Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note

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INTRODUCTION

As the name of this Symposium suggests, the Restatement (Second) of Conflict of Laws\(^1\) has been with us for a quarter of a century. In some senses it has been around longer. The American Law Institute began the endeavor in 1952\(^2\) and approved it in May 1969.\(^3\) In draft form, the Second Restatement attracted early attention from courts, including a prominent citation in the New York Court of Appeals pathbreaking 1963 Babcock v. Jackson\(^4\) decision. With good reason, Babcock is viewed as the beginning of the conflicts revolution,\(^5\) and, thus, the Second Restatement has been a prominent feature of the conflicts revolution since the beginning.

Like the revolution itself, the project of re-restating American conflicts law was controversial. Although the first Restatement of Conflict of Laws,\(^6\) adopted in 1934, was under attack from its beginning,\(^7\) it represented a synthesis of a stable, territorial, multilateral choice-of-law system whose American roots dated at least to Justice Story's 1834 treatise,\(^8\) and whose European ancestry predated Story by centuries.\(^9\) Even among those who favored modification or abandonment of the

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6. RESTATEMENT OF CONFLICT OF LAWS (1934).
8. See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834).
multilateral system embodied in the First Restatement, however, the Second Restatement came in for criticism.\(^\text{10}\)

Despite the slings and arrows launched toward it, the Second Restatement has risen to prominence. More than half of the states now purport to follow it, while only a dozen follow its predecessor.\(^\text{11}\) Even among states that follow some other choice-of-law approach, certain provisions in the Second Restatement have proven influential.\(^\text{12}\) Thus, in a sense, one could say that the Second Restatement now represents the dominant American conflicts methodology.

But what does it mean to say that the Second Restatement is "dominant"? What is it that courts actually do in "following" the Second Restatement? Does saying that a state is a Second Restatement jurisdiction mean anything more than that it does not follow the First Restatement?\(^\text{1}\)

This Article suggests that the reason the Second Restatement has attracted such a large following—in name, anyway—is its open-ended general provisions.\(^\text{13}\) Its general provisions are cited with considerable frequency, while its more narrow, specific provisions are often ignored, even in cases in which they offer explicit answers to the case at hand.\(^\text{14}\) The result, which will surprise no one who has closely followed American conflicts doctrine, is that citation to the Second Restatement is often little more than a veil hiding judicial intuition.

The remedy this Article proposes is that courts nominally following the Second Restatement should make an effort to follow the entire document, including analysis of relevant specific provisions. To the extent that courts wish to depart from the narrower, presumptive rules contained in the Second Restatement, they should candidly set forth their reasons for doing so. As Professor Leflar and others have recognized,\(^\text{15}\) courts have a strong preference for applying the better...

\(^{10}\) See infra note 18 and accompanying text.


\(^{13}\) See infra tbl.I (documenting the frequency of citation to the general provisions of the Second Restatement).

\(^{14}\) See infra tbls.II & III (documenting the frequency of citation to specific tort (tbl. II) and contract (tbl. III) provisions of the Second Restatement).

\(^{15}\) See, e.g., Juenger, supra note 9, at 191-94 ("Openly or covertly, the better law principle now permeates case law, statutes and conventions."); Robert A. LeFlar, Choice-Influencing Laws in Conflicts Law, 41 N.Y.U. L. Rev. 267, 295-304 (1966) (stating that the most important factor in conflicts is the application of the better rule of law); Luther A. McDougal, III, Toward Application of the Best Rule of Law in Choice of Law Cases, 35 Mercer L. Rev. 483, 512-14 (1984) (stating that courts should not stop with the better rule of law, but...
rule of law, especially in tort conflicts.\textsuperscript{16} Courts that find themselves frequently departing from the narrower, presumptive rules should reconsider their status as \textit{Second Restatement} states.

If courts were either to follow the narrower, more specific rules in the \textit{Second Restatement}, or candidly state reasons for departing from them, this would further important goals. First, this approach would foster predictability. Predicting results based solely on the \textit{Second Restatement}'s general provisions is almost impossible, whereas the specific provisions contain many relatively sensible rules. Second, this approach would promote judicial candor. To the extent that courts reject the \textit{Second Restatement}'s guidance, they should say so forthrightly, rather than bathing in the vast expanses of the \textit{Second Restatement}'s open-ended general provisions. Certainly, those courts that routinely deviate from the \textit{Second Restatement}'s specific provisions should reconsider their professed adherence to the document.

