The Complex Litigation Project's Tort Choice-of-Law Rules

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I. INTRODUCTION

The American Law Institute’s Proposed Final Draft of the Complex Litigation Project¹ was approved by the Institute’s membership on May 13, 1993.² In an effort to “enhance the efficiency and economy of handling”³ large-scale civil litigation, the Project recommends numerous changes in the law of procedure, venue, and transfer of cases to allow the consolidation, in a single court, of actions brought in numerous fora. In addition, its Chapter 6 sets forth a series of choice-of-law provisions designed to govern cases consolidated in federal courts pursuant to the Project’s rules. The Reporters, who profess to pursue the “objectives of fostering the fair, just, and efficient resolution”⁴ of complex cases, recognized that the most direct way to resolve the substantive law issues such cases pose would be to adopt uniform national standards.⁵ However, they rejected this solution because, in their opinion, “the possibilities of reaching a political consensus on what the appropriate federal standard should be, as well as [of] expecting Congress to intrude so directly into areas historically governed by state law, appear[ed] . . . slim.”⁶

Worried about perceived political obstacles to an optimal response to the question of the law applicable to master disaster cases, the Reporters decided to opt instead for what they call a “procedural solution”⁷ whose essential element is, in their words, a “coherent and uniform federal choice of law code.”⁸ Conceding that conflicts rules amount to “an imperfect solution at best,”⁹ they nevertheless believe their approach to be workable. In their opinion, federal choice-of-law provisions governing complex litigation could decrease the forum-shopping opportunities¹⁰ created by Klaxon Co. v. Stentor Electric Manufacturing Co.¹¹ and Van Dusen v. Barrack.¹² These Supreme Court decisions, which

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¹ American Law Institute, Complex Litigation Project, Proposed Final Draft (May 13, 1993) [hereinafter Proposed Final Draft].
³ Proposed Final Draft, supra note 1, ch. 1, cmt. a, at 3; see also id. Ch. 6, Intro. Note, at 376.
⁴ Id. Ch. 6, Intro. Note, at 375.
⁵ Id.
⁶ Id.
⁷ Id.
⁸ Id.
⁹ Id.
¹⁰ Id. at 376.
¹¹ See id. Ch. 6, Intro. Note, cmt. a, at 376-77.
require federal courts sitting in diversity to apply the choice-of-law rules of the state in which the action was initially filed, do indeed provide litigants with a powerful incentive to forum shop among federal courts to maximize their chances of recovery. In addition, Klaxon and Van Dusen complicate considerably the disposition of such dispersed tort cases as In re Agent Orange, in which multitudes of actions filed in numerous fora ultimately ended up in a single judge's lap. Trying each under the law that would have been applied by the forum in which the action was brought initially would, of course, be exceedingly cumbersome, time-consuming and potentially unfair.

Presiding over Agent Orange, Judge Weinstein managed to escape the morass of conflicting state choice-of-law and substantive rules by postulating a "national consensus law" of universal application in all states to govern the tort law issues presented. By applying uniform rules of decision, he avoided the conflicts chaos that might have ensued from the Second Circuit's determination that there was no federal common law to govern the claims of thousands of servicemen who claimed to have been injured by defoliants sprayed in Indo-China. Conceding the usefulness of Judge Weinstein's substantive law approach, the Project's Reporters nevertheless rejected it because of "federalism constraints" and asserted "state interests." For these reasons they espouse the second best solution, even though they realize that choice-of-law rules do not allow the consolidated handling of all dispersed torts.

The choice-of-law provisions the Reporters have drafted are divided into several sections. Section 6.01 is devoted to mass torts, Sections 6.02 and 6.03 to mass contracts, Section 6.04 deals with statutes of limitations, Sections 6.05 and 6.06 with damages, and Sections 6.07 and 6.08 contain rules that address procedural issues concerning the judicial determination of the applicable law. This comment addresses only the Project's tort choice-of-law rules, limiting itself largely to a discussion of Section 6.01. In the interest of full disclosure, I should mention that I was a member of the Project's Consultative Group, whose meetings I attended on two occasions, on both of which I took issue with the Reporters' proposed choice-of-law rules. In addition, I raised objections to these rules with the American Law Institute's Council. At the Institute's 1993 Annual Meeting, Professors Donald Trautman and Louise Weinberg, as well as myself,

15. Id. at 713.
17. Proposed Final Draft, supra note 1, § 6.01, cmt. c, at 423.
18. Id. See also infra notes 142-147 and accompanying text.
presented motions to substitute provisions we considered more appropriate than those contained in Section 6.01. These motions were defeated. I am pleased the Louisiana Law Review affords me the opportunity for further comment on why I believe Section 6.01 represents a misguided approach to a serious problem.

II. The Reporters’ Scheme

The choice-of-law provisions contained in Section 6.01 hearken back to simpler times. At bottom, they reflect tenets that were in vogue sixty years ago, when the American Law Institute adopted Professor Joseph Beale’s First Conflicts Restatement. At that time it was widely believed that certainty, predictability, and uniformity of result were the be-all and end-all of the conflict of laws. To pursue these objectives, Professor Beale, the First Restatement’s Reporter, relied on hard and fast rules of a jurisdiction-selecting nature that attempted to allocate each and every legal relationship to a particular state by means of rigid connecting factors. In his scheme, torts were governed by the law of the place of injury, the lex loci delicti. Although far more complex than Beale’s simplistic tort choice-of-law rules, Section 6.01, stripped down to its essentials, has a similar thrust, except that the contact point the Reporters chose is the place of acting, rather than injury. The reason for the reemergence of a hard and fast rule similar to the one the Second Restatement disavowed more than twenty years ago is obvious. Once the Reporters decided that the Project’s choice-of-law provisions ought to be value-free, and that they should preferably invoke a single state’s law, their shape was

