there is a "common domicile" or whether the requirements of the recommended "split domicile" rule are satisfied.

47. *See supra* text accompanying notes 29-41.

48. The *Restatement* should not include characterization or the hundreds of rules. *See supra* text accompanying notes 19-36.

49. *See, e.g.*, *Bryant v. Silverman*, 703 P.2d 1190, 1192-97 (Ariz. 1985) (in banc); Wood

court leaves out this step, it does not get the full picture it needs to make an informed decision of the law to apply. No matter which law a court chooses (even if it chooses not to apply the law of the only interested state in a false conflict), it should realize what it is doing in terms of the Currie-interests.⁵¹ Presumably, if a court decided to apply the law of a state, realizing that the other state had the only Currie-interest, it would require more in terms of the other choice-influencing factors than if it had concluded that both or neither state had a Currie-interest.⁵²

FALSE CONFLICTS: THE ONLY RIGID RULE

Not only does the *Second Restatement* not require the conflict to be identified, it positively encourages courts to apply the *wrong*⁵³ law in false conflicts.⁵⁴ Although reasonable people differ,⁵⁵ the *Second Restatement* should require that when an issue is identified as a false conflict, the law of the only interested state should be applied. This would lead to results rational in terms of the policies of the competing laws and the facts of the case.⁵⁶ It would also simplify the judicial task and enhance certainty, predictability, and uniformity of result. If a court identifies a conflict as false, that is "all she wrote." Under the *Second Restatement*, even false conflicts are to undergo analysis by way of the section 6 choice-influencing factors, and this analysis could result in applying the law of the "interestless" state.⁵⁷

If the conflict is not identified as false, the section 6 factors plus two new ones⁵⁸ should apply, and should be made exclusive. The current *Restatement's* laundry list is not meant to be exclusive.⁵⁹ Although this author can see the argument in favor of an open-ended list,⁶⁰ enough is enough.⁶¹

Bros. Homes, Inc. v. Walker Adjustment Bureau, 601 P.2d 1369, 1372-74 (Colo. 1979) (en banc).

50. SECOND RESTATEMENT, *supra* note 2, § 6 cmt. b.

51. *See supra* note 9.

52. *See* Posnak, *supra* note 8, at 876. Once again I have changed my mind. I had advocated that identifying the conflict in Currie parlance precedes the step of determining whether a presumption-raising rule applies. *See id.* at 877. But now that I have replaced the hundreds of jurisdiction-selecting rules with just two, I think it would be more efficient to first determine whether one of the two jurisdiction-selecting rules apply. Moreover, if the court concluded that one of the two rules applied, the party disfavored by the presumption may take his ball and go home so that it would never be necessary to identify the type of conflict, which I believe usually would be more time consuming and problematic than determining if one of the two rules applied.

53. *See id.* at 877-81; *see also* Posnak, *supra* note 14, at 683, 686-89.

54. *See supra* text accompanying note 52.

55. *See* Posnak, *supra* note 8, at 877-81.

56. *See id.*

57. *See supra* text accompanying note 47.

58. *See infra* text accompanying notes 67-89.

59. *See* Posnak, *supra* note 8, at 890 n.111.

60. *See* Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1587 (1985).

61. *See* Posnak, *supra* note 8, at 893.

True conflicts should be resolved by using choice-influencing factors, but the weighing or comparing of the Currie-interests should be prohibited.⁶² This author's reasons for this prohibition are the same Currie gave over forty years ago.⁶³ This would relieve courts of the impossible burden of somehow quantifying the Currie-interests of the two states and then somehow determining which is paramount or superior.⁶⁴ Furthermore, if the Currie-interests were not quantified, the courts would not have to weigh the fact that one state had the stronger Currie-interest against the fact that, in the aggregate, the other choice-influencing factors point to the other state's law.⁶⁵ This would eliminate having to compare the proverbial apples and oranges. Since the weight of the Currie-interests would be a nonfactor, the true conflict would have to be resolved by the remaining section 6 choice-influencing factors.⁶⁶

TWO "NEW"⁶⁷ CHOICE-INFLUENCING FACTORS

In addition to these changes in the existing section 6 factors, two "new" choice-influencing factors should be added to resolve true conflicts and unprovided for issues: conflicts justice, that is, the avoidance of *unnecessary* discrimination, and the "better law."⁶⁸ Discrimination occurs if a court applies different laws to similarly situated people.⁶⁹ It is *unnecessary* if applying the same law to these people would not be irrational in terms of the policies of the competing laws and the facts of the case. It would only be irrational if it were a false conflict *and* a state other than the state whose law had been previously applied to someone similarly situated possessed the only Currie-interest.⁷⁰ The last sentence cries out for a concrete example and *Tooker* supplies it. Three Michigan coeds were in a fatal one-car accident on a trip that was to begin and end there.⁷¹ One of the passengers was from Michigan, but the driver and the other passenger were from New York where the car was insured and registered

62. See SECOND RESTATEMENT, *supra* note 2, § 6(2)(c); see also Posnak, *supra* note 8, at 892 n.122.

63. See CURRIE, *Notes on Methods and Objectives*, *supra* note 43, at 182. I would, like Currie, reexamine the tentative interests with restraint and moderation to determine whether the states really have Currie-interests. See Posnak, *supra* note 8, at 892 n.124.