Part I of this Article considers the \textit{Second Restatement}'s guidance and considers why the document has inspired the selective treatment it receives from courts. Part II presents some data on the frequency with which courts invoke \textit{Second Restatement} provisions and shows that, while the general provisions are frequently cited, the more narrow provisions are rarely cited.

I. \textbf{THE SECOND RESTATEMENT'S STRUCTURE}

The \textit{Restatement (Second) of Conflict of Laws}\textsuperscript{17} is a strange document. From a current perspective, the vigor with which the whole project was attacked while in the drafting stage is surprising. Two of the giants of that earlier era, Brainerd Currie and Albert Ehrenzweig, should apply the best rule of law—the law that best serves the common interest—to resolve choice-of-law cases).

\textsuperscript{16} See, e.g., Offshore Rental Co. v. Continental Oil Co., 583 P.2d 721, 728 (Cal. 1978) (in bank) (stating that the California rule is “archaic” and, thus, not to be applied); Bigelow v. Halloran, 313 N.W.2d 10, 12-13 (Minn. 1981) (en banc) (concluding that the rule of survival of tort liability is the better rule); Cooney v. Osgood Mach., Inc., 612 N.E.2d 277, 283 n.2 (N.Y. 1993) (describing that the New York rule of allowing contribution against impleaded employers is clearly a minority rule and its imposition on “the carefully structured workers’ compensation schemes of other States . . . is undesirable”); see also Patrick J. Borchers, \textit{Conflicts Pragmatism}, 56 ALB. L. REV. 883, 905 (1993) (stating that the New York Court of Appeals in Kilberg v. Northeast Airlines, Inc., 172 N.E.2d 526 (N.Y. 1961), applied the traditional approach, but applied other devices to apply the preferable substantive rule).

\textsuperscript{17} \textit{Restatement (Second) of Conflict of Laws} (1971).
insisted that the entire venture was counterproductive and should be abandoned.  

The various twists and turns taken in the drafting of the Second Restatement are well documented in the American Law Institute proceedings, as well as being discernable from its various tentative drafts of the Second Restatement. In general terms, it is apparent that the Second Restatement began as one kind of project and ended as another. To understand how this came about, it is necessary to return to the Second Restatement's nominal predecessor.

The first Restatement of Conflict of Laws was begun in 1923 under the leadership of Reporter and Harvard law professor Joseph Beale. The American Law Institute's aim in drafting the First Restatement was—as it was for other restatements—to produce an "orderly statement of the general common law of the United States." In that sense, the First Restatement was a reasonably successful enterprise. For the most part, it accurately restated American law as it then existed.

While there was apparently fairly broad agreement on the statement of the rules in the First Restatement, Beale's theory—and thus his explanation for the rules—was controversial even then. For this reason, the First Restatement's drafters eliminated a good deal of the explanatory material, resulting in commentary that the Reporter for the Second Restatement, Professor Willis Reese, accurately described as "terse." Although eliminating the controversial explanatory material might have been expedient, it resulted in a document more dogmatic than perhaps even Beale wanted.

The First Restatement's dogmatic character, combined with the devastating criticisms launched by David Cavers, Walter Wheeler Cook, Hessel Yntema, Ernest Lorenzen, and others foretold its

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18. See Brainerd Cuttie, The Disinterested Third State, 28 LAW & CONTEMP. PROBS. 754, 755 (1963) ("We certainly do not need a new Restatement, although we are threatened with one."); Albert A. Ehrenzweig, The "Most Significant Relationship" in the Conflicts Law of Torts: Law and Reason Versus the Restatement Second, 28 LAW & CONTEMP. PROBS. 700, 700 (1963) ("Only the remaining hope to induce the Restaters to withdraw their latest draft on the conflicts law of torts has prompted me to offer these comments . . . ").


