# AN ESSAY ON PREDICTABILITY IN CHOICE-OF-LAW DOCTRINE AND IMPLICATIONS FOR A THIRD CONFLICTS RESTATEMENT

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This essay is Erwin Griswold's fault. Griswold was Harvard's law dean and renowned conflicts scholar. As chance would have it, I eventually became a co-editor of a Conflicts casebook on which he had been one of the early editors.[1] As I began my academic career, following my Conflicts professor, the great comparativist Friedrich Juenger,[2] I was an unabashed substantivist, urging courts to apply the better rule of law.[3] Like Juenger, I thought (and still think) that Brainerd Currie's "interest analysis"[4] is mostly a circumlocution for applying forum law.[5]

Interest analysis, except to the extent that it influenced other approaches–notably the Second Restatement of Conflicts–has fizzled out among U.S. courts. Important state courts, notably the high courts of California, New York, and New Jersey, once adopted it. But New York went its own way with the creation and expansion of the so-called "*Neumeier* rules"[6] and now cites the Second Restatement.[7] New Jersey had long been held out as the last bastion of relatively pure interest analysis, but departed from it in favor of the Second Re-

1. PETER HAY, RUSSELL WEINTRAUB & PATRICK BORCHERS, CONFLICT OF LAWS: CASES AND MATERIALS (14th ed. 2013).

2. FRIEDRICK K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE (1993).

3. *See, e.g.*, Patrick J. Borchers, *Conflicts Pragmatism*, 56 ALB. L. REV. 883 (1993). Of course, I had plenty of company, most famously Robert Leflar, whose pioneering work clearly influenced Juenger, and Leflar's five-factor test is still nominally followed in some states. *See, e.g.*, Robert A. Leflar, *Choice-Influencing Considerations in Conflict Law*, 41 N.Y.U. L. REV. 267 (1966); *see also* Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co., 604 N.W.2d 91, 96 (Minn. 2000) (nominally following Leflar but putting heavy emphasis on the locus of the accident, and noting that the Minnesota Supreme Court has not relied on the "better rule of law" consideration in over 20 years); State Farm Mut. Auto. Ins. Co. v. Gillette, 641 N.W.2d 662, 684 (Wis. 2002) (refusing to decide whether Wisconsin or Manitoba law on compensation for non-economic damages is better).

4. *See* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

5. Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1 (1984).

6. *See, e.g.,* Edwards v. Erie Coach Lines Co., 952 N.E.2d 1033, 1037 (N.Y. 2011); Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 684 (N.Y. 1985); Neumeier v. Kuehner, 286 N.E.2d 454, 457-58 (N.Y. 1972) (explaining the origins of the *Neumeier* rules, and demonstrating the application and development of the *Neumeier* rules).

7. *See, e.g.*, Matter of Allstate Ins. Co. (Allstate Ins. Co. v. Stolarz), 613 N.E.2d 936, 940 (N.Y. 1993).

statement.[8] California still hangs onto the interest analysis vocabulary, but rejected a central tenet of Currie's theory, which is that in "true conflict" cases—those in which multiple states have interests—the forum state should apply its own law.[9] Instead, California adopted the "comparative impairment" solution—that is, applying the law of the state whose interests would be most impaired if it were not applied—for true conflicts.[10] A recent and thorough examination of the actual application of California's choice-of-law methodology reveals that it generates strikingly territorial results.[11]

None of this is to suggest that Currie did not have a giant effect on American conflicts law. He did. In Harold Korn's memorable observation, Currie seduced—with his brilliant writing—an entire generation of American lawyers into accepting as self-evident the proposition that states generally enact laws to benefit their residents, which in turn gives a state an interest in seeing its law applied to favor its residents.[12] That assumption washes through the Second Restatement's general sections and Robert A. Leflar's choice-influencing considerations, the former of which is widely applied and the latter of which is at least nominally followed by some state courts.[13] Moreover, almost everyone seems to agree that in tort "false conflict" cases, such as *Babcock v. Jackson*,[14] the law of the common domicile of the parties should apply, rather than the injury state as was commanded by the *lex loci delicti* rule.[15]

But let's return to Griswold. As a young academic I mailed out reprints of my articles. Griswold, then in his late 80's, was still listed in the Association of American Law Schools directory as teaching conflicts. I mailed him a reprint of one of my articles. I didn't expect him

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8. *See, e.g.*, P.V. ex rel. T.V. v. Camp Jaycee, 962 A.2d 453, 460 (N.J. 2008) (explaining that "New Jersey now adheres to the method of analysis set forth in" the Second Restatement).

9. BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 278-79 (1963).

10. Bernhard v. Harrah's Club, 546 P.2d 719, 723 (Cal. 1976), *cert. denied*, 429 U.S. 859 (1976).

11. Michael Hoffheimer, *California's Territorial Turn in Choice of Law*, 67 RUTGERS U. L. REV. 167, 170-71 (2015).

12. Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 812 (1983).

13. *See, e.g.*, *Nodak Mut. Ins. Co.*, 604 N.W.2d at 96 (nominally following Leflar but putting heavy emphasis on locus of the accident and noting that the Minnesota Supreme Court has not relied on the "better rule of law" consideration in over 20 years); *Gillette*, 641 N.W.2d at 684 (citing Leflar's five-factor test but refusing to decide whether Wisconsin or Manitoba law on compensation for non-economic damages is better).

14. 191 N.E.2d 279 (N.Y. 1963).

15. *See, e.g.*, Ala. Great S. R.R. v. Carroll, 11 So. 803, 804, 809 (Ala. 1892) (applying Mississippi law in Alabama court because the injury occurred in Mississippi).

to read my article, let alone reply, yet he did both. And his reply was not a perfunctory note; it was a long and thoughtful letter.

He said that he too was not much of a fan of interest analysis, but for different reasons than mine. He argued that while people like me were celebrating the reaching of more "just" results in cases such as *Babcock*, the systemic cost of a lack of predictability was high.[16] If, he continued, parties could not predict with reasonable certainty what law would be applied, it would be much more difficult to settle interstate cases and result in more appeals.

It does not require a deep knowledge of economics to see that he was right. Assuming the parties act rationally (and there is no fee shifting), a case will settle when each party's estimate of the value of the case converges to the point where the costs of continuing to litigate the case exceed the gap in valuation. So, for example, if the plaintiff believes that her case is worth $100,000 and it will take $30,000 more to litigate the case and the defendant believes the case is worth nothing and it will cost $30,000 to litigate the case, the case will not settle. The plaintiff will not accept anything less than $70,000 and the defendant will not offer more than $30,000. But if the plaintiff's estimate of the value of the case is reduced to $70,000 and the defendant's increases to $40,000 we now have what dispute resolution experts call a ZOPA—a zone of potential agreement.[17] On these facts, a rational plaintiff would take an offer over $40,000 and a rational defendant would be willing to pay up to $70,000. But if the parties are unsure as to the applicable law, that may keep the case from settling because it makes it harder for the parties' estimates to converge. Choice of law becomes, in Juenger's turn of phrase, the "joker in the deck."[18]

I once wrote on the issue of predictability in an article on Louisiana's codification of conflicts law.[19] In the period between Louisiana's adoption of interest analysis and the codification, the reversal rate of Louisiana's trial courts on conflicts issues was statistically indistinguishable from a coin flip, about 50%.[20] After the codification, the reversal rate dropped to about 20%.[21] The improvement in

16. Courts too have made that observation. *See, e.g.*, Paul v. Nat'l Life, 352 S.E.2d 550, 554-56 (W. Va. 1986) (discussing the various conflicts of law doctrines, but not discarding the *lex loci delicti* approach).

17. Jeremy Lack & Francois Bogacz, *The Neurophysiology of ADR and Process Design: A New Approach to Conflict Prevention and Resolution?*, 14 CARDOZO J. CONFLICT RESOL. 33, 63 (2012).

18. Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 169 (2001).

19. Patrick J. Borchers, *Louisiana's Conflicts Codification: Some Empirical Observations Regarding Decisional Predict*ability, 60 LA. L. REV. 1061 (2000) [hereinafter Borchers, *Louisiana's Conflicts Codification*].

20. Borchers, *Louisiana's Conflicts Codification*, *supra* note 19, at 1067.

21. *Id.*

predictability was not due to a return to hard-and-fast rules. The Louisiana codification adopts something like California's "comparative impairment" approach.[22] But it gives Louisiana courts and lawyers a common vocabulary on which to debate the issues, which is crucial to predictability.

It is true, of course, that choice of law was not entirely predictable in the pre-revolutionary era. Courts employed escape devices such as the public policy doctrine[23] and re-characterization of obviously substantive issues as procedural[24] to achieve results that could be explained best by either substantivism or interest analysis. But those cases, celebrated as they were,[25] were the exception and not the rule. Anyone who thinks that the revolution did not deliver a major blow to the predictability of choice of law is kidding herself.

