

Symposium - the Silver Anniversary of the Second Conflicts Restatement: Introduction

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Symposium

THE SILVER ANNIVERSARY OF THE SECOND CONFLICTS RESTATEMENT

INTRODUCTION

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A quarter of a century ago,¹ the American Law Institute published the *Restatement (Second) of Conflict of Laws*,² a work that has had enormous practical importance, and which has also been the subject of much controversy. The silver anniversary of the publication of such an important work seemed an appropriate time to assess its impact. Accordingly, the *Second Restatement* was the focus of the six papers presented at the Annual Meeting of the Section of Conflict of Laws of the Association of American Law Schools held in Washington, D.C., in January 1997. This Symposium collects those papers; not surprisingly, given the topic, the papers present a wide variety of views.³

The William Richman and David Riley Article⁴ takes the unusual tack of examining the current status of the *lex loci* rules of the first

* Jacob A. France Professor of Judicial Process, University of Maryland School of Law; Chair, Conflict of Laws Section, Association of American Law Schools (1996).

1. The *Second Restatement* was actually finished in 1969, two years before its eventual publication. For that matter, the papers in this Symposium, which were delivered in January 1997, are actually a few months late for a silver anniversary party of a work published in 1971.

2. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

3. But not a wide variety of topics. All five papers devoted to the *Second Restatement* discuss choice of law. That topic takes up only 109 of the 423 sections of the work.

4. William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196 (1997).

Restatement of Conflict of Laws,⁵ the authors' rendition of cheating and dishonesty by those judges who purport still to follow those rules will not surprise any expert in the field. Patrick Borchers then examines the decisions under the *Second Restatement* empirically and finds that the judges much prefer that work's open-ended, general provisions to the narrow, presumptive clauses that were meant to govern in common choice-of-law situations.⁶ The third Article, by Symeon Symeonides, also traces the strong judicial acceptance of the *Second Restatement*.⁷ Although not a great fan of the work, Symeonides gives it credit for helping eliminate the *lex loci* rules and for providing a common starting point for a new synthesis on choice of law; hence his call for the consideration of a Third Conflicts Restatement.

The alert reader will have noticed a theme here: Judges do what they want to do, and they are not willing to let theory stand in the way of the "right" decision in a case. The flexibility of the *Second Restatement* then becomes an advantage. Thus, Russell Weintraub observes that the judges who purport to follow the *Second Restatement* do so because of its elasticity and because of the insight that it occasionally provides; in less able judicial hands, the work, unfortunately, can be more dangerous.⁸ Obviously, it is a product that needs a warning label and must be handled with care. Louise Weinberg then makes the case that judges have often ignored the "rules laid down" in order to do justice as they see fit.⁹ What makes her study different is her focus on slave cases in the early nineteenth century, a jurisprudence where, for a good while, judges ignored the stated rules in order to achieve "just" results, a jurisprudence that changed dramatically as the south lost political power and attitudes hardened. Finally, my own piece explores the robe-gown split over the *Second Restatement*; why is it that judges love, and scholars hate, the work?¹⁰ The answer, of course, is mainly a reprise of the rules versus standards debate, although there is a good bit more to the story than that.

5. RESTATEMENT OF CONFLICT OF LAWS (1934).

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

7. Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248 (1997).

8. Russell J. Weintraub, "At Least, to Do No Harm": *Does the Second Restatement of Conflicts Meet the Hippocratic Standard?*, 56 MD. L. REV. 1284 (1997).

9. Louise Weinberg, *Methodological Interventions and the Slavery Cases; Or, Night-Thoughts of a Legal Realist*, 56 MD. L. REV. 1316 (1997).

10. William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371 (1997).

I hope that the reader will find these Articles both stimulating and informative. It was certainly a pleasure to hear them presented and then to read them.