20. See Reese, supra note 2, at 679.


22. See Reese, supra note 2, at 679-80.

23. Id. at 679.

24. See supra note 7.

25. See Walter Wheeler Cook, The Logical and Legal Bases of the Conflict of Laws ix (1942) (analogizing the dogma of the First Restatement to a "rank weed" and stating that "until the intellectual garden is freed of the rank weeds in question useful vegetables cannot grow and flourish").
short life. The academic criticism of its underpinnings, coupled with judicial deviation from some of its categorically stated rules, put it at the head of the line for revision. In the beginning, the Second Restatement’s drafters apparently did not envision a work radically different from the original. They still wanted a document that “restated” the existing law in the United States.28

When work began in 1952, that hope must not have seemed too far out of reach. After all, 1952 was the year before Grant v. McAuliffe,29 two years before Auten v. Auten,30 nine years before Kilberg v. Northeast Airlines, Inc.,31 eleven years before Babcock v. Jackson,32 fifteen years before Reich v. Purcell,33 and well in advance of the countless other cases that spawned the conflicts revolution. The revolution, however, rendered the conflicts law of the United States incapable of restatement. The diversity of new approaches destroyed any possibility of a coherent statement of the “general common law” that the First Restatement sought to reflect.34 By the late 1960s, it was probably no more possible to “restate” choice-of-law doctrine than it was to “restate” the law of zoning or child support.

Moreover, even the task of “restating” the law of a single state might have become impossible. For instance, in the span of six years, the New York Court of Appeals decided that in guest-host cases the

27. See Ernest G. Lorenzen, Territoriality, Public Policy and the Conflict of Laws, 33 YALE L.J. 736, 748 (1924) (describing the First Restatement’s covert mode of approach to the conflict of laws as an a posteriori approach).
28. See Reese, supra note 2, at 680.
29. 264 P.2d 944, 949 (Cal. 1953) (in bank) (holding that the issue of survival of a cause of action is a question of procedural law, and thus is governed by the law of the forum).
30. 124 N.E.2d 99, 103 (N.Y. 1954) (emphasizing “the law of the place with the most significant contacts” in a contract dispute, rather than relying upon the conventional rule “that matters of performance and breach are governed by the law of the place of performance”).
31. 172 N.E.2d 526, 529 (N.Y. 1961) (holding that the public policy interests of New York prevented application of another state’s damage limitation in a wrongful death action and treating the measure of damages as a procedural question controlled by the laws of the forum state).
32. 191 N.E.2d 279, 283 (N.Y. 1963) (concluding that, in tort cases with multistate contacts, justice and fairness may best be achieved “by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation”).
33. 432 P.2d 727, 729 (Cal. 1967) (in bank) (noting that “when application of the law of the place of the wrong would defeat the interests of the litigant and of the states concerned,” the court should not apply that law).
34. See supra note 21 and accompanying text.
law of the state of common domicile of the guest and host should, then should not, then should apply. This prompted Maurice Rosenberg's famous assertion that "[a] New York lawyer with a guest statute case has more need of an ouija board... than a copy of Shepard's citations."

With or without an ouija board, the attempt to restate the law continued. The pressures of the nineteen years that intervened between the conception and birth of the Second Restatement produced a document that could not—and cannot—be fairly called a "restatement" of anything. Instead, it is an amalgamation of different conflicts approaches, producing a document of a distinctly normative character. Nowhere is this normative character more evident than in section 6 and its juxtaposition with other provisions in the document.

Yet the territorial, multilateral tradition of its predecessor still shows in the Second Restatement, which its Reporter would describe as "eclectic and territorial." The objections of Currie and Ehrenzweig appear, as much as anything else, to have been directed at this territorialist bent—especially in its earlier drafts. The attempt to accommodate their objections produced section 6, which one writer somewhat uncharitably described as "a sop tossed... to members of the American Law Institute who were unhappy with a purely territorial methodology."

As uncharitable as this characterization might be, there is no denying its accuracy. As is well known, section 6's list of "factors relevant" to the choice include:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,

40. See supra note 18 and accompanying text.
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law
to be applied.42

In structure, this list much resembles others compiled by academic
authors, including the one by Elliott Cheatham and Willis Reese.43 A
notable omission, however, is any explicit reference to “justice in the
individual case” or any similar consideration.44 Even as late as 1963,
Reese insisted that individualized justice was an appropriate concern
in multistate cases, which he explained with the observation that “no
judge will willingly reach a result which he deems to be unjust.”45 The
absence in section 6 of any explicit reference to such a consideration
is also the major distinction between the Second Restatement’s list and
the one proffered by Professor Leflar, who included “[t]he better rule
of law” as the fifth of five coequal factors.46

Whether or not the “better rule” is explicitly made a factor, sec-
tion 6 gives almost unlimited discretion to a court in choosing the
applicable law.47 Moreover, the factors often pull in opposite direc-
tions. A rule that protects justified expectations, for instance, may not
be the easiest to apply. Application of the rule that promotes the fo-
rum’s policies may not lead to predictability and uniformity of result.