64. One problem with weighing Currie-interests is that what is to be quantified is not even clear—is it the quality of a competing law, the importance to the state of having its law applied, or something else?

65. See Posnak, *supra* note 8, at 892-93.

66. This would eliminate the second phrase in the *Second Restatement's* section 6(2)(c).

67. They have been around for a long time. I did not invent them. See *supra* note 7. Indeed Professor Weinberg would add the same two factors. See Weinberg, *supra* note 27, at 507. Even though her conception of better law and antidiscrimination differ somewhat from mine, the fact that two great minds independently reached similar conclusions should count for something, but I am not sure what.

68. See generally Posnak, *supra* note 8, at 886 n.95, 893-97.

69. See *Tooker v. Lopez*, 249 N.E.2d 394, 411 (N.Y. 1969) (Briemel, J., dissenting).

70. Consequently, avoiding discrimination should be a potential choice-influencing factor in true conflicts and unprovided-for issues because applying either of the competing laws in the former, or any law in the latter, cannot be irrational in the Currie scheme of things.

71. See *Tooker*, 249 N.E.2d at 395.

in the name of the driver's New York father.⁷² Michigan, but not New York, had a guest statute.⁷³ The New York passenger's estate sued in New York, and the court applied the plaintiff-favoring New York law, which did not require a showing of gross negligence.⁷⁴ If Ms. Silk, the Michigan passenger, sues, the forum (wherever it is), in deciding which law to apply, should take into account the fact that someone (the New York passenger), similarly situated to this Michigan plaintiff, received the benefit of the pro-plaintiff New York law. The court should consider this because this second case brought by Ms. Silk is not a false conflict with Michigan possessing the only interest. Michigan's guest statute was probably passed to hold down insurance premiums, but recovery in this case (involving a single car owned by a New Yorker, registered and insured there) will not affect premiums in Michigan.⁷⁵ No purpose or policy of the Michigan guest statute would be furthered if applied, nor frustrated if the New York law was applied. The Michigan guest statute was not promulgated to preclude a passenger from recovering just because that passenger was from Michigan. Similarly, applying the New York law (requiring only a showing of simple negligence) would not further or thwart any of its policies.⁷⁶ This, then, is an unprovided-for issue—no policy behind either state's competing law is implicated.⁷⁷ Not only should avoiding discrimination be one of the relevant factors in deciding which law to apply to Ms. Silk's claim, it should be dispositive because none of the other section 6 factors seem to point to the Michigan law that requires gross negligence.⁷⁸ Consequently, there is no legitimate reason for denying the benefit of the pro-plaintiff New York law to Ms. Silk, but there is a good reason for applying it: another similarly situated (the other passenger) has had it applied in her favor.⁷⁹ Indeed, if New York is the forum in both cases, the Privileges and Immunities Clause of the Constitution should require the application of the New York law for Ms. Silk's benefit.⁸⁰

72. *See id.*

73. *See id.*

74. *See id.*

75. *See* Russell J. Weintraub, *The Conflict of Laws Rejoins the Mainstream of Legal Reasoning*, 65 TEX. L. REV. 215, 228-29 (1986) (book review).

76. In this context where the New York simple negligence law is competing against the Michigan gross negligence law, one can say that the policy of the New York law was to compensate. But since a Michigan plaintiff is involved, one cannot say that the policy would be furthered. *See* CURRIE, *Married Women's Contracts*, *supra* note 43, at 85-87.

77. Despite what Professor Kramer claims. *See* Larry Kramer, *The Myth of the 'Unprovided-for' Case*, 75 VA. L. REV. 1045 (1989).

78. The fact that the accident occurred in Michigan and most people, if asked, would expect Michigan law to apply is not the type of expectation that deserves any weight because no one relied on it. It certainly should not trump the aspiration to treat similarly situated people the same. *But see* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992); Aaron D. Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373, 378 (1971).

79. *See* Posnak, *supra* note 14, at 723-26.

