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# One Size Does Not Fit All: The Third Multi-track Restatement of Conflict of Laws

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# One Size Does Not Fit All: The Third Multi-Track Restatement of Conflict of Laws

AARON D. TWERSKI\*

## INTRODUCTION

We simply can't agree. Any attempt to draft a traditional third restatement of conflicts will quickly deteriorate into irreconcilable conflict between academicians, judges, and members of the bar who favor one or another approach to choice of law. In order to draft a traditional restatement, one must sense a general consensus about fundamental issues. When consensus is lacking, the effort is bound to fail. However, the American Law Institute ("ALI") has developed a method for dealing with irreconcilable conflict and writing a successful, nontraditional multi-track restatement. The author was co-reporter of a traditional consensus *Restatement*<sup>1</sup> and an interested observer to a very nontraditional *Restatement* in an area where consensus could not be found.<sup>2</sup> From the vantage point of a reporter, I believe that to attempt the former will fail for conflict of laws but that a multi-track restatement of conflicts of laws could succeed and make a valuable contribution to the clarity of judicial decisionmaking in this contentious and troubled area of the law. This Article will briefly describe the traditional and nontraditional models. It will then argue that the non-traditional model will be a vast improvement over the *Restatement (Second) of Conflict of Laws*<sup>3</sup> ("*Second Restatement*").

### I. THE PRODUCTS LIABILITY RESTATEMENT—THE TRADITIONAL MODEL

In 1992, the author was appointed co-reporter for the *Restatement (Third) of Torts: Products Liability* together with Professor James A. Henderson, Jr. In May 1997, after five grueling years, the ALI approved the *Restatement* at its annual meeting.<sup>4</sup> The previous *Restatement* of the law of products liability was embodied in one section of the *Restatement (Second) of Torts*. The now famous section 402A imposed strict tort liability for the sale of defective products and laid to rest for all time the canard of privity that blocked plaintiffs from bringing direct actions against product

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1. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998) [hereinafter RESTATEMENT (THIRD): PRODS. LIAB.].

2. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. (Proposed Final Draft 1999) [hereinafter RESTATEMENT OF APPORTIONMENT]. The Draft was adopted by the American Law Institute on May 18, 1999, subject to changes suggested at the Annual Meeting. See American Law Institute, *Actions Taken at 1999 Annual Meeting* (last visited Dec. 17, 1999) <[http://www.ali.org/ali/1999\\_Actions\\_Sum.htm](http://www.ali.org/ali/1999_Actions_Sum.htm)>.

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

4. The Proposed Final Draft was approved on May 20, 1997, by the membership of the ALI and published in final form after incorporating minor changes mandated by the membership at that meeting.

manufacturers.<sup>5</sup> The implied warranty of merchantability (contractual strict liability) action was laden with too much UCC baggage to be an effective remedy for classic personal injury litigation.<sup>6</sup> In very short order, strict tort liability for defective products swept the country.<sup>7</sup> It became the all-time winner as the most cited *Restatement* section in the history of the American Law Institute.<sup>8</sup>

For all its vaunted success, section 402A was clearly inadequate for the burgeoning field of products liability. It did not address design defect liability at all and spoke to failure-to-warn only obliquely.<sup>9</sup> Both of these fields were in their infancy when section 402A was drafted. Its discussion of liability for defective drugs was muddled and confused.<sup>10</sup> The entire field of crashworthiness litigation antedates section 402A and thus was not mentioned at all.<sup>11</sup> The rules governing component part manufacturers are captured in one paragraph and do not begin to deal with the subtleties arising from this genre of products.<sup>12</sup> Postsale duties to warn were almost two decades in coming.<sup>13</sup> The discussion of plaintiff fault in section 402A was mired in the now outdated rule of contributory fault as a complete bar.<sup>14</sup> And the list goes on. There was a desperate need for a new restatement.<sup>15</sup>

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5. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

6. See *id.* § 402A cmt. m.

7. See DAVID G. OWEN ET AL., PRODUCTS LIABILITY AND SAFETY 165 (3d ed. 1996).

8. See Letter from Marianne M. Walker, ALI Restatement Case Citations Editor, to Aaron D. Twerski and James A. Henderson, Jr. (Oct. 11, 1991) (on file with author) ("In my nine years with the American Law Institute I have found Section 402A to be the most frequently cited section of any Restatement.")