Of course, section 6 is but one of many provisions in the Second
Restatement. It coexists with numerous other sections more in the
mold of the First Restatement and the earlier, more rigidly territorial,
Second Restatement drafts. An examination of the tort chapter is illus-
trative. The tort chapter begins with section 145, a section nearly as

42. Restatement (Second) of Conflict of Laws § 34 (1971).
43. See Elliott E. Cheatham & Willis L.M. Reese, Choice of the Applicable Law, 52 COLUM.
   L. REV. 959, 961 (1952) (listing the following as “at least some of the major policies under-
lying choice of law”: (1) the needs of the interstate and international systems; (2) application
of local law unless there is a good reason for not doing so; (3) effectuating the purpose of rele-
vant local law; (4) certainty, predictability, and uniformity of result; (5) protecting justified expectations; (6) applying
the law of the state of dominant interest; (7) convenience and ease in determining applicable law; (8) the fundamental policy under-
lying the broad local law field involved; and (9) justice in the individual case).
   817 & n.6 (1983) (quoting Cheatham & Reese, supra note 43, at 980-81, and commenting
that individualized justice is “[n]otably omitted from section 6”).
45. Reese, supra note 2, at 690.
46. Robert A. Leflar, Conflicts Laws: More on Choice-Influencing Considerations, 54 CAL. L.
   REV. 1584, 1585-88 (1966); see also Reppy, supra note 41, at 657-58 (commenting that “the
addition of section 6 makes the Restatement Second’s choice of law methodology a ‘hy-
brid’ of territorialism and ‘Leflar’s five factor test’” (quoting General Elec. Co. v. Keyser,
275 S.E.2d 289, 295 (W. Va. 1981))).
47. See supra note 42 and accompanying text.
amorphous as section 6.\textsuperscript{48} Section 145 begins with the nearly useless admonition that tort issues are to be determined so as to choose the law that "has the most significant relationship to the occurrence and the parties under the principles stated in § 6."\textsuperscript{49} Section 145 then lists four different groups of "[c]ontacts to be taken into account in applying the principles of § 6."\textsuperscript{50} These contacts are the place of the injury, the place of the injury-causing conduct, the "domicil, residence, nationality, place of incorporation and place of business of the parties," and "the place where the relationship, if any, between the parties is centered."\textsuperscript{51} Section 145 then concludes with the precatory statement that the contacts "are to be evaluated according to their relative importance with respect to the particular issue."\textsuperscript{52}

Thus, section 145 is no more definite than section 6, and perhaps even less so. On top of the "factors" listed in section 6, section 145 adds a generous dollop of territorial and personal contacts. Once one ventures past section 145, however, the chapter dramatically changes character. Instead of infinitely open-ended sections, the Second Restatement, for the most part, articulates reasonably definite rules. To be sure, these succeeding sections contain escape valves that refer to section 6.\textsuperscript{53} Many of the rules echo the First Restatement's preference for choosing the law of the injury state.\textsuperscript{54} Others do not refer to the injury state directly, but choose connecting factors very likely, if not certain, to lead to the application of the law of the injury state.\textsuperscript{55} A few presumptively choose the place of the defendant's conduct, the domicile of one or both parties, or some other reasonably definite

\textsuperscript{48} See Friedrich Juenger, Choice of Law in Interstate Torts, 118 U. PA. L. REV. 202, 212 (1969) ("Although it is printed in black letters, section 145 is not much of a rule . . . .").

\textsuperscript{49} RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

\textsuperscript{50} Id. § 145(2).

\textsuperscript{51} Id.

\textsuperscript{52} Id.

\textsuperscript{53} See, e.g., id. § 146 ("In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.").

\textsuperscript{54} See id. §§ 146 (Personal Injuries); 147 (Injuries to Tangible Things); 156 (Tortious Character of Conduct); 157 (Standard of Care); 158 (Interest Entitled to Legal Protection); 159 (Duty Owed Plaintiff); 160 (Legal Cause); 162 (Specific Conditions of Liability); 164 (Contributory Fault); 165 (Assumption of Risk); 166 (Imputed Negligence); 172 (Joint Torts); 175 (Right of Action for Death); 176 (Defenses); 177 (Beneficiaries: How Damages Distributed); 178 (Damages); 179 (Person to Bring Suit); 180 (Personal Representative to Bring Suit).