20. See Proceedings, supra note 2.
21. See id.
24. See Juenger, supra note 23, at 89 n.587.
25. See id. at 47-48, 89.
26. See infra notes 48-49 and accompanying text.
29. See id. at vii-ix. But see Proposed Final Draft, supra note 1, § 6.01, cmt. a, at 398 (claiming that the Project’s approach is consistent with that of the Second Restatement).
30. See Proposed Final Draft, supra note 1, Ch. 6, Intro. Note, cmt. b, at 384 (“neutral and fair”) and cmt. c, at 387 (no “substantive preferences”). See also id. § 6.01, Reporter’s Note 12 to cmt. b, at 419 (rejection of plaintiff’s choice of the applicable law) and Reporter’s Note 16 to cmt. c, at 426-27 (rejection of better-law approach).
31. See id. § 6.01(a), cmt. a, at 398 (the objective of applying, to the extent feasible, a single state’s law to all similar tort claims); Ch. 6, Intro. Note, cmt. c, at 389 (“it would be highly desirable if a single state’s law could be applied”); § 6.01, cmt. a, at 398 (“the objective . . . is to allow a single state’s tort law to apply to all similar claims”).
preprogrammed: only multilateral rules of the traditional variety can allocate legal relationships to a particular state in a neutral, objective manner that is blind to the legal consequences ensuing from the application of that state's law.

However, instead of laying down a single rule with a single connecting factor, as the First Restatement did, the Reporters drafted an entire array of provisions that, at first glance, look quite diverse. There is, first of all, an introductory Subsection (a), which proclaims the Reporters' objective to have a single state's law apply, if at all possible. Subsection (b) then lists such familiar contact points (the Reporters call them "factors") as the place of injury, place of conduct, and the parties' residence (or place of business). Having thus deferred to the wisdom of the past, the Reporters, with a certain disdain for foolish consistency, pay tribute to Currie's interest analysis; according to Subsection (c), if the court finds that only one state "has a policy that would be furthered by application of its law"—i.e., in a "false conflict" situation—it is to apply the law of the only interested state. In this fashion, the Project reflects the eclecticism (or "mish-mash" methodology as a critic called it) so popular with modern conflicts writers.

Should Section 6.01 become positive law, interest analysis is unlikely to play much of a role in practical application. As the Reporters note at the outset, they favor "reasonably precise choice of law rules" and disdain the "intrinsic indeterminacy" of interest analysis. Similarly, while they purport to follow an issue-by-issue approach, they reject the dépeçage effect interest analysis inevitably entails. They also concede implicitly, if guardedly, that in complex cases "false conflicts" will be as rare as hens' teeth. Clearly, their preference is for choice-of-law rules rather than freewheeling analysis; the talk about policies and interests amounts to hardly more than a pro forma, face-saving concession to current conflicts lore. Quite unsurprisingly, the four numbered paragraphs following the nod to interest analysis contain rules of the traditional ilk to resolve the "true conflicts" of state interests that supposedly result from a

32. See id. Ch. 6, Intro. Note, at 376 ("a highly complex set of standards").
33. See Juenger, supra note 23, at 36-37.
36. See Juenger, supra note 23, at 140-43.
37. Proposed Final Draft, supra note 1, Ch. 6, Intro. Note, at 376.
38. Id. cmt. c, at 386.
39. See id. at 388.
40. See id. Reporter's Note 9 to cmt. c, at 391 (warning against the potential for "anomalous results" produced by a "hybrid law not available in any state"). The Reporters have apparently misunderstood the French term. See id. Reporter's Note 9 to cmt. c, at 394 (attributing to it the meaning of issue-by-issue analysis, rather than the resulting "hybrid law").
41. See Juenger, supra note 23, at 138-39.
42. "[T]he identification of states leaving significant contacts often may suggest more than one state whose law may be applied, particularly in the context of complex multiparty litigation." Proposed Final Draft, supra note 1, § 6.01, cmt. a, at 398-99.
clash and clang of policies. To this end the Reporters ostensibly blend together personal and territorial contacts in the following way.

According to Paragraph (1) of Section 6.01(c), when injury and injurious conduct occur in the same state, that state’s law governs. If tort actions do not take place in a single jurisdiction, Paragraph (2) provides that the state of common residence of all plaintiffs furnishes the applicable law, as long as at least one defendant also resides there. The same law controls, according to Subsection (c), if no defendant has the required personal nexus with that state, but the plaintiffs’ common residence is also the place of injury. Last, but certainly not least, pursuant to Subsection (d) in all other cases—i.e., in the overwhelming majority of dispersed mass disaster litigation, such as products liability cases and air crashes—the law of the state of injurious conduct governs. In the event such conduct occurred in more than one state, the second sentence of Paragraph (4) picks the state with the “most significant relationship to the occurrence.”

As the Reporters admit, in “most mass tort situations it is unlikely that all the plaintiffs will reside in a single state.” The law of the place of conduct will therefore apply in practically every case, either because it is also the place of injury, which triggers Paragraph (1), or because of the “residual” rule contained in Paragraph (4). Accordingly, Section 6.01 places primary reliance on a territorial connecting factor, rather than the personal nexus interest analysts prefer. As one might expect, the Reporters’ territorialist preference, their downgrading of analysis and their quest for invoking the law of a single state have provoked strong reactions from interest analysts. In effect, Section 6.01