Lately I have become a bigger fan of rules. Not inflexible rules, but at least rules that allow for application of a common terminology and reasonably clear direction as to the presumptive result. In what I thought would be an unnoticed article, I pointed out that the Second Restatement has a large number of presumptive rules, but that courts tend to ignore them in favor of citing the open-ended sections such as sections 6, 145, and 188, which purport to apply broadly the test of "the most significant relationship," the general formula adopted by the Second Restatement.[26]

Despite my modest expectations, the article got noticed. In particular it was noticed by the Illinois Supreme Court in *Townsend v. Sears Roebuck & Co*.[27] That case involved an allegedly defective lawn tractor sold to a Michigan consumer by an Illinois-based manufacturer. The injury occurred in Michigan but the plaintiff sued in Illinois, certainly because Illinois law was more favorable to him. Citing to my previously obscure article, the Illinois high court homed in on section 146, which creates a presumption that the injury state's law applies in personal injury cases.[28] The court saw nothing to overcome the presumption and thus applied Michigan law. Along the way, the court stated "[w]e agree with the concern that the bench and bar have over-

22. LA. CIV. CODE ANN. art. 3515 (2012).

23. Kilberg v. Ne. Airlines, Inc., 172 N.E.2d 526, 529 (N.Y. 1961).

24. Grant v. McAuliffe, 264 P.2d 944, 949 (Cal. 1953).

25. *See, e.g*., Roger J. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 670 n.35 (1959) (re-characterizing *Grant* in interest analysis terms).

26. Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1246 (1997) [hereinafter Borchers, *Courts and the Second Conflicts Restatement*].

27. 879 N.E.2d 893 (Ill. 2007).

28. Townsend v. Sears, Roebuck & Co., 879 N.E.2d 893, 900, 903 (Ill. 2007).

emphasized the general sections of the Second Restatement of Conflict of Laws and have undervalued the specific presumptive rules."[29]

Then the same thing happened in New Jersey. In *P.V. v. Camp Jaycee*,[30] New Jersey's high court eschewed applying the law of the (arguably) common residence of the parties in favor of applying that of the locus of the tort. In that case—reminiscent of New York's *Schultz v. Boy Scouts of America, Inc.*[31]—the defendant attempted to interpose New Jersey's charitable immunity statute in an action for sexual assault in Pennsylvania. Citing the same previously obscure article, the New Jersey high court applied Pennsylvania law because the tort had occurred there, and there were not sufficient reasons to displace the Second Restatement's presumption that the law of the place of the wrong should apply.[32] This time the result benefited the plaintiff, while in the Illinois case it benefited the defendant.

Admittedly, two cases a tidal wave not makes. But they are decisions from influential state courts that were early adopters of the break from the purely territorial system that ruled before 1963.[33] Something is amiss; it seems to be that courts want at least a presumptive rule. If they depart from the rule, they want to say so and give reasons for departing from it. Courts have begun to see that conflicts law must be judged by the same values as other areas of law. Courts (and commerce) would never accept a rule that contracts should only be enforced if "fair" or if a local party has an "interest" in having it bind the other party; courts are beginning to awaken to the concept that freeform notions of justice will not suffice in interstate cases. Gone are the days when judges and their clerks are likely to pore over long, technical, and footnote-laden articles on conflicts theory. I have noticed in my own work that the chance of it being cited by a court is inversely related to its length. Courts want a starting point that the "glass-bead games" of the conflicts revolution have not given them.[34]

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29. *Townsend*, 879 N.E.2d at 902.

30. 962 A.2d 453 (N.J. 2008).

31. 480 N.E.2d 679 (N.Y. 1985).

32. *Camp Jaycee*, 962 A.2d at 459, 468.

33. *See* Wartell v. Formusa, 213 N.E.2d 544, 545-46 (Ill. 1966) (abandoning the rule of *lex loci delicti* in a case involving a question of interspousal immunity); Mellk v. Sarahson, 229 A.2d 625, 629-30 (N.J. 1967) (abandoning the rule of *lex loci delicti* in favor the law of the common domicile of the parties in a guest statute case).

34. Friedrich K. Juenger, *Symposium on Interest Analysis in Conflict of Laws: An Inquiry into Fundamentals with a Side Glance at Products Liability: What Now?*, 46 OHIO ST. L.J. 509, 511 (1985).