80. *See* Posnak, *supra* note 8, at 886-87 n.95. *See generally* BRAINERD CURRIE, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS, *supra* note 43, at 490-511; Mark P. Gergen,

BETTER LAW

Finally, and perhaps most controversially, this author recommends that the *Second Restatement* explicitly include the “better law” as one of its choice-influencing factors in section 6. Although many commentators, including the *Restatement*’s reporter,⁸¹ adamantly contend that the *Second Restatement* does not and should not contain a “better law” component,⁸² this consideration may “sneak” in the side door.⁸³ The *Second Restatement* calls upon the court to apply the law that will carry out “the basic policies underlying the particular field of law.”⁸⁴ This will usually point to the better law. For example, two basic policies underlying the law of negligence are compensation and spreading the risk. The competing law that is consistent with those policies will often be considered “better.” For example, a law that does not artificially limit compensatory damages should be considered better than one that does because it spreads the risks and makes the injured party whole. This coincidence of the “better law” with the basic policies underlying an area of the law is not a coincidence. The competing law that does more to carry out the basic policies underlying a particular field of law is tantamount to the better law. The reason that one law is better is because it more effectively carries out the *current* basic policies underlying its field of law.

Since the *Restatement* implicitly contains a “better law” factor, and since most people realize that it could never be kept out no matter what the *Restatement* or any law said,⁸⁵ drafters should avoid hypocrisy and explicitly include it. More positively and persuasively, the “better law” factor should be included even if judges could be convinced to ignore it. It should, however, be assigned a limited and defined role. Contrary to what many commentators believe,⁸⁶ even if the “better law” is included as a section 6 factor, it need not always, or even usually, affect the choice-of-law decision. The better law factor should be articulated so that the personal opinions of the judge as to the relative quality of the competing laws, the fact that one of the laws belongs to the forum, or the fact that applying one will benefit a forum resident, should *all* be irrelevant.⁸⁷ Moreover, to avoid misleading and confusion, the “better

Equality and the Conflict of Laws, 73 IOWA L. REV. 893 (1988); Posnak, *supra* note 9, at 1124 n.17, 1155-59 & nn.198-209.

81. See Willis L.M. Reese, *Conflict of Laws and the Restatement (Second)*, 28 LAW & CONTEMP. PROBS. 679 (1963).

82. See, e.g., CURRIE, *Married Women's Contracts*, *supra* note 43, at 104-06; Arthur Taylor von Mehren, *Recent Trends in Choice of Law Methodology*, 60 CORNELL L. REV. 927, 952 (1975).

83. There is no doubt that the “better law” factor will often slide under the back door. See Posnak, *supra* note 8, at 893 n.130.

84. SECOND RESTATEMENT, *supra* note 2, § 6(2)(e).

85. See Posnak, *supra* note 8, at 894 n.135.

86. See, e.g., Herma Hill Kay, *Testing the Modern Critics Against Moffatt Hancock's Choice of Law Theories*, 73 CAL. L. REV. 525, 533 (1985).

87. Some commentators do not believe judges are capable of disregarding these factors. See, e.g., Korn, *supra* note 31, at 781. I disagree even though I believe that if no latitude is given judges to consider the quality of the competing laws, they will often take their personal predilections into account. See Posnak, *supra* note 8, at 895 n.140.

law” choice-influencing factor should be renamed the “stinky law” choice-influencing factor. When deciding *whether* one of the competing laws is “better,”⁸⁸

[The judge] will consider whether [either one of] the rule[s] is anachronistic in its origins, whether commentators tend to favor or oppose it in its modern context and whether courts in any of the states where it is in force have given it a restricted construction. . . .

. . . The better law analysis does not . . . purport to give the judge the same breadth of choice [in a conflicts case of choosing between competing laws when the law of the jurisdiction isn’t clear] that he enjoys in the context of domestic adjudication. . . . [In order to find one law “stinky” which is a *prerequisite* to finding one “better”] an objective demonstration must be made that the rule in question is an anachronism, repugnant to accepted present-day policies, by reference to judicial or commentarial criticisms or through historical policy analysis.⁸⁹

Rarely will either competing law satisfy this criteria, and the criteria places significant constraints on trial judges.⁹⁰ Another significant limitation on the “better law” is the fact that this author recommends that the court should not even consider whether there is a “better law” unless it identifies the conflict as true or unprovided for, and even then, only if consideration of the other section 6 factors is inconclusive.⁹¹ Finally, this author will discuss another constraint that Professor Weinberg would place upon a court choosing foreign law because it is better. She would encourage the forum not to conclude that foreign law is better and apply it in a conflicts case unless it is prepared to adopt it for future domestic cases as well.⁹² Although I think I agree with her conclusion and her reasons, I am uncomfortable about those situations where the displaced forum law was the creature of the forum’s legislature or where the forum’s displaced common law had received the stamp of approval of the legislature. In such cases we have separation of powers problems.