43. Concerning my own doubts about interest analysis and the conundrums this approach creates, see Juenger, supra note 23, at 131-39.
44. More precisely, Proposed Final Draft, supra note 1, § 6.01(b)(3), (c)(2) and (3), define the domiciliary connecting factor as the state in which parties “habitually reside” or have their “primary places of business.”
45. It should also be noted that the Proposed Official Draft establishes a fictive common residence for plaintiffs from different states whose laws are not in material conflict. Id. § 6.01(c)(2), second sentence.
46. By employing the Second Restatement’s key phrase, the Reporters probably attempt to suggest the affinity of their work product with the earlier A.L.I. endeavor.
47. The Reporters acknowledged that the term “most significant relationship” does not necessarily provide a “quick or easy reference to the state where defendant’s conduct . . . occurred.” Proposed Final Draft, supra note 1, § 6.02, cmt. c, at 420. The reason is that such catchphrases mean “nothing except, perhaps, that the answer is not ready at hand.” René David, The International Unification of Private Law, 2 Int’l Enc. Comp. L. ch. 5, § 16 (1969). That is of course their very virtue; they afford judges a manipulatable margin to reach the right result. See Juenger, supra note 23, at 180-81. The use of such an amorphous connecting factor is, however, obviously at odds with the Reporters’ yearning for certainty, predictability, and uniformity.
48. Proposed Final Draft, supra note 1, § 6.01 cmt. a, at 403; see also id. cmt. b, at 415; Mullenix, supra note 19, at 1641.
49. Concerning this preference, see Juenger, supra note 23, at 100-02, 131, 136-38.
is an attempt to turn back the clock by substituting a hard and fast rule for the more finely tuned approaches that scholars have developed and courts have adopted in conflicts cases ever since Babcock v. Jackson\textsuperscript{51} was decided more than thirty years ago.

The Project’s central choice-of-law provision is not only out of line with current academic and judicial trends, it is also insensitive to results, as any rule of the traditional kind must be. Multilateral conflicts systems cope with this problem by allowing courts to disregard foreign laws that violate the forum’s public policy.\textsuperscript{52} This option was not open to the Reporters because the Project’s gist is to render the notion of “forum” irrelevant.\textsuperscript{53} At the same time, however, they realized that their choice-of-law rules can produce unacceptable decisions. To avoid “unfair surprise or arbitrary results,”\textsuperscript{54} they included what they choose to call the “safety valve”\textsuperscript{55} or “loophole provision”\textsuperscript{56} of Section 6.01(d). This Subsection permits a court to select the applicable law, whenever appropriate,\textsuperscript{57} by relying on “additional factors that reflect the regulatory policies and legitimate interests of a particular state not otherwise identified under Subsection (b).” Alternatively, Subsection (d) allows the court to depart from the order of preferences for selecting the governing law specified in Subsection (c). Finally, Subsection (e) recommends subclassing in the event that the application of a single law to all elements of a claim would be “inappropriate.”

Stripped of refinements and complexities, the thrust of the Reporters’ scheme for choosing the law that governs complex tort litigation is obvious: they favor the application of a single law in mass disaster cases, a law determined by means of a traditional connecting factor, namely, the state of defendant’s conduct.\textsuperscript{58} The obvious affinity between this basic rule and the tort provisions of the First Restatement is by no means accidental. Like Beale, the Reporters were guided by the classical desiderata of certainty, predictability, and uniformity of result.\textsuperscript{59} If, as they envisage, the Congress enacts Section 6.01 as part of a new chapter


\textsuperscript{51} 191 N.E.2d 279 (N.Y. 1963).

\textsuperscript{52} See Juenger, supra note 23, at 79-81.

\textsuperscript{53} See Weinberg, supra note 50, at 813-14.

\textsuperscript{54} Proposed Final Draft, supra note 1, § 6.01(d).

\textsuperscript{55} Id. § 6.01, cmt. d, at 431.

\textsuperscript{56} Proceedings, supra note 2.

\textsuperscript{57} The Proposed Final Draft empowered the court to rely on additional factors when “necessary to avoid unfair surprise or arbitrary results.” Proposed Final Draft, supra note 1, § 6.01(d). During the Institute’s 1993 annual meeting, the Reporters broadened this judicial discretion by agreeing to substitute the word “appropriate” for “necessary.” Proceedings, supra note 2; see Weinberg, supra note 50, at 811 n.4.

\textsuperscript{58} See supra notes 48-49 and accompanying text.

\textsuperscript{59} See supra notes 30-31 and accompanying text.
of the Judiciary Act, the *lex loci delicti*—redefined to mean the law of the place of acting rather than injury—will once again reign supreme in the limited but important area of mass disaster litigation.

In the following, I shall take issue with the objectives of Section 6 as well as with the manner in which this provision attempts to implement them. I shall limit my discussion to basics and refrain from going into details; cogent critiques of fundamentals as well as specifics have already been published by Professors Linda Mullenix and Louise Weinberg. Addressing only what I believe to be the heart of the matter, I shall deal with two questions: (1) whether conflicts solutions are preferable to substantive ones, and (2) whether, if conflicts solutions must be used, the provisions of Section 6.02 are adequate to deal with the task at hand.

### III. Current Trends in American Conflicts Law

To comment, once again, on the defects of the classical choice-of-law approach is a tedious task. Yet the Reporters' reliance on value-blind multilateral rules requires me to say at least a few words about the evolution of American conflicts law. Once upon a time great jurists, such as Story and Savigny, believed that the primary task of the conflict of laws is the prevention of forum shopping and that appropriately framed multilateral choice-of-law rules could achieve this goal. But a century and a half of experimentation with the multilateral approach they espoused has shown conclusively that certainty, predictability, and uniformity of result will forever lie beyond the classical system's grasp. Although this realization is not limited to the United States, in this country the judiciary's reaction against the traditional approach has been especially forceful. A "conflicts revolution" has swept our courts. While the peculiar American incarnation of the multilateralist dogma, Joseph Beale's First Restatement, once was the law of the land, its authority is now limited to a dwindling minority of jurisdictions.