Scholars and judges are beginning to declare, with some good reason, the conflicts revolution dead or dying.[35] One recent article declares that "[t]he total rejection of conceptual thinking destroyed the field it was supposed to save and frustrated the basic expectation of lawyers, judges, and the general public that law provide a minimal degree of certainty and predictability."[36] Judge Richard Posner declared the revolution to be a "legal reform [that] miscarried."[37] It has been over fifteen years since a U.S. court has openly rejected the formal rules that pre-dated the modern methodologies,[38] leaving at ten the number of state courts standing with their arms metaphorically folded and unwilling to cross the line to "modernity."[39]

Moreover, the conflicts revolution was fought on the battlegrounds of tort and contract law, leaving mostly untouched rules such as the *lex situs* in real property cases, applying the law of the decedent's last domicile in the distribution of personal property, and so on.[40] States on the modern side of the line have gravitated toward the Second Restatement, which is the most rule-based of modern approaches, assuming that one ventures beyond its general statements.[41]

So now perhaps is a good time to undertake a new Restatement. There is actually something to restate and clarify rather than engaging the difficult task the drafters of the Second Restatement had in trying to draft a "transitional"[42] document with the battle swirling around them.

Moreover, we have somewhere from which to start. The two U.S. codifications give us experience with codes, to say nothing of what can be learned from international codifications. The expanded *Neumeier* rules in New York teach lessons about judicially drafted rules. I made a modest effort to synthesize Nebraska[43] case law into soft rules.[44] For example, here is the rule that I drafted for tort conflicts:

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35. *See* Celia Wasserstein Fassberg, *Realism and Revolution in Conflict of Laws: In with a Bang and out with a Whimper*, 163 U. PA. L. REV. 1919, 1940 (2015) (discussing the dead end of the conflicts law revolution).

36. *Id.* at 1941.

37. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 429 (1990).

38. Symeon C. Symeonides, *Choice of Law in the American Courts in 2001: Fifteenth Annual Survey*, 50 AM. J. COMP. L. 1, 4 (2002).

39. Symeon C. Symeonides, *Choice of Law in American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMP. L. 227, 231 (2010).

40. Fassberg, *supra* note 35, at 1939.

41. Symeonides, *supra* note 39, at 231.

42. Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 519 (1983).

43. A former student of mine did the same in Missouri. *See* Kevin Tuininga, *Toward Predictable Choice of Law in Missouri*, 65 J. MO. BAR 14 (2009) (synthesizing how Missouri has applied tort and contract rules).

> **Tort Rule: In tort cases in which the parties or events are connected with more than one State, the law of the State in which the plaintiff is injured governs.**
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> **Tort Exception #1: If the laws of the connected States conflict as to an issue of loss distribution and each party contesting that issue is domiciled (or, in the case of a business entity has its principal place of business) in the same State and that State is not the injury State, the law of the State of the contesting parties' common domicile (or principal place of business) governs as to the contested issue. For purposes of Exception #1, "the same State" includes States that are distinct but have identical laws on the issue being contested.**
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> **Tort Exception #2: If the injury and the conduct causing the injury occur in different States, and the laws of those States differ as to an issue of conduct regulation, the law of the State in which the conduct occurred governs.**[45]

Conflicts scholars might recognize this rule and its exceptions as a refinement and expansion of the *Neumeier* rules. In fact, the first version of my torts rule was an effort to restate the *Neumeier* rules.[46] To be sure, the rule is not completely inflexible. In particular, the line between conduct regulation and loss allocating rules is a fuzzy one.[47] But the rule accommodates the *Babcock* false conflict paradigm and extends it to the "three state" cases as lower New York courts have.[48] It then uses territorial connecting factors as the tiebreaker in split domicile cases instead of Currie's forum law preference.[49]

Codes take on this flavor. For example, Article 3544 of the Louisiana Civil Code[50] expressly adopts the common domicile solution in issues of loss allocation and extends it to circumstances in which the victim and the tortfeasor are domiciled in states that have "substantially identical" laws.[51] Although nuanced, in split domicile cases the Louisiana code generally defaults to the injury state.[52]

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44. Patrick J. Borchers, *Nebraska Choice of Law: A Synthesis*, 39 CREIGHTON L. REV. 1, 6-7 (2005) [hereinafter Borchers, *Nebraska Choice of Law*].

45. Borchers, *Nebraska Conflict of Laws*, *supra* note 44, at 6-7.

46. Patrick J. Borchers, *Conflict of Laws*, 49 SYRACUSE L. REV. 333, 347 (1999).

47. *See, e.g.*, Padula v. Lilarn Props. Corp., 644 N.E.2d 1001, 1003 (N.Y. 1994) (resolving split among lower New York courts as to whether New York's "scaffolding law"—which imposes strict liability on a landowner—is conduct regulating or loss allocating).