9. Neither the black letter or comments to § 402A discuss liability for defective design. See also James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 880 (1998) ("The simple truth is that liability for defective design was in its nascent stages in the early 1960s and Section 402 did not address it meaningfully, if at all."); George L. Priest, *Strict Product Liability: The Original Intent*, 10 CARDOZO L. REV. 2301 *passim* (1989). The only reference to failure to warn is found in section 402A, comments j and k. These comments are among the most troublesome in the *Restatement (Second) of Torts* and have been radically altered in the *Restatement (Third) of Torts*.

10. Section 402A comment k is widely acknowledged to be poorly drafted and almost unfathomable. See James A. Henderson, Jr. & Aaron D. Twerski, *Will a New Restatement Help Settle Troubled Waters: Reflections*, 42 AM. U. L. REV. 1257, 1264-65 (1993).

11. The lead case establishing crashworthiness liability, *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968), was not decided until three years after the publication of section 402A.

12. See RESTATEMENT (SECOND) OF TORTS, *supra* note 5, § 402A cmt. q. The *Restatement (Third) of Torts* deals with the issues in comprehensive fashion. See RESTATEMENT (THIRD): PRODS. LIAB., *supra* note 1, § 5.

13. Only one pre-section 402A case discussed postsale failure to warn. See *Comstock v. General Motors Co.*, 99 N.W.2d 627, 634 (Mich. 1959). Not until *Cover v. Cohen*, 461 N.E.2d 864, 871 (N.Y. 1984), did this theory become a real weapon in the plaintiff's arsenal.

14. See RESTATEMENT (SECOND) OF TORTS, *supra* note 5, § 402A cmt. n.

15. For a comprehensive discussion of the issues that supported the drafting of a new products liability restatement, see James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1526-29 (1992). This article was drafted before the authors were appointed as reporters for the

As with most restatements, we had choices to make between majority and minority rules and we did so.<sup>16</sup> Where section 402A made unfortunate policy choices, we rejected them.<sup>17</sup> And where the case law was so muddled and confused that no one could divine what the courts were saying, we sought to make sense out of what was going on and reformulate the law in a sensible and logical fashion.<sup>18</sup> One major controversy surfaced within the project and that dealt with the standard of liability for defective product design.<sup>19</sup> Our reading of the case law led us to the conclusion that the general rule required that plaintiffs prove a reasonable alternative design in most cases in order to establish a case for design defect. Most courts view risk-utility balancing as the doctrinal base for deciding design cases.<sup>20</sup> This test imposes liability when an alternative to an existing design could have been adopted that would have avoided a reduced injury at acceptable cost.<sup>21</sup>

Opponents sought to convince the ALI that it ought to adopt a test that allowed a product to be found defective if it failed to meet consumer expectations.<sup>22</sup> The consumer expectations test had been rejected as an acceptable test for defect in a large number of jurisdictions.<sup>23</sup> We were able to demonstrate that even courts that utilized

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*Restatement (Third) of Torts: Products Liability.*

16. See, e.g., RESTATEMENT (THIRD): PROD. LIAB., *supra* note 1, § 16. The authors chose the *Fox-Mitchell* rule imposing joint liability on tortfeasors when the plaintiff cannot establish the extent of the aggravation caused by the defective product and rejected the *Huddell* rule. See *id.* § 16, reporter's note at 243-52. For a discussion of the *Fox-Mitchell* and *Huddell* rules, see James A. Henderson, Jr. & Aaron D. Twerski, *The Politics of the Products Liability Restatement*, 26 HOFSTRA L. REV. 667, 692-94 & nn.69-73 (1998).

17. For example, section 402A, comment j stated that, "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." RESTATEMENT (SECOND) OF TORTS, *supra* note 5, § 404A cmt. j. This section came under scathing attack from Howard Latin, "Good" Warnings, *Bad Products and Cognitive Limitations*, 41 UCLA L. REV. 1193, 1206-07 (1994); see also James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure To Warn*, 65 N.Y.U. L. REV. 265, 278-79 (1990).