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60. See Proposed Final Draft, *supra* note 1, ch. 1 cmt. a, at 3 and Appendix A § 7 (proposed amendments of 28 U.S.C.).
64. See id. at 34-40.
65. See id. at 39.
66. See id. at 69-87, 154-63.
67. See id. at 152-53.
68. See id. at 106-20.
70. For the latest nose count, see Luther L. McDougal, III, *The Real Legacy of Babcock v. Jackson: Lex Fori Instead of Lex Loci Delicti and Now It's Time for a Real Choice-of-Law Revolution*, 56 Alb. L. Rev. 795, 796 n.11 (1993); Weintraub, *supra* note 50, at 702 n.7 (37 states, the District of Columbia, and Puerto Rico have abandoned the First Restatement's rule to embrace modern approaches).
The dominant American academic approach to choice of law is "governmental interest analysis," a doctrine propounded by Brainerd Currie, which purports to deduce the spatial reach of substantive rules from their underlying policies and from the "interest" states are said to have in effectuating such policies. In contrast to the classical multilateral methodology, Currie used rules of decision—rather than legal relationships—as his point of departure. Unlike the First Restatement's rules, which submitted all substantive aspects of a given relationship (e.g., a tort) to the law of one state (e.g., the state in which the injury occurred), Currie's approach compels, of necessity, an issue-by-issue determination. Because his approach is geared to analyzing substantive rules, it requires a separate analysis with respect to each of the potentially applicable rules of decision. At the same time, Currie's hypothesis that states are primarily interested in persons—who pay taxes and elect the government—emphasized the personal nexus between an individual (or entity) and a legal system, whereas the First Restatement's search for the spot in which rights vest strongly favored territorial contacts.

Thus, by reinstating the First Restatement's jurisdiction-selecting approach and relying on a territorial contact as its principal connecting factor, Section 6.01 is at odds with current American conflicts theory. Nor do its proposed choice-of-law rules jibe with current judicial practice. Following a wide variety of academic teachings, American state and federal courts have adopted a panoply of modern choice-of-law doctrines. Although they habitually speak of "policies" and "interests," the courts—unlike the majority of legal writers—are not wedded to interest analysis. Instead, they rely—in a rather undiscerning fashion—on a mélange of discordant methodologies, including Currie's, the Second Restatement's eclectic proper law approach, and Leflar's better-law rule. But whatever theories they profess to follow, in tort cases at least, few courts still apply a mechanical approach resembling the First Restatement's place-of-injury rule or the place-of-conduct rule enshrined in Section 6.01 of the Complex Litigation Project.


72. See Juenger, supra note 23, at 98-103.

73. See id. at 48.

74. See id. at 102, 138-39.

75. See id. at 100-02, 131, 136-38.

76. See id. at 90-91.

77. See supra notes 40-42 and accompanying text.

78. See supra note 49 and accompanying text.

79. For the reaction of interest analysts, see supra note 50 and accompanying text.

80. See Juenger, supra note 23, at 106-20.

81. See id. at 140, 153; Friedrich K. Juenger, Babcock v. Jackson Revisited: Judge Fuld's Contribution to American Conflicts Law, 56 Alb. L. Rev. 727, 743-44 (1993); McDougal, supra note 70, at 797, 803; Weinberg, supra note 50, at 829-30; Sedler, supra note 50, at 855.

82. See supra note 70 and accompanying text.
However confused and confusing the case law may be, two basic tendencies are clearly discernible in American conflicts practice: (1) a strong forum preference and (2) a preference for the sounder rule of decision. Since I have commented on this phenomenon elsewhere, it should suffice briefly to restate the reasons for the interrelationship between these tendencies. The forum bias inherent in the modern approaches, which may cater to an instinctive judicial preference for local over foreign law, as some observers have surmised, promotes recovery. In tort cases, the lex fori usually favors the victim, who, as party plaintiff, selects the forum. Rarely will counsel, with a contingent fee at stake, choose to sue in a state whose law is unfavorable to the client’s cause. Moreover, a judge who prefers a foreign rule of decision to the local one is free to change the forum’s common law rule or, if need be, to hold a substandard local statute unconstitutional.

On occasion, however, courts do prefer the sounder foreign rule of decision. Again, this preference should not come as a surprise. Judges are apt to compare the relative merits of the tort rules from which they are asked to make a selection, and comparison readily reveals qualitative differences. In general, the law less favorable to the plaintiff will turn out to be aberrational. In the past, the large majority of tort conflicts cases were prompted by such obsolete and draconian precepts as guest statutes, or their functional equivalent, common law rules on interspousal immunity, and, to a lesser extent, by arbitrary limitations on wrongful death recovery. In part because of the "conflicts revolution," which exposed their defects, these relics from a distant past have largely become extinct. The judicial reorientation simply mirrored, on the interstate level, the trend to enhance the protection of accident victims that was so noticeable in domestic tort law. Nowadays, the troublemakers are misguided statutes enacted, as part of the tort law "reform" movement, in response to a number of so-called "liability crises."