48. *See, e.g.*, Diehl v. Ogorewac, 836 F. Supp. 88, 93 (E.D.N.Y. 1993) (applying New York conflicts law in a diversity case).

49. *See* Borchers, *Nebraska Conflict of Laws*, *supra* note 44, at 7.

50. LA. CIV. CODE ANN. art. 3544.

51. LA. CIV. CODE ANN. art. 3544(1).

52. LA. CIV. CODE ANN. art. 3544(2).

Europe's Rome II Regulation goes in the same direction. Article 4(1) directs application of the injury state's law unless the parties have a common habitual residence outside the forum state.[53]

Of course predictability is not (and should not be) the only goal of conflicts law. A regime in which a state always applies its own law would be highly predictable. In fact, some states have asserted that they do so unless application of their own law is unconstitutional.[54] However, such a regime extracts a heavy price. Plaintiffs and defendants ought to be on equal footing. If one imagines a world of broad jurisdictional rules, and constant application of the *lex fori*, plaintiffs would have a distinct advantage. Although it is impossible to prove causation, one reason for the Supreme Court's campaign to roll back general jurisdiction to states where corporate defendants are "essentially at home"[55] may have been the heavy forum law bias of state conflicts law, and a desire to protect defendants against forum-shopping plaintiffs.

Lately, the United States has also shown no appetite for raw substantivism. Even among courts that nominally follow Leflar's approach, some have given up on applying the "better rule of law" criterion.[56] The efforts to incorporate the Rome II Regulation's mild consumer preference into the Uniform Commercial Code's choice-of-law provision were a flop.[57] With the lone exception of the Virgin Islands, every U.S. jurisdiction to adopt the revisions to Article 1 of the U.C.C. replaced the proposed new choice-of-law provision[58] with the old substance-blind choice-of-law provision,[59] causing the American Law Institute and the National Conference on the Creation of Uniform State Laws to withdraw the new provision.[60]

So what, if any, relevance does all of this have for a Third Restatement? It is relevant in several respects.

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53. Council Regulation (EC) No. 864/2007 of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II), Art. 4(1-2), 2007 O.J. (L 199) 40.

54. Symeonides, *supra* note 39, at 231 (noting how two states follow the *lex fori* approach).

55. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

56. *See, e.g.*, *Nodak Mut. Ins. Co.*, 604 N.W.2d at 96 (nominally following Leflar but putting heavy emphasis on locus of the accident and noting that the Minnesota Supreme Court has not relied on the "better rule of law" consideration in over 20 years); *Gillette*, 641 N.W.2d at 684 (refusing to decide whether Wisconsin or Manitoba law on compensation for non-economic damages is better).

57. HAY, WEINTRAUB & BORCHERS, *supra* note 1, at 528.

58. U.C.C. § 1-301 (AM. LAW INST. & NAT'L CONF. ON THE CREATION OF UNIF. ST. LAWS 2008).

59. U.C.C. § 1-105 (AM. LAW INST. & NAT'L CONF. ON THE CREATION OF UNIF. ST. LAWS 1999).

60. HAY, WEINTRAUB & BORCHERS, *supra* note 1, at 528.

Restatements are not written in the prescriptive terms of a code, though they can come pretty close. Some of the most successful sections of the Second Restatement create a very heavy presumption. So, for example, Section 187—on party autonomy in contractually choosing the applicable law—creates a strong presumption that the chosen law will be applied.[61] Section 193 creates a strong presumption that the law of the principal place of an insured risk will be applied in insurance disputes.[62] Section 196 creates a heavy presumption that disputes over personal services contracts will be governed by the state in which the services are to be performed.[63]

It is no coincidence that these sections are among the most widely and faithfully followed sections of the Second Restatement. Section 187 is essentially a declaration of universal law in the United States.[64]

The sections that have caused the greatest difficulty are the open-ended Sections 6, 145, and 188. Let's begin with Section 6. It is the laundry list to end all laundry lists. Its seven factors have no hierarchy, nor is it clear how, if at all, they are to be applied in various cases. The "protection of justified expectations" might be of enormous importance in some cases and of trivial importance in others. Any effort to create one overarching test—here "the most significant relationship"—is doomed to be so banal that it is of little use. To the extent it ever generated any consensus, it is because significance is in the eye of the beholder.