\textsuperscript{55} See id. §§ 148 (Fraud and Misrepresentation); 149 (Defamation); 150 (Multistate Defamation); 151 (Injurious Falsehood); 152 (Right of Privacy); 153 (Multistate Invasion of Privacy); 155 (Malicious Prosecution and Abuse of Process).
connection. Only a relatively few sections refer solely to the general formula of section 145 without providing some presumptive choice.

More could be said about the dynamics of drafting the Second Restatement and its overall structure. My point is simple, however. The forces that contorted choice of law between 1952 and 1971 resulted in a schizophrenic Second Restatement. One portion of its split personality is vague sections such as 6 and 145. The other portion is a set of reasonably definite rules and a preference for territorial solutions, including the injury-state rule for tort cases, endorsed by its predecessor.

II. THE SECOND RESTATMENT AS APPLIED

In applying the Second Restatement, one might speculate that courts would fall into one of two patterns. One possibility is that they might rely heavily on the relatively narrow, presumptive rules in the Second Restatement and largely ignore the general sections such as 6 and 145. The second is that courts might refer primarily to the general sections and largely ignore the specific ones. In theory, of course, a court following the Second Restatement might attempt to do both, but this seems unlikely. The general sections and the specific sections represent fundamentally different approaches to choice of law. The general sections are the embodiment of a free-form approach to choice of law, whereas the specific sections are quite close to the multilateral system embodied by the First Restatement.

There is already a good deal of evidence that courts take the free-form approach. At least two recent empirical studies of choice-of-law decisions examine the frequency with which reported cases are decided in favor of plaintiffs or defendants, local or foreign parties, and forum or foreign law. Both studies confirm the observation that the modern theories are "pro-resident, pro-forum-law, and pro-recovery." While states adhering to the First Restatement choose pro-resi-
dent, pro-forum law and pro-recovery rules fairly infrequently, all of the modern theories do so with considerable frequency. 62

If courts followed the narrow provisions of the Second Restatement, their result patterns should be closer to the First Restatement than to the major competing modern methodologies; neither interest analysis nor Leflar's approach gives much weight to territorial connections, and little weight to the place of the injury in tort cases. 63 Empirical analysis shows, however, that, with one minor exception, the Second Restatement's performance is statistically identical to that of the other modern approaches. 64 This suggests that Second Restatement states are inclined to rely on the general, not the specific, sections.

There is other evidence that the general sections in the Second Restatement are the most important. Even a cursory examination of judicial opinions relying on the Second Restatement reveals that they often proceed without examining any of the specific provisions in the Second Restatement. The New York Court of Appeals decision in Allstate Insurance Co. v. Stolarz 65 offers a good example. Stolarz dealt with a two-car, New York automobile accident and focused on whether to apply New York or New Jersey law to a question of whether the policyholder's uninsured motorist coverage should be stacked on top of the coverage afforded by the other driver's policy. 66 New Jersey law would not have allowed such stacking; 67 New York law apparently would have. 68 New York's high court attempted to answer the conflicts question by reference to section 188—the Second Restatement's general contracts section—and applied New Jersey law. 69 Nowhere did the court refer to section 193, the section dealing with casualty insurance.

62. See Borchers, supra note 60, at 374-75 (applying a binary statistical method to show totals for each approach); Solimine, supra note 60, at 50 (stating that "the modern approaches are usually 'pro-resident, pro-forum-law, [and] pro-recovery'" (quoting Brilmayer, supra note 61, at 398)).

63. See Borchers, supra note 60, at 361-67 (discussing the conflicts revolution and the analytical arguments therein).

64. See id. at 377-79. The minor exception is that the ninety-five percent confidence intervals for Second Restatement and Leflar states do not overlap with regard to the application of pro-recovery rules. See id. at 378. All other ninety-five percent confidence intervals overlap.


66. Id. at 936-37.

67. Id. at 937.

68. Id. Although the New York Court of Appeals applied New Jersey law, its alternative rationale was to distinguish and limit the New York case, United Community Insurance Co. v. Mucatel, 487 N.Y.S.2d 959 (Sup. Ct. N.Y. County 1985), aff'd without opinion, 501 N.Y.S.2d 761 (App. Div. 1986), aff'd for reason stated by trial court, 505 N.E.2d 624 (N.Y. 1987), which apparently allowed for the stacking. Stolarz, 613 N.E.2d at 938.