83. See Juenger, supra note 23, at 146-49.
86. See, e.g., Schlemmer v. Fireman’s Fund Ins. Co., 730 S.W.2d 217 (Ark. 1987); Bigelow v. Halloran, 313 N.W.2d 10 (Minn. 1981); Borchers, supra note 23, at 899 (with further references).
87. See Juenger, supra note 23, at 117-18, 146-49.
88. See id.; Juenger, supra note 81, at 746.
89. See Juenger, supra note 23, at 147.
IV. SECTION 6.01 IN PRACTICAL APPLICATION

The Reporters' reliance on neutral, jurisdiction-selecting choice-of-law rules that use the place of conduct as the principal connecting factor is not only at odds with current academic theories but also defies a clear trend in American practice. Paying homage to the traditional goals of certainty, predictability and uniformity of result, they failed to heed the lessons of the past. The First Restatement, which pursued the same objectives, became obsolete because of its inability to produce sound results in tort cases. Oblivious to the obvious, the Reporters attempted to resurrect what had proved to be a resounding failure. Conceivably, their focus on procedural matters may have distracted them from the consideration that procedure, however important it is, ought to be subservient to the demands of material justice. In part, their attempt to revive an anachronism may also be explained by the well-known propensity of conflicts law to befog the minds of judges and scholars.91

In practical application, Section 6.01 would prove to be worse than the First Restatement's rigid rules. Rather than merely prompting an occasional harsh result, its insensitive choice-of-law provisions would produce large-scale miscarriages of justice. Moreover, the substantive setting in which the section is to operate has been transformed. In the past, American tort law was largely uniform, except for a small group of aberrational rules, such as guest statutes, immunities, and arbitrary limitations on wrongful death recovery. While these "drags on the coattails of civilization"92 have by now largely disappeared, a new wave of noxious statutes has taken their place. Agitation for "tort reform"93 has produced a motley array of laws lobbied by powerful and well organized special interest groups. The manner in which these enactments curtail the rights of tort victims differs from one state to the next. Among them are arbitrary caps on damages,94 stunted limitation periods,95 "statutes of repose" that bar actions before they arise,96 as well as provisions abolishing the collateral source rule97 or joint and several liability,98 to name just a few of the products of the lobbyists' fertile imagination. Furthermore, some legislatures have shown

93. For obvious reasons, this term usually appears between quotation marks. See Franklin & Rabin, supra note 90, at 711; Keeton et al., supra note 90, at 1.  
94. See Franklin & Rabin, supra note 90, at 711, 712; Keeton et al., supra note 90, at 1, 2.  
95. See Franklin & Rabin, supra note 90, at 711, 712.  
96. See id. at 712-13.  
97. See id. at 712; Keeton et al., supra note 90, at 2.  
98. See Franklin & Rabin, supra note 90, at 712; Keeton et al., supra note 90, at 1, 2.
extraordinary solicitude towards certain professions, such as medical practitioners, manufacturers, and retailers.

Since hardly two of the statutes enacted in response to the lobbyists' pressures are alike, American tort law, losing its former unity, has become thoroughly chaotic. By now, the states of the Union are out of step not only with the rest of the world, but also with one another. Moreover, the differences among state laws are exacerbated by the fact that state courts have struck down some of these enactments for constitutional reasons, while letting others stand. But the balkanization of American tort law and the curtailment of victims' rights have done little to cure the "crises" such legislation was designed to cure. As a renowned scholar observed:

Tort reform statutes in thirty-nine states have effected modest changes of substantive and remedial law since the mid-70s... Although promoted by the insurance industry, they have not resulted in any noticeable reduction of premiums, thereby fuelling the accusation that the reform campaign was just a disingenuous attack on the deserved gains of tort victims.

Passed by state legislatures with local realities in mind, even that portion of the hodge-podge "reform" legislation which has managed to survive constitutional scrutiny cannot possibly aspire to become part of a "national consensus law," to use Judge Weinstein's felicitous phrase. Yet, the undiscerning choice-of-law provisions of Section 6.01 confer upon such local special interest legislation the status of interstate rules of decision. Even worse, the Reporters' remarks about "state policies that legitimately reflect substantive, regulatory rules" suggest that these odious statutes can claim a privileged

99. See Franklin & Rabin, supra note 90, at 711; Keeton et al., supra note 90, at 1.
100. See Franklin & Rabin, supra note 90, at 712-13; Keeton et al., supra note 90, at 1.
101. See Franklin & Rabin, supra note 90, at 713.
102. "Each state took its own distinctive approach to tort reform. Even when the states began with the same agenda, legislative compromise often produced quite disparate results." Id. at 712.
103. Compare Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987) (striking down a $450,000 ceiling on noneconomic damages) with Fein v. Permanente Medical Group, 695 P.2d 665 (Cal. 1985) (upholding a $250,000 ceiling on noneconomic damages for medical malpractice). See also Weinberg, supra note 50, at 825.
106. "By equating tort reform with unidirectional statutory modification of the common law, its advocates succeeded in investing the term with a politically useful, if skewed, meaning." Joseph A. Page, Deforming Tort Reform, Geo. L.J. 649, 651 (1990) (reviewing Peter W. Huber, Liability: The Legal Revolution and its Consequences (1988)).
108. Proposed Final Draft, supra note 1, Ch. 6, Intro. Note, cmt. c, at 387. See also id. at 388 ("regulatory interests"), 393 ("a legitimate regulatory interest").
position. Few private law provisions have a more obvious regulatory purpose than those enacted to shelter tortfeasors from victims’ claims. Normal tort rules merely embody the court’s or legislature’s endeavor to be fair. In contrast, the “reform” legislation is designed, like a tax measure, to rob Peter to pay Paul, which is of course precisely the reason why some of it has been held unconstitutional. Because the legislative objective is as clear as it is misguided, this kind of legislation is considerably more policy-laden than ordinary tort rules, and can therefore be said to express a stronger state “interest.”

Paradoxically, therefore, the lobbyists’ work product may be entitled to greater deference than the principles elaborated by such jurists as Cardozo, Schaeffer and Traynor.

Even if state tort “reform” statutes are only entitled to the same respect as ordinary tort rules, the Russian-roulette approach of Section 6.01 is bound to invoke substandard provisions enacted to placate powerful lobbies with considerable frequency. The propensity of indiscriminately importing foreign rules of decision law without regard to their intrinsic quality, thereby producing unpalatable results, was of course the very reason for the First Conflict Restatement’s demise. In fact, even before the so-called “conflicts revolution” dethroned Beale’s Restatement, American courts, in countless cases, avoided the draconic outcomes its rules so often compelled by recourse to various escape devices. One should have thought that the example of a Restatement discredited for its failure to do multistate justice would discourage similar ventures. But, it seems, in the law of conflicts past errors inspire emulation rather than caution.