18. As noted *supra* note 9, the law with regard to defective drugs as set forth in *Restatement (Second) of Torts*, section 402A comment k was in serious need of total overhaul. The new product liability restatement in section 6 sets forth a totally new formulation of liability for this special product area. See RESTATEMENT (THIRD): PRODS. LIAB., *supra* note 1, § 6.

19. See Henderson & Twerski, *supra* note 9, at 876-87 (chronicling the debate on the appropriate standard for design defect liability); Henderson & Twerski, *supra* note 15, at 672-86.

20. See Henderson & Twerski, *supra* note 9, at 887; Henderson & Twerski, *supra* note 15, at 672 n.11.

21. For an exhaustive listing of authority, see Henderson & Twerski, *supra* note 15, at 672 n.11.

22. See, e.g., Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 665-68 (1995).

23. See Henderson & Twerski, *supra* note 15, at 672; see also *Armentrout v. FMC Corp.*, 842 P.2d 175, 185 (Colo. 1992); *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 183 (Mich. 1984); *Holm v. Sponco Mfg. Inc.*, 324 N.W.2d 207 (Minn. 1982); *Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979) (codifying this approach in Texas in TEX. CIV. PRAC. REMEDIES

the consumer expectations test were utilizing the test in a very limited set of cases,<sup>24</sup> but generally risk-utility balancing had won the overwhelming allegiance of the courts throughout the country.<sup>25</sup> We further noted that courts often spoke of consumer expectations but when one dug a bit deeper and analyzed the opinions, the courts were in fact performing risk-utility analysis.<sup>26</sup>

This process of carefully parsing the case law and getting behind the facade of linguistics is the classic role of restatements. In doing so, we were able to discover a remarkable consensus throughout the country as to the governing standard for design defect liability.<sup>27</sup> Furthermore, the leading academics concurred in our analysis.<sup>28</sup> Admittedly, there were some naysayers.<sup>29</sup> And partisan advocates on the plaintiff's side sought to portray the judicial landscape as more fluid and open to a formless liability standard.<sup>30</sup> Their efforts were for nought. The ALI Council, consisting of sixty leading academics, judges and lawyers, sensed that we had cut through the verbiage and identified the liability standard correctly. The Council is the governing

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CODE ANN. § 82.005 (West 1997)).

24. See Henderson & Twerski, *supra* note 9, at 872-76, 889-90; see also RESTATEMENT (THIRD): PRODS. LIAB., *supra* note 1, § 3, note at 115-18.

25. See *supra* note 19.

26. See, e.g., *Aller v. Rodgers Mach. Mfg. Co.*, 268 N.W.2d 830, 834-35 (Iowa 1978) (“The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer . . .”) (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. i). “Proof of unreasonableness involves a balancing process. On one side of the scale is the utility of the product and on the other is the risk of its use.” *Id.* at 835.

27. See Henderson & Twerski, *supra* note 9, at 893-901.

28. See, e.g., WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 149, 644 (4th ed. 1971) (defining the standard of conduct in negligence as a balancing of “the risk, . . . probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued” and writing that in the area of design defect a manufacturer’s liability appears to be “essentially a matter of negligence”); W. Page Keeton, *Products Liability—Design Hazards and the Meaning of Defect*, 10 CUMB. L. REV. 293, 313 (1979) (proposing that a product be determined defectively designed “if a reasonable person would conclude that the magnitude of the danger . . . outweighs the utility of the design”); William M. Landes & Richard A. Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535, 553-43 (1985) (endorsing use of risk-utility analysis in design defect cases); David G. Owen, *Risk-Utility Balancing in Design Defect Cases*, 30 U. MICH. J.L. REFORM 239, 239 (1997) (“Courts and commentators increasingly comprehend that ascertaining design defectiveness in products liability cases requires some kind of ‘risk-utility’ balancing.”); Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435, 464 (1979) (“There can be little doubt about the correctness of the risk-benefit standard for design defect . . .”); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973) (listing factors to be balanced in a risk-utility analysis.)

29. See Shapo, *supra* note 22, at 665-68; see also, Howard C. Klemme, *Comments to the Reporters and Selected Members of the Consultative Group, Restatement of Torts (Third): Products Liability*, 61 TENN. L. REV. 1173 (1994); Joseph W. Little, *The Place of Consumer Expectations in Product Strict Liability Actions for Defectively Designed Products*, 61 TENN. L. REV. 1189 (1994).