69. Stolarz, 613 N.E.2d at 939.
Closer inspection of that section would have revealed an illustration specifically dealing with the problem facing the Stolarz court. Although the court's result was consistent with the illustration, the court appeared to be completely unaware that section 193 or its illustrations even existed.

Stolarz is anecdotal evidence that courts view general sections of the *Second Restatement* as the ones that really matter. There remains, however, the question of whether the anecdotal impression can be confirmed empirically. Using LEXIS, I set out to measure the frequency with which courts cite to various sections of the *Second Restatement*. First, I collected data on how often some of the general sections in the *Second Restatement* have been cited. The results are correlated in the following Table.

<table>
<thead>
<tr>
<th>Restatement Section</th>
<th>Topic of Section</th>
<th>Number of Cases Citing</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>Choice-of-Law Principles</td>
<td>523</td>
</tr>
<tr>
<td>145</td>
<td>The General Principle (Torts)</td>
<td>610</td>
</tr>
<tr>
<td>187</td>
<td>Law of the State Chosen by the Parties</td>
<td>330</td>
</tr>
<tr>
<td>188</td>
<td>Law Governing in the Absence of Effective Choice by the Parties (Contracts)</td>
<td>494</td>
</tr>
<tr>
<td>6 and 145 Cited Together in the Same Case</td>
<td>Tort Considerations</td>
<td>210</td>
</tr>
<tr>
<td>6 and 188 Cited Together in the Same Case</td>
<td>Contract Considerations</td>
<td>94</td>
</tr>
</tbody>
</table>

70. This aspect of Stolarz is discussed in Patrick J. Borchers, *New York Choice of Law: Weaving the Tangled Strands*, 57 ALB. L. REV. 93, 109-11 (1993), wherein the author argues that courts should look to the *Second Restatement's* narrow rules rather than just to the general provisions.

71. See id. at 110-11.

72. I ran the searches on November 16, 1996. When searching for citations to section 6, for example, I entered the following search in the MEGA, MEGA library: "(Restatement w/4 Conflict w/4 Law w/4 Section) w/4 6." For other sections I substituted the appropriate number for 6 in the above search. Undoubtedly, this search routine produced some false positives. For instance, if another citation—such as a case citation—used the number 6 in close proximity to another citation to the *Second Restatement*, that combination would satisfy the search criteria. However, narrowing the search by using "w/1" as the connector for the section number, for instance, would have excluded some citations to multiple sections of the *Second Restatement*. In any event, individually checking a large number of the citations revealed that the vast majority of them were not false positives; they were in fact citations to the sought-after *Second Restatement* provision.
As one might expect, given the large number of states purporting to follow the Second Restatement, the general sections have been cited quite often. The most popular section is 145, which is not surprising given that tort cases pose most of the difficulties in the postrevolutionary period. Next in frequency of citation is section 6, the most general section.

Having ascertained the raw number of cases citing the most general sections of the Second Restatement, I set out to compare their frequency of citation to the frequency of citation of the more specific sections in the Second Restatement. The following Table correlates the data for the tort sections.

### Table II
**Frequency of Citation to Tort Provisions of the Second Restatement**

<table>
<thead>
<tr>
<th>Restatement Section</th>
<th>Topic of Section</th>
<th>Number of Cases Citing</th>
</tr>
</thead>
<tbody>
<tr>
<td>145</td>
<td>The General Principle (Torts)</td>
<td>610</td>
</tr>
<tr>
<td>146</td>
<td>Personal Injuries</td>
<td>120</td>
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<tr>
<td>147</td>
<td>Injuries to Tangible Things</td>
<td>14</td>
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<tr>
<td>148</td>
<td>Fraud and Misrepresentation</td>
<td>43</td>
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<tr>
<td>149</td>
<td>Defamation</td>
<td>20</td>
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<td>150</td>
<td>Multistate Defamation</td>
<td>42</td>
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<tr>
<td>151</td>
<td>Injurious Falsehood</td>
<td>3</td>
</tr>
<tr>
<td>152</td>
<td>Right of Privacy</td>
<td>6</td>
</tr>
<tr>
<td>153</td>
<td>Multistate Invasion of Privacy</td>
<td>7</td>
</tr>
<tr>
<td>154</td>
<td>Interference with Marriage Relationship</td>
<td>2</td>
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<tr>
<td>155</td>
<td>Malicious Prosecution and Abuse of Process</td>
<td>11</td>
</tr>
<tr>
<td>156</td>
<td>Tortious Character of Conduct</td>
<td>2</td>
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<tr>
<td>157</td>
<td>Standard of Care</td>
<td>2</td>
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<tr>
<td>158</td>
<td>Interest Entitled to Legal Protection</td>
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<td>159</td>
<td>Duty Owed Plaintiff</td>
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<td>Legal Cause</td>
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<td>Defenses</td>
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<td>162</td>
<td>Specific Conditions of Liability</td>
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<td>163</td>
<td>Duty or Privilege to Act</td>
<td>5</td>
</tr>
<tr>
<td>164</td>
<td>Contributory Fault</td>
<td>4</td>
</tr>
<tr>
<td>170</td>
<td>Release or Covenant Not to Sue</td>
<td>10</td>
</tr>
<tr>
<td>171</td>
<td>Damages</td>
<td>25</td>
</tr>
</tbody>
</table>