To be sure, the Reporters were not entirely oblivious to the problems substandard rules of decision can cause in mass disaster litigation. Eschewing traditional escape devices, they included instead the “loophole” provision of

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109. For instance, as the New Hampshire Supreme Court said in striking down a limitation on noneconomic damages in malpractice actions, “It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation.” Carson v. Maurer, 424 A.2d 825, 837 (N.H. 1980).

110. Concerning the possible differential treatment of different types of “interests” depending on the regulatory policies they represent, see Sedler, supra note 50, at 872-73.

111. See Juenger, supra note 23, at 117-20, 146-49.

112. See id. at 96, 112, 116, 173-77.

113. Proposed Final Draft, supra note 1, Ch. 6, Intro. Note, cmt. c, at 392 dismisses—in a single sentence that hardly does the much debated subject justice—the possibility of renvoi. The Reporters never even discuss the characterization problem to which they cursorily refer in a reporter’s note. See id. § 6.03, Reporter’s Note 8 to cmt. b, at 468. Apparently they assume that the difference between, for instance, tort and contract law is sufficiently clear so as not to warrant comment. Several products liability cases, however, shed doubt on this assumption. See, e.g., Johnson v. Knight, 459 F. Supp. 962 (N.D. Miss. 1978) (contract characterization); Bohrer-Reagan Corp. v. Modine Mfg. Co., 433 F. Supp. 578 (E.D. Pa. 1977) (same). See also Mullenix, supra note 19, at 1642-43 n.82, 84. The modern methodologies serve to obliterate the traditional categories. Robert A. Leflar et al., American Conflicts Law § 134, at 377 (4th ed. 1986). By resurrecting an earlier approach and establishing separate provisions for tort and contract choice of law, the Proposed Final
Section 6.01(d). While this subsection does grant courts some wiggle room, its dimensions are far from clear. Should the Project be enacted into positive law, judges, heeding the Reporters' call for uniformity, can be expected—at least initially—to construe this exception cautiously and narrowly. Accordingly, Section 6.01(d) is probably but "a thin reed on which to rest [the] argument that the specific rule of (c)(4) should not apply." For this reason, neither the loophole rule nor the other palliatives found in Section 6.01 are apt to prevent the unfair results the place-of-conduct rule inevitably compels. Although they do undercut, to some extent, the quest for predictability and uniformity of result, the Project's fudge factors fail to offer the same measure of protection against the application of substandard law as the classic public policy reservation.

Section 6.01 thus resuscitates tenets that have long been found wanting and promotes the large-scale influx of special interest legislation into complex litigation. In addition to seriously jeopardizing the interests of mass disaster victims, it jeopardizes its own avowed objective of resolving complex cases in an evenhanded manner. The Reporters' reliance on the place of conduct, a contact that is often fortuitous and usually manipulatable, leaves to happenstance and defense strategies the decision who recovers what, if anything, when an airplane crashes or a noxious drug causes worldwide injuries. Furthermore, Section 6.01 would cause additional disparities in current conflicts practice. It requires federal courts to apply federal choice-of-law rules in mass disaster cases, but state choice-of-law rules in all others. Secondly, it discriminates between mass disaster cases adjudicated in federal court and those adjudicated in state courts, and thereby invites forum shopping. Finally, by compelling subclassing in dispersed mass tort cases, this section is bound to defeat the Project's consolidation objective.

V. ALTERNATIVE APPROACHES TO MASS DISASTERS

Before looking for alternatives to the Project's hard and fast choice-of-law rules, it may not be remiss to recall how federal judges used to deal with interstate torts and mass disasters. Until 1934 choice-of-law problems rarely arose in federal courts. Following Swift v. Tyson, they applied a general federal common law to cases that were interstate in nature by virtue of the

Draft reintroduces the hoary characterization problem.
114. Weintraub, supra note 50, at 723.
115. For an example of such palliatives, § 6.01(c), first sentence, invites a search for false conflicts. See supra note 34 and accompanying text. Other examples include the "most significant relationship" formula found in § 6.01(c)(4), and the subclassing possibility afforded by § 6.01(d).
116. See supra note 30 and accompanying text; Borchers, supra note 23, at 895.
117. See Weinberg, supra note 50, at 848; Weintraub, supra note 50, at 722, 723.
118. See Mullenix, supra note 19, at 1634.
119. See id. at 1646-47, 1657.
120. See id. at 1630-31, 1644-45.
121. 41 U.S. (16 Pet.) 1 (1842).
parties' diversity of citizenship. *Swift* of course dealt with a negotiable instrument, and Justice Story's reference to the *ius gentium* was limited to commercial law. But when the federal courts expanded its rationale to encompass torts, they encountered no difficulty whatsoever in developing a body of substantive rules. Nor did mass disasters daunt the federal judiciary. Prior to the advent of more modern modes of transportation, vessels provided the principal means of long-distance travel. Mishaps in the course of voyages were within the admiralty jurisdiction granted by Article III, section 2, clause 3 of the Constitution, and the federal judiciary construed this bare jurisdictional grant broadly to authorize the development of an entire federal maritime law. Thus, whether they dealt with single torts or large-scale catastrophes, such as ship or train wrecks, federal judges did not leave the rights of accident victims to the tender mercies of choice-of-law rules. Instead, they developed a substantive law that dealt directly with the mass disasters of yore.