30. See John F. Vargo, *The Emperor’s New Clothes: The American Law Institute Adorns a “New Cloth” for Section 402A Products Liability Design Defect—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493, 553 (1996).

body of the Institute that reviews and approves all tentative drafts before they are sent to the entire membership for adoption. The membership concurred in their judgment. Not only was it the rule, it was the only approach that made good sense.

## II. THE NONTRADITIONAL MODEL— THE APPORTIONMENT RESTATEMENT

In 1993, Professors William Powers and Michael Green began work on the *Restatement of Apportionment*. They faced the unenviable task of working out the rules for apportionment of fault and causation, not only between plaintiffs and defendants, but between defendants *intra se*. They immediately faced the dilemma of how to deal with the issue of joint and several tort liability. With the advent of comparative fault, courts were routinely assigning proportional fault in contribution actions between defendants.<sup>31</sup> It was not long before the defendants successfully argued to state legislatures<sup>32</sup> and courts<sup>33</sup> that once fault was apportioned, no defendants should bear more than their share of the fault.

Where all defendants are solvent, the issue is of no moment. When they are not, the major issue is who should bear the share of the insolvent or immune defendant's responsibility.<sup>34</sup> Those arguing for several liability argued that it was unfair for any defendant to bear more than their share of the fault.<sup>35</sup> If another defendant whose fault could be determined was insolvent, it was the plaintiff's problem. Those arguing for the retention of the common-law joint and several doctrine, contend that though fault was apportionable, an innocent plaintiff, whose injury was brought about through the causal contribution of two or more defendants, should not bear the loss of an insolvent defendant whose negligence causally contributed to the plaintiff's injury.<sup>36</sup> The solvent defendant whose fault was causal should bear the burden of the insolvent defendant.

The law throughout the country was sharply divided. Some sixteen jurisdictions retained the common-law joint and several rule.<sup>37</sup> Approximately fourteen states have opted for several liability exclusively.<sup>38</sup> A goodly number of states allow joint and

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31. For a discussion setting forth the statutory and judicial development of the rule requiring contribution based on proportional fault, see VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* ch. 16 (3d ed. 1994).

32. For a discussion of the legislative initiatives to abolish the common-law joint and several liability doctrine, see Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. DAVIS L. REV. 1125, 1131-33 (1989); Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U. C. DAVIS L. REV. 1141, 1164-68 (1988).

33. See, e.g., *Bartlett v. New Mexico Welding Supply, Inc.*, 646 P.2d 579 (N.M. Ct. App. 1982); *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992).

34. See RESTATEMENT OF APPORTIONMENT, *supra* note 2, § 20 cmt. b.

35. See Twerski, *supra* note 32, at 1130 & nn.17-18.

36. See, e.g., Wright, *supra* note 32, at 1186.

37. See RESTATEMENT OF APPORTIONMENT, *supra* note 2, § 28A cmt. a reporters' notes.

38. See *id.* § 28B cmt. b reporters' note.

several liability only if a defendant's fault exceeds some percentage threshold.<sup>39</sup> Others apply joint and several liability to economic loss but several liability only to non-economic loss.<sup>40</sup> Finally, a cadre of states apportion the share of the insolvent defendants' fault among all of the parties to the action according to their percentage of fault.<sup>41</sup> Thus, not only defendants, but also a plaintiff who is at fault, bears her proportional share of the loss brought about by the insolvent defendant.

The Reporters Powers and Green had their own view of the fairest solution to the problem. They would have opted for one of the hybrid solutions rather than either retention or rejection of joint and several liability.<sup>42</sup> However, it is clear, that given the irreconcilable differences between the jurisdictions, consensus could not be reached.