73. See Borchers, supra note 60, at 369.
<table>
<thead>
<tr>
<th>Restatement Section</th>
<th>Topic of Section</th>
<th>Number of Cases Citing</th>
</tr>
</thead>
<tbody>
<tr>
<td>172</td>
<td>Joint Torts</td>
<td>1</td>
</tr>
<tr>
<td>173</td>
<td>Contribution and Indemnity Among Tortfeasors</td>
<td>12</td>
</tr>
<tr>
<td>174</td>
<td>Vicarious Liability</td>
<td>2</td>
</tr>
<tr>
<td>175</td>
<td>Right of Action for Death</td>
<td>52</td>
</tr>
<tr>
<td>176</td>
<td>Defenses (Wrongful Death)</td>
<td>3</td>
</tr>
<tr>
<td>177</td>
<td>Beneficiaries: How Damages Distributed (Wrongful Death)</td>
<td>5</td>
</tr>
<tr>
<td>178</td>
<td>Damages (Wrongful Death)</td>
<td>10</td>
</tr>
<tr>
<td>179</td>
<td>Person to Bring Suit (Wrongful Death)</td>
<td>1</td>
</tr>
<tr>
<td>180</td>
<td>Personal Representative to Bring Suit (Wrongful Death)</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td><strong>Total Citations to Specific Tort Provisions</strong></td>
<td><strong>435</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Total Citations to Specific Tort Provisions Excluding § 146</strong></td>
<td><strong>315</strong></td>
</tr>
</tbody>
</table>

As one might expect, section 145 is cited with much greater frequency than any other tort section. In fact, section 145 has been cited more than five times as often as the next most popular section, section 146. Moreover, section 146's status as the second most popular section correlates with its generality. Section 146 covers all matters of "personal injury," a large subset of torts. After section 146, no other section has been cited in more than fifty-two cases, and twenty-five of the sections have been cited in ten or fewer cases. Even more striking, however, is that the total citations to specific tort sections of the Second Restatement is only 71.3% of the citations to section 145. If one excludes section 146, the total becomes a mere 51.6% of the citations to section 145.

A similar pattern emerges with regard to contracts cases, which are correlated in the next table.

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### Table III

**Frequency of Citation to Contracts Provisions of the Second Restatement**

<table>
<thead>
<tr>
<th>Restatement Section</th>
<th>Topic of Section</th>
<th>Number of Cases Citing</th>
</tr>
</thead>
<tbody>
<tr>
<td>188</td>
<td>Law Governing (Contracts)</td>
<td>494</td>
</tr>
<tr>
<td>189</td>
<td>Contracts for the Transfer of Interests in Land</td>
<td>20</td>
</tr>
<tr>
<td>190</td>
<td>Contractual Duties Arising from Transfer of Interests in Land</td>
<td>2</td>
</tr>
<tr>
<td>191</td>
<td>Contracts to Sell Interests in Chattel</td>
<td>14</td>
</tr>
<tr>
<td>192</td>
<td>Life Insurance Contracts</td>
<td>30</td>
</tr>
<tr>
<td>193</td>
<td>Contracts of Fire, Surety or Casualty Insurance</td>
<td>127</td>
</tr>
<tr>
<td>194</td>
<td>Contracts of Suretyship</td>
<td>15</td>
</tr>
<tr>
<td>195</td>
<td>Contracts for the Repayment of Money Lent</td>
<td>5</td>
</tr>
<tr>
<td>196</td>
<td>Contracts for the Rendition of Services</td>
<td>28</td>
</tr>
<tr>
<td>197</td>
<td>Contracts of Transportation</td>
<td>2</td>
</tr>
<tr>
<td>198</td>
<td>Capacity to Contract</td>
<td>3</td>
</tr>
<tr>
<td>199</td>
<td>Requirements of a Writing—Formalities</td>
<td>12</td>
</tr>
<tr>
<td>200</td>
<td>Validity of a Contract in Respects Other Than Capacity and Formalities</td>
<td>0</td>
</tr>
<tr>
<td>201</td>
<td>Misrepresentation, Duress, Undue Influence and Mistake</td>
<td>12</td>
</tr>
<tr>
<td>202</td>
<td>Illegality</td>
<td>14</td>
</tr>
<tr>
<td>203</td>
<td>Usury</td>
<td>31</td>
</tr>
<tr>
<td>204</td>
<td>Construction of Words Used in Contract</td>
<td>5</td>
</tr>
<tr>
<td>205</td>
<td>Nature and Extent of Contractual Obligations</td>
<td>6</td>
</tr>
<tr>
<td>206</td>
<td>Details of Performance</td>
<td>8</td>
</tr>
<tr>
<td>207</td>
<td>Measure of Recovery</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>Total Citations to Specific Contracts Provisions</td>
<td>385</td>
</tr>
</tbody>
</table>