This brief glance at the past shows that the federal courts were perfectly capable of developing tort rules of decision for mass disasters as well as for other cases, which obviated the need for choice-of-law rules. If judicial *cris de coeur* are any indication, the perceived need for a uniform national law is no less pressing in aerial than in aquatic disasters. Lacking the necessary foresight, the Founding Fathers only provided for admiralty jurisdiction. One may, however, surmise that had they been enrolled in frequent flyer plans they would not have been averse to including other forms of interstate and international transportation. But even in the absence of a specific constitutional provision akin to the admiralty clause, it can hardly be denied that equal justice in mass disaster cases would be considerably enhanced by a uniform body of federal

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122. *Id.* at 19.
123. U.S. Const. art. III, § 2, cl. 3.
125. For a vote of confidence in the federal judiciary's ability to develop acceptable common law rules, see Vairo, *supra* note 16, at 219 n.349.

We are at a stage in development of air commerce roughly comparable to that of steamship navigation in 1824.

Aviation has added a new dimension to travel and to our ideas.

Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water.

As the Project's Reporters concede, to leave the outcome of complex litigation to the vagaries of state case law and statutes, especially the kind state legislatures have enacted in the last decade, is an imperfect solution at best.

Why, then, did the Project's Reporters reject a federal resolution to what they correctly identified as a "national problem"? Acknowledging that the most direct way of dealing with the law applicable to mass disasters would be to adopt national standards, they nevertheless doubted that the Congress could be expected to "intrude . . . into areas historically governed by state law." For this reason they dismissed—in one paragraph and without analysis—what they recognized as the preferable solution. Such short shrift is remarkable, especially since the Reporters do not point to any constitutional provision that would inhibit the elaboration of federal tort rules for complex cases. That the Congress has the power to adopt such rules is of course beyond cavil, as the Reporters implicitly conceded.

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The Reporters' failure seriously to consider a federal common law for mass disasters, a possibility thoughtfully and convincingly argued in two articles they cited, is astonishing. One can empathize with their reluctance to entrust the task of formulating substantive rules to Congress, whose legislative

128. Proposed Final Draft, supra note 1, Ch. 6, Intro. Note, at 376.
129. Id. at 375.
130. Id. For a more optimistic view, see Andreas F. Lowenfeld, Mass Torts and the Conflict of Laws: The Airline Disaster, 1989 U. Ill. L. Rev. 157, 172-74.
131. Their scruples are of a political, rather than constitutional, nature. See Proposed Final Draft, supra note 1, Ch. 6, Intro. Note, at 375. For a full discussion of the constitutional issues, see Vairo, supra note 16, at 174-208.
132. The Proposed Final Draft merely discusses the possibility of a congressional authorization to develop a federal common law of conflicts and, without mentioning admiralty, notes the absence of uniform federal liability laws. See Proposed Final Draft, supra note 1, Ch. 6, Intro. Note, at 375-76; cmt. c, at 386; Reporter's Note 7 to cmt. c, at 394.
135. See Proposed Final Draft, supra note 1, Ch. 6, Intro. Note, Reporter's Note 7 to cmt. c, at 394.
136. Although they briefly allude to the possibility of a "national consensus approach," which they equate with the creating of a federal common law, the Reporters reject this possibility out of hand because of asserted "federalism restraints" and sensitivity to state interests. See id. § 6.01, cmt. c, at 423 and Reporter's Note 14 to cmt. c, at 425. The Reporters' neglect is all the more remarkable given the fact that the Tydings Bill, drafted more than a quarter century ago, which provided for the transfer and consideration of air crash litigation, already contained a provision authorizing the federal courts to create a federal common law. See Lowenfeld, supra note 130, at 170.
record in the field of torts is spotty at best.\textsuperscript{137} But no similar reasons caution against leaving the matter to federal judges, who can rely on a fully formed body of case law, including—and that covers the bulk of mass disaster cases—products liability rules,\textsuperscript{138} which they developed in the maritime context. Whatever adjustments may conceivably be required to adapt this body of law to nonmaritime situations should pose no insurmountable obstacles. To say that mass disaster litigation was “historically governed by state law”\textsuperscript{139} overlooks the experience federal courts have gathered in the realm of torts and is therefore, at the very least, misleading. One suspects that the real reasons for the Reporters’ rejection of an alternative that is so clearly superior to their proposal are of an instinctive, subliminal nature.\textsuperscript{141} Indications that this surmise may not be too far off the mark are their ritual incantations of “basic principles of federalism,”\textsuperscript{142} “states’ rights,”\textsuperscript{143} federalism “concerns”\textsuperscript{144} and “restraints,”\textsuperscript{145} “state interests,”\textsuperscript{146} and their apparent particular fondness of what they call a “vigorous body of state law.”\textsuperscript{147}

The Reporters’ comments sound like an allusion to the \textit{Erie}\textsuperscript{148} doctrine, although they surely recognize that \textit{Erie} would not preclude the adoption of a federal common law to govern situations that are interstate by their very nature.\textsuperscript{144} Clearly, the states’ rights rationale Justice Brandeis invoked in a case dealing with a hapless hiker hit by an open door while walking along railroad tracks has little pertinence to mass disasters such as air crashes or cases involving noxious drugs that are distributed worldwide. In situations that so clearly transcend state and even national boundaries, there are no good reasons


\textsuperscript{138} \textit{See} Maraist, \textit{supra} note 124, at 138-44.
\textsuperscript{139} Proposed Final Draft, \textit{supra} note 1, Ch. 6, Intro. Note, at 375.
\textsuperscript{140} For recent contributions on the subject, see \textit{Admiralty Law Institute Symposium: The American Law of Personal Injury and Death}, 68 Tul. L. Rev. 311 (1994).