The American Law Institute wisely chose to be agnostic as to which system was preferable and instead opted for a multi-track restatement.<sup>43</sup> The *Restatement of Apportionment* describes the five tracks and then undertakes the important task of deciding how each of the systems should be fairly administered.<sup>44</sup> What factors should be considered in apportioning fault?<sup>45</sup> How should courts deal with the fault of nonparties to the action?<sup>46</sup> Should the fault of a negligent tortfeasor whose responsibility is to prevent the occurrence of an intentional tort be apportioned?<sup>47</sup> How or whether to apportion fault between the negligent and intentional tortfeasors is of great significance in cases where a hotel or an office building breaches its duty to provide security in order to prevent thieves and rapists from entering the establishment and injuring patrons. If fault apportionment is allowed in these cases, the negligent tortfeasor might pay little or nothing in any system that is not joint and several. A jury would likely apportion the lion's share of the fault to the intentional tortfeasor. Under a theory of several liability, the plaintiff would be relegated to recovering only a small percentage of her losses from the tortfeasor who had the responsibility of assuring that the unwelcome entrant be prevented from entering the premises.<sup>48</sup> In short, even in a multi-track restatement, there is much work to be done to ensure that the law under each respective system is internally consistent with its own governing principles and provides the greatest degree of fairness given the inherent limitations of the system.

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39. *See id.* § 28D cmt. c reporters' note.

40. *See id.* § 29E cmt. b reporters' note.

41. *See id.* § 28C cmt. a reporters' note.

42. *See id.* § 20 cmt. a.

43. *See id.* § 20 cmt. a.

44. *Id.* §§ 28A-28D.

45. *See id.* § 8.

46. *See id.* §§ 29B cmts. c, d, e & f; 29C cmt. e; 29D cmt. e; 29E cmts. e & f.

47. *See id.* § 24.

48. *See id.* § 24 cmt. b.

III. A MULTI-TRACK RESTATEMENT OF  
CONFLICT OF LAWS

Though there is much disagreement as to how to resolve many choice-of-law issues, there are matters on which there is little disagreement. No modern-day conflicts scholar advocates returning to the rigid jurisdiction-selecting rules of the *Restatement of the Law of Conflict of Laws* (“*First Restatement*”).<sup>49</sup> Furthermore, few, if any, express any real enthusiasm for the *Second Restatement*.<sup>50</sup> Even admitting that courts who utilize the *Second Restatement* often get the right results, the cases are poorly reasoned and provide no predictability to counsel as to how the court would resolve cases in the future. For starters, a new restatement could begin by rejecting both the *First* and *Second Restatement* as adequate analytical tools for resolving choice-of-law problems.

It should then identify the major academic currents in the policy-centered approach to choice of law. Candidates for inclusion include the following:

A. *Classic Interest Analysis*

The pathbreaking work done by Brainerd Currie in the 1960s continues to retain an impressive group of devotees who believe that Currie was correct.<sup>51</sup> In Currie’s view conflict of laws is simply not a legitimate subject.<sup>52</sup> The universe consists of

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49. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934) [hereinafter FIRST RESTATEMENT]. Neither of the two most extreme territorialists among the modern-day writers is prepared to embrace *First Restatement* jurisdiction-selecting rules without qualification. See Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1636-46 (1985). The author has set forth his territorialist bias in a series of articles and does not advocate a return to *First Restatement* territorialism. See Aaron D. Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373, 385, 390 (1971).

50. The disdain for *Second Restatement* “contact-counting” has been so oft repeated that it hardly warrants citation. See, e.g., RUSSELL J. WEINTRUB, COMMENTARY ON THE CONFLICT OF LAWS (3d ed. 1986); Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 466, 486-89 (1991) (“[O]ne needs to read a lot of opinions in a single sitting fully to appreciate just how badly the Second Restatement works in practice . . . [i]t is time to abandon this dead-end project in order to channel judges in more productive directions.”); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 253 (1992) (“Trying to be all things to all people, it produced mush.”); Joseph William Singer, *Real Conflicts*, 69 B.U.L. REV. 1, 77 (1989) (“[S]ilence regarding the priority of [Section 6(a)] policies mystifies rather than clarifies.”).

51. See, e.g., Herma Hill Kay, *A Defense of Currie’s Governmental Interest Analysis*, 215 RECUEIL DES COURS 9 (1989); Bruce Posnak, *Choice of Law: Interest Analysis and Its “New Critics”*, 36 AM. J. COMP. L. 681 (1988); Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the ‘New Critics’*, 34 MERCER L. REV. 593 (1983); Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L.J. 475 (2000).