CONCLUSION

There should be a “Restatement (Third) of Conflict of Laws.” It should retain what is good and at the core of the *Second Restatement*—using jurisdiction-selecting rules (but only two instead of hundreds) to allocate the burden of production and raise

88. It would be clearer to phrase this initial inquiry as follows: “Is one of the laws a drag on the coattails of society?” If the inquiry were so phrased, one should see that only rarely would this factor point to either competing law. Furthermore, it does not necessarily follow that a law is “better” just because it represents the majority position or the trend.

89. MOFFATT HANCOCK, *STUDIES IN MODERN CHOICE-OF-LAW: TORTS, INSURANCE, LAND TITLES* 98, 141 (1984).

90. Indeed, with the “better law” factor out in the open, along with the objective criteria for it, there would be more constraints upon a judge selecting one law merely because she liked it, it was the forum’s, or it benefitted the “homey.”

91. See Posnak, *supra* note 8, at 896.

92. See Weinberg, *supra* note 43, at 501-03. Professor Currie and I have flirted with this requirement. See Posnak, *supra* note 8, at 877 & n.52; see also Posnak, *supra* note 29, at 778 n.243.

presumptions that a functional analysis may rebut. The contact identifying and characterization steps, as well as all rigid rules, should be excised. The conflict should be identified in Currie-parlance as false, true, or unprovided for. If false, the law of the only "interested" state should apply. If true, the "Currie interests" should not be weighed. The section 6 factors should be made exclusive, and "better law" and conflicts justice (avoiding discrimination) should be added to them.

Professor von Mehren, commenting on the *Second Restatement*, said:

The approach is ample enough to encompass a highly developed policy-based analysis. However, the Restatement does not significantly refine and discipline theory and analysis. No principled basis is adumbrated, for example, in terms of which clashes between policies underlying specific domestic-law rules [Currie policies] and more general policies of comprehensibility or of facilitation of multistate activity can be resolved.⁹³

The recommended approach fares better in satisfying the implicit and explicit criteria of Professor von Mehren than the *Second Restatement*. Implicit in the quote is the admonition that any choice-of-law approach should permit consideration of the forum's policies, both those emanating from its competing law and those emanating from other sources. The rigid jurisdiction-selecting rules of the *Second Restatement* ignore the content of the competing laws and could not pass muster. One cannot adequately consider the forum's policies unless one considers the content and policies of the forum's competing law. In fact there can be no "analysis" if rigid choice-of-law rules are applied. Since the recommendation calls for consideration of the policies of the forum's competing law, and, when the conflict is identified as other than false, other forum policies, it satisfies this criterion. Although the presumption-raising rules of the *Second Restatement* also satisfy this criterion, the recommended approach "refine(s) and discipline(s) theory and analysis" to a significantly greater extent than the *Second Restatement*. The recommended approach, unlike the *Second Restatement*, provides not only a *principled* basis for resolving at least some clashes between "policies underlying specific domestic-law rules and more general policies of comprehensibility," it also provides a more certain one: if only one state has a Currie interest, its law applies to that issue regardless of the other "more general policies" of section 6. Moreover, it "refine(s) and discipline(s) theory and analysis" by prohibiting the weighing of the Currie-interests in a true conflict.

Referring to the *Second Restatement*, a leading casebook asks: "The critical question is whether the series of compromises that produced the Restatement, and the attempted fusion of jurisdiction-selecting rules with open-ended policy analysis, has resulted in a flabby, amorphous and sterile product."⁹⁴ The recommended third restatement ameliorates at least some of the significant defects in the *Second Restatement*, and this will lead to a lean, mean machine or at least a trimmed down, clearer, and dynamic product.⁹⁵ It is, however, far from perfect. It incorporates interest analysis, and, as many have pointed out frequently, reasonable people will differ as to whether a state has an interest and therefore as to the law to apply. It also

93. von Mehren, *supra* note 82, at 964.

94. ROGER C. CRAMTON ET AL., *CONFLICT OF LAWS* 318 (3d ed. 1981).

95. See Posnak, *supra* note 8, at 909.

requires the application of the law of the only state with an interest in a false conflict, and many reasonable people disagree with that.⁹⁶ Nevertheless, since courts must choose a law when the choice-of-law issue is raised and since the recommended approach is the best alternative because it addresses more of the right questions, it should be adopted, warts and all, “until someone comes along with a better idea.”⁹⁷

96. *See, e.g.*, Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1585-98 (1966).

97. Brainerd Currie, *Comment on Babcock v. Jackson*, 63 COLUM. L. REV. 1233, 1243 (1963); *see also* Posnak, *supra* note 8, at 911.