\textsuperscript{141} According to Professor Mullenix, “the legal profession has a long standing, collective psychological block with regard to even the mention of federal common law.” Mullenix, \textit{supra} note 19, at 1635. \textit{But see} Patrick J. Borchers, \textit{The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for \textit{Erie} and \textit{Klaxon}}, 72 Tex. L. Rev. 79 (1993).

\textsuperscript{142} Proposed Final Draft, \textit{supra} note 1, Ch. 1, at 7.
\textsuperscript{143} \textit{Id.} Ch. 6, Intro. Note, cmt. c, at 389.
\textsuperscript{144} \textit{Id.} § 6.01, Reporter's Note 4 to cmt. a, at 409.
\textsuperscript{145} \textit{Id.} § 6.01, cmt. c, at 423; \textit{see also} \textit{id.} at 425 (rejection of federal common law).
\textsuperscript{146} \textit{Id.} at 423.
\textsuperscript{147} \textit{Id.} Ch. 6, Intro. Note, Reporter's Note 4 to cmt. b, at 385.
\textsuperscript{148} \textit{Erie R.R. v. Tompkins}, 304 U.S. 64, 58 S. Ct. 817 (1938).
\textsuperscript{149} \textit{See} \textit{Vairo}, \textit{supra} note 16, at 174-84.
for leaving the parties' rights and obligations to the vagaries of state laws, especially at a time when the states' "vigorous lawmaking" has reached new lows in the wake of the so-called tort law "reform" movement. Whatever deference may be due and owing to state prerogatives should not encompass legislation that reflects a peculiar predilection to protect privileged local defendants. Such solicitude is already questionable in entirely local situations; it is doubly so if privileges are granted at the expense of foreign victims and to the detriment of interstate justice.

If, however, the creation of a federal common law for mass disasters should be considered too bold a step to take, there is an alternative that relies on conflicts rules rather than substantive law. Remaining within the Reporters' framework of using state rules of decision and federal choice-of-law provisions, sensible results in complex tort cases can be reached if the choice of the applicable law is contingent on the merits of competing rules of decision. This idea, which has more than casual affinity with Judge Weinstein's "national consensus law," can serve as the basis for a choice-of-law rule of the kind I presented to the American Law Institute's membership. My proposed alternative reference rule reads as follows:

§ 6.01 Mass Torts

(a) In actions consolidated under § 3.01 in which the parties assert the application of laws that are in material conflict the transferee court shall choose the rules of decision governing the rights, liabilities, and defenses of the parties with respect to a tort claim in the manner specified below.

(b) In selecting the appropriate rules of decision the court shall consider the laws of the following jurisdictions:

(1) the place or places of injury;
(2) the place or places of the conduct causing the injury; and
(3) the principal places of business or habitual residences of the plaintiffs and defendants.

(c) With respect to each issue, the court shall select from the laws of these jurisdictions the rule of decision that most closely accords with modern tort law standards.

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150. See supra notes 93-104 and accompanying text.
151. For the doubtful constitutionality of such "reform" legislation, see supra note 103 and accompanying text.
152. "[T]he notion of general federal common law has never recovered from Erie and Justice Holmes's famous dictum about the 'brooding omnipresence in the sky.'" Mullenix, supra note 19, at 1633. See also Lowenfeld, supra note 130, at 170-72.
153. See supra notes 15-16 and accompanying text.
As noted earlier, on May 13, 1993, the American Law Institute’s membership voted down my motion to substitute these provisions for Section 6.01. It also voted down motions by Professor Louise Weinberg and the late Professor Donald Trautman, which likewise were designed to assure a measure of quality control in selecting the law applicable to complex tort cases. Accordingly, Section 6.01, “recycling tired conflicts principles and adapting them, Rube Goldberg fashion, to a bigger tort model,” remained intact, subject only to minor modifications. It is regrettable that the Reporters have resisted the invitation to reconsider their approach in spite of the vigorous opposition by conflicts teachers of otherwise vastly differing views, and that the House supported the Reporters’ insistence on resuscitating an approach that has long been found wanting.

Creating rather than resolving problems, Section 6.01 cannot possibly attain the Reporters’ fundamental objective of “fostering the fair, just, and efficient resolution” of complex tort litigation. By opting for an admittedly imperfect solution that requires a cumbersome set of standards, they have created unnecessary obstacles to the hoped-for enactment of their work product into positive law. In addition, as the Reporters realize, the needless introduction of choice-of-law conundrums is counterproductive to the goal of consolidating dispersed litigation. Moreover, the Reporters swept under the rug the problems that beset all multilateral schemes, such as renvoi and characterization. The Congress would therefore be ill-advised to promulgate the Project without first excising the deeply flawed provisions of Section 6.01, which sacrifice the rights of mass disaster victims without any corresponding gain. One can only hope that fairness and common sense will ultimately prevail and that the Congress, in the interest of substantial justice, will choose to authorize either the development of a federal common law to govern mass disasters cases or an appropriate alternative reference rule.

155. See supra notes 20-21 and accompanying text.
156. Proceedings, supra note 2. The motion did not surprise the reporters, as I had advocated the adoption of such a rule on earlier occasions. See Friedrich K. Juenger, Mass Disasters and the Conflict of Laws, 1989 U. Ill. L. Rev. 105, 126; What Now?, 46 Ohio St. L.J. 509, 517 (1985). The Reporters cited both of these articles. See Proposed Final Draft, supra note 1, § 6.01, Reporter’s Note 6 to cmt. a, at 410; id. Reporter’s Note 16 to cmt. e, at 425.
157. See supra notes 20-21 and accompanying text.
158. See Proceedings, supra note 2. For earlier attempts to modify § 6.01, see Weinberg, supra note 50, at 809-10.
159. Mullenix, supra note 19, at 1629.
160. See Proceedings, supra note 2.
161. Proposed Final Draft, supra note 1, Ch. 6, Intro. Note, at 375.
162. Id. at 376.