52. See BRAINERD CURRIE, *Married Women’s Contracts: A Study of Conflict-of-Laws Method*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 77, 117 (1963).



false conflict cases in which every state confronted with the alleged conflict should find that the law of the only interested jurisdiction applies.<sup>53</sup> Where each state can lay claim to a legitimate state interest, the conflict is real and cannot be resolved by choice-of-law theory.<sup>54</sup> Faced with a true conflict, a state is duty-bound to foster its own interest by applying its law.<sup>55</sup> Currie acknowledged a class of cases where no state has any legitimate interests to foster. In such unprovided for cases the default rule is that the forum applies its own law.<sup>56</sup> Admittedly, Currie allowed for a state to engage in a moderate and restrained interpretation of its own law to discern whether it had a legitimate interest,<sup>57</sup> but for Currie this was an exercise in domestic lawmaking, not an attempt to engage in the forbidden task of working out a sensible allocation of lawmaking authority between states in situations in which the facts straddled several state lines.<sup>58</sup> At bottom the Currie approach is premised on a state's interest in favoring its own domiciliaries and an abiding belief that in the absence of direction from Congress, states have no business in choosing between the laws of interested jurisdictions.<sup>59</sup>

The task for the advocates of a third restatement of conflicts would be to delineate what *interests* qualify as legitimate expressions of state policy concerns<sup>60</sup> and which are nothing more than unconscionable grabs for power<sup>61</sup> or blatant attempts to utilize conflicts law to accomplish justice in the individual case, irrespective of whether a state had a legitimate interest.<sup>62</sup> One would expect that the Currieites would marshal considerable authority from existing case law to demonstrate that courts have, in fact, been faithful to the Currie approach.<sup>63</sup> Restaters have an obligation to get behind the

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53. *See id.* at 107.

54. *See id.* at 119; Sedler, *supra* note 51, at 595.

55. *See* CURRIE, *supra* note 52, at 119.

56. *See* BRAINERD CURRIE, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, *supra* note 52, at 128, 152-56.

57. *See id.* at 153-56. For an interesting analysis of the unprovided for case challenging the premise that no such category exists, see Larry Kramer, *The Myth of the "Unprovided-For" Case*, 75 VA. L. REV. 1045 (1989).

58. *See, e.g.*, Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963).

59. *See* BRAINERD CURRIE, *Conflict, Crisis, and Confusion in New York*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, *supra* note 52, at 690, 718.

60. This issue will require substantial attention. *See, e.g.*, Symposium, *Choice of Law: How It Ought To Be*, 48 MERCER L. REV. 639, 674-88 (1997) (transcript of roundtable discussion) (noting significant disagreement as to whether in *Schultz v. Boy Scouts of America*, 480 N.E.2d 679 (N.Y. 1985), New York has an interest in applying its law or whether the case presented a false conflict).

61. *See, e.g.*, Lea Brillmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980).

62. *See, e.g.*, *Milkovich v. Saari*, 203 N.W.2d 408, 417 (Minn. 1973).

63. In a series of articles, Professor Robert Sedler has marshalled authority in support of interest analysis and has reduced his findings to what he calls "rule of choice of law." *See, e.g.*, Robert A. Sedler, *Choice of Law in Conflicts Tort Cases: A Third Restatement or Rules of Choice of Law*, 75 IND. L.J. 615, 619-33 (2000); Robert A. Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Tort Cases*, 44 TENN. L. REV. 975,

rhetoric and demonstrate that, the rhetoric notwithstanding, the actual holdings of the court are best explained by the Currie principles.

### B. The Neo-Territorialists

The father of the neo-territorialist approach to choice of law is David Cavers. In his book, *The Choice of Law Process*,<sup>64</sup> and a host of articles<sup>65</sup> Cavers took issue with Brainerd Currie. Cavers agreed with the fundamental thrust of a policy-oriented approach to choice of law. Indeed, one of his early articles was highly influential in demonstrating the folly of policy-blind jurisdiction-selecting rules.<sup>66</sup> However, the neo-territorialists are not ready to accede to the notion that courts have no business looking beyond their own states' interests.<sup>67</sup> And they are clearly not satisfied with the heavy emphasis on states interests in their own domiciliaries as the lynchpin on which to base their policy-oriented approach.<sup>68</sup> Once one abandons the two fundamental tenets of Currie Interest Analysis, the impetus to adopt a territorial perspective is powerful. For some a territorialist bias runs very deep and has its basis in the respect that sovereign states must have for each other in recognizing their right to govern events within their borders.<sup>69</sup> For others it is fueled by serious constitutional antidiscrimination concerns.<sup>70</sup> Whatever the source, there exists a deep skepticism among a strong contingent of scholars as to the Currie approach and a concomitant flight to territorialism, albeit not mindless jurisdiction-selecting rules, as the preferred approach to choice of law.

994-1040 (1977).

64. DAVID F. CAVERS, *THE CHOICE OF LAW PROCESS* 73-75 (1965).

65. See, e.g., David F. Cavers, *Cipolla and Conflicts Justice*, 9 DUQ. L. REV. 360, 369-70 (1971); David F. Cavers, *The Changing Choice of Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROBS. 732, 734 n.9 (1963).

66. See David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

67. See, e.g., Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 475-76 (1985); Lea Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315, 1349 (1981); John Bernard Corr, *Interest Analysis and Choice of Law: The Dubious Dominance of Domicile*, 1983 UTAH L. REV. 651, 673-76; Jack Davies, *A Legislator's Look at Hague and Choice of Law*, 10 HOFSTRA L. REV. 171, 182-84 (1981); John H. Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 175 (1981); Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 809-20 (1983); Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 314-32 (1987); Linda Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103, 119-29 (1981).

68. See, e.g., LEA BRILMAYER, *CONFLICT OF LAWS* § 2.1.2 (2d ed. 1995); Ely, *supra* note 67, at 174-75.

69. See, e.g., Twerski, *supra* note 49, at 384-85, 390; Aaron D. Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice*, 10 HOFSTRA L. REV. 149, 161-62 (1981); Aaron D. Twerski, *To Where Does One Attach the Horses?*, 61 KY. L.J. 393, 412-15 (1973).

70. See, e.g., Ely, *supra* note 67; Laycock, *supra* note 50, at 317.

In a new restatement the territorialists would be challenged to delineate where policy concerns end and where territorial concerns begin. Territorialists (myself included) have had a devil of a time explaining how it is that territorialist principles are so important to the resolution of conflicts cases yet are not sufficient to create interests, in and of themselves.<sup>71</sup> And once one abandons the rigid territorialist rules of the *First Restatement*, fashioning more sophisticated territorial doctrine will be no picnic.<sup>72</sup> The devil will be in the details, and it remains to be seen whether the task can be accomplished.

### C. Better Rule and Justice in the Individual Case

Though both the interest analysts and the territorialists believe that the "better law" approach championed by Judge Leflar<sup>73</sup> is not appropriate for deciding choice-of-law cases,<sup>74</sup> the view has its adherents both in the academy<sup>75</sup> and in the courts.<sup>76</sup> It may well deserve recognition as a separate track in a new restatement of conflicts.

Adherents of the Leflar approach will have a more difficult time of it than did Leflar himself. As others have noted, in the early days of conflicts the "better law" approach was utilized by a forum to unshackle itself from its own anachronistic rules that had long become obsolete but hung on because of legislative indifference.<sup>77</sup> In the brave new world of tort reform, the courts flirting with the "better law" approach will be confronting legislative mandates whose ink has yet to dry. Many of the rules may well be distasteful to courts who find them substantively unjust or too rigid and in any event an incursion on traditional lawmaking of common law courts. A conflicts case might provide an opportunity to give the legislature the proverbial

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71. See CAVERS, *supra* note 64, at 166-76 (1965) (applying his fourth principle of preference, a territorial principle to govern a case that would otherwise be a false conflict and to support the holding of *Dym v. Gordon*, 209 N.E.2d 792 (N.Y. 1965)); see also Aaron D. Twerski, Neumeier v. Kuehner: *Where Are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104, 123-24 (1973).

72. See Laycock, *supra* note 50, at 322-31.

73. Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 295-304 (1966); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1587-88 (1966).

74. See, e.g., WEINTRAUB, *supra* note 50, § 6.27; BRILMAYER, *supra* note 68, § 2.2.3; see also CAVERS, *supra* note 64, at 75-81.