I suggest that the Third Restatement not make any effort to state any overarching verbal formula, or that if it does it should borrow from the Louisiana codification. Article 3515 of the Louisiana codification provides a residual rule that the "law of the state whose policies would be most seriously impaired if its law were not applied to that issue."[65] True enough, the next paragraph of the Article lists some of the factors listed in Section 6, but much of the rest of the codification is sufficiently definite to make resort to the general formula unnecessary in the vast majority of cases.

This brings me to what I believe to be the most pernicious section of the Second Restatement, which is Section 145. In Juenger's pithy phrase, "[a]lthough it is printed in black letters, section 145 is not

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61. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1971).

62. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193.

63. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 196.

64. *See* Patrick J. Borchers, *Choice of Law in the American Courts in 1992: Observations and Reflections*, 42 AM. J. COMP. L. 125, 136 (1994) (stating that Section 187 "appears to be a nearly universal principle in the United States.").

65. LA. CIV. CODE ANN. art. 3515.

much of a rule . . . ."[66] Anyone who has read many United States conflicts decisions has suffered through an endless parade of block quotations of Section 6 and then, noting that it is a tort case, block quotations of Section 145. Section 145 starts by reminding courts of Section 6 and then directs courts to consider "the place where the injury occurred," "the place where the conduct causing the injury occurred," "the domicil, residence, nationality, place of incorporation and place of business of the parties," "the place where the relationship, if any, between the parties is centered," and then adds unhelpfully, "[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue."[67]

The result is that courts are left looking at a slate of eleven factors (seven from Section 6 and four from Section 145) with little guidance as to how to apply them. It is a small wonder courts are often unwilling to venture past these open-ended sections as they fear more unhelpful lists.[68]

Section 188, the general section applicable to contracts, fares no better and has baffled even the most prestigious of courts. In *Matter of Allstate Insurance Co.*,[69] the New York Court of Appeals, faced with a choice-of-law issue involving an automobile insurance policy, attempted to reason the case from Sections 6 and 188, apparently unaware of Section 193, which covers insurance contracts, and that the Restatement includes an illustration mirroring the facts of the *Stolarz* case.[70]

One could blame poor lawyering, lazy law clerks, and a whole host of other culprits in applying the Second Restatement. But a good deal of the blame must go to the Second Restatement itself. Given the great number of torts and types of contracts covered by the more specific sections, I doubt we need anything like Sections 6, 145, and 188 in the Third Restatement. At a minimum, they should not be given the pride of place they now enjoy. Their placement at the front of the chapters signals that they are to be the principal guides for courts, when in fact they provide little guidance at all. If placed at the end of the chapters, with a notation to resort to the general formula only if no specific section covers the issue, reliance on them would likely drop dramatically.

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66. Friedrich K. Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 212 (1969).

67. RESTATEMENT (SECOND) CONFLICT OF LAWS § 145.

68. *See* Borchers, *Courts and the Second Conflicts Restatement*, *supra* note 26, at 1242-44 (explaining the frequency with which courts cite these sections of the Second Restatement).

69. 613 N.E.2d 936 (N.Y. 1993).

70. *Matter of Allstate Ins. Co.*, 613 N.E.2d at 940.

It is time to consolidate the gains of the revolution while admitting the reality that we no longer need be in a state of war against anything that looks like a rule. Predictable result patterns have begun to emerge and anything that can claim to be a Restatement must restate them so that courts need not start from first principles in every conflicts case. For example, there is wide agreement that in tort cases falling into the common domicile pattern, the law of the domicile applies. In split domicile cases, the law of the injury state usually emerges as the tiebreaker.[71] In multi-party cases courts have become comfortable with dépeçage rather than attempting to fashion a single solution for all parties.[72]

United States conflicts decisions are beginning to fall into patterns that might be called quasi or soft rules.[73] Sometimes the impetus for this has been judicial, sometimes legislative, and sometimes the result of the efforts of commentators to systematize decisions. A principal goal of the Third Restatement ought to be to catalog those result patterns to guide the bench and bar. It would do a great deal to improve predictability and restore the flagging reputation of our discipline.

71. PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 950-51 (5th ed. 2010).

72. *See, e.g.*, *Edwards*, 952 N.E.2d at 1042-44 (addressing conflict of laws issues in a multi-party tort case).

73. Patrick J. Borchers, *The Emergence of Quasi Rules in U.S. Conflicts Law*, 12 YBK. PRIV. INT'L L. 93 (2010).