As with tort cases, no specific section approaches the popularity of the general provision—section 188. The next most popular provision is section 193, which has been cited in 127 cases. Beyond that, no section has been cited in more than thirty-one cases. When one totals all of the cases citing specific contracts sections, the resulting amount is 385 cases, which is only 77.9% of the number of cases citing the general section.

This suggests that cases like *Stolarz* are fairly common. One possible explanation for the numerous cases citing the general sections might be that no specific section covers the problem before the court.
This seems unlikely, however, given the wide array of specific sections. The more plausible explanation appears to be that there are a large number of cases to which specific sections might apply, but courts ignore them in favor of the general sections.

CONCLUSIONS AND RECOMMENDATIONS

Over time, the Second Restatement has become something different from the document it appears to be. Even the courts that claim to adhere to the Second Restatement most likely do not look at it very often. Moreover, courts' indifference to the Second Restatement causes counsel to ignore it. Instead, courts and the attorneys practicing before them look to cases quoting sections 6, 145, 188, or some of the other popular provisions. They content themselves with block quotations of those general sections and then proceed to solve the choice-of-law problem, considering only those general sections. For judges and lawyers, the Second Restatement exists not as a handsome, two-volume book authored by the American Law Institute, but rather as a kind of chain letter consisting of selective block quotations.

For many courts, this chain-letter approach is comfortable. The "official" status of the Second Restatement is more attractive than attempting to follow theories developed in law review articles that by now are thirty or more years old. The eclectic mix of territorial and personal connecting factors allows a court to claim that almost any result is consistent with the Second Restatement. Given the Second Restatement's schizophrenic character, the advent of such a chain-letter approach should have been foreseeable, but hardly intended by its drafters, who gave it a much more definite, territorial cast than that followed by Second Restatement courts.

Self-described Second Restatement states should reexamine their approach. If they find themselves routinely departing from the presumptive choices set forth in the narrower sections, they ought to renounce their alleged adherence to the Second Restatement. "Following" the Second Restatement ought to mean something other than a ritualized citation to sections 6 and 145. If courts actually began to follow the Second Restatement, however, they might well find themselves reaching unpalatable results. The fact that a court finds these results unacceptable should indicate that it is not really a Second Restatement court.

75. See, e.g., Brainerd Currie, Married Women's Contracts: A Study in Conflict-of-Laws Method, 25 U. Chi. L. Rev. 227 (1958) (discussing various ways to resolve conflicts of interest between states); Leflar, supra note 46, at 1585-88 (analyzing the principles and policy considerations that judges use in resolving conflict of laws).
Courts that find themselves in this position ought to consider endorsing Professor Leflar's approach. His explicit recognition that the relative quality of the competing rules is an important consideration in making choice-of-law decisions makes his list a more accurate "restatement" of what courts actually do.

In any event, making a serious effort to consider the entire Second Restatement would improve the quality of judicial decisionmaking. Courts that are willing to follow the narrow rules of the Second Restatement would derive vastly more guidance than that which can be gleaned from sections 6, 145, and 188. Courts unwilling to adhere generally to its narrow rules should renounce the claim that they are Second Restatement states and candidly state their true preferences.

76. See Leflar, supra note 46, at 1585-88.
77. See id.