75. See, e.g., Robert L. Felix, *Leflar in the Courts: Judicial Adoptions of Choice-Influencing Considerations*, 52 ARK. L. REV. 35, 121 (1999); William L. Reynolds & William M. Richman, *Robert Leflar, Judicial Process and Choice-of-Law*, 52 ARK. L. REV. 123, 139-40 (1999); see also Singer, *supra* note 50, at 75.

76. See Felix, *supra* note 75, at 46 nn.32-33 (listing Arkansas, *Wallis v. Mrs. Smith's Pie Co.*, 550 S.W.2d 453 (Ark. 1977); Minnesota, *Milkovich v. Saari*, 203 N.W.2d 408 (Minn. 1973); New Hampshire, *Clark v. Clark*, 222 A.2d 205 (N.H. 1966); Rhode Island, *Woodward v. Stewart*, 243 A.2d 917 (R.I. 1968); and Wisconsin, *Heath v. Zellmer*, 151 N.W.2d 664 (Wis. 1967), as jurisdictions which have applied choice-influencing considerations to tort conflicts, and Minnesota, *Hime v. State Farm Fire & Cas. Co.*, 284 N.W.2d 829 (Minn. 1979), and Wisconsin, *Haines v. Mid-Century Ins. Co.*, 177 N.W.2d 328 (Wis. 1970), as jurisdictions which have done so to contract conflicts).

77. See, e.g., WEINTRAUB, *supra* note 50, § 6.27.

“kick in the pants.” How to deal with this phenomenon will require straight-talking by the Leflarites.

The suggestions for three categories are illustrative. Others may be able to define some other discreet approaches that deserve working out in a new conflicts restatement. What would be unworkable would be to have a restatement that reflects the nuances of the host of scholars who have written so ably in this fascinating field of law. Ultimately the politics of lawmaking will require academicians to recognize the value of delineating a principled approach that captures the essence of the theoretical approach they espouse. If this cannot be done the enterprise will fail. Parenthetically, I believe this to be true about every restatement that has or will be written. Nuances can be reflected in the comments, and often that must be done in a tentative fashion so that they are not read as imperative. But no restatement can serve a useful purpose unless it can successfully bring together like-minded adherents to one view or another.

#### IV. SOME ANCILLARY QUESTIONS

If agreement could be reached on the usefulness of a multi-track conflicts restatement there would be a need to decide how a new restatement should deal with different subject matter categories. Should the divisions of subject matters (for example, torts, contracts, property, decedent's estates, corporations) be continued with or should they be dealt with only illustratively under the aegis of the theoretical approaches to choice of law. Here there will likely be considerable dissonance between the law in the courts and the law as the academicians would like it to be. Furthermore, respected scholars have suggested a separate set of rules for subspecialty fields such as products liability.<sup>78</sup> These separate rules often reflect a plaintiff bias and might run into considerable opposition from business groups who would view them as seriously undermining gains they believe to have been made in the legislative arena.

#### V. CONCLUSION

From the vantage point of a reporter who just completed his task of drafting a politically sensitive restatement, I am confident that given the sharp divisions that exist in the field, that any attempt to draft a traditional “one-rule-fits-all” restatement will not work. Any attempt to fussy it up with laundry lists of considerations such as the current section 6 will be useless. One would only add to the list, and any list of factors would give little guidance to the courts. We already have mush. Little will be gained by creating slightly more sophisticated mush. What courts need is direction in implementing the major theoretical approaches that have captured the hearts and the minds of the scholars. The major themes that the scholars of the various camps have been championing can be found in the decisions of courts throughout the

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78. See, e.g., WEINTRAUB, *supra* note 50, at § 6.29; Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 IND. L.J. 437, 472-74 (2000).

country. But, they lack direction. A new multi-track restatement could provide real guidance to the courts.

It is of little solace to say that under the *Second Restatement* courts seem to come to the right result most of the time. It has been said that if anyone saw how sausage was made no one would eat it. Sadly, we watch “conflicts” sausage being made every day, and it makes the eating very unappetizing. So here’s a vote for a third restatement, one that honestly reflects the differences between the warring schools and allows the courts to choose between them and then administer their respective approaches with honesty and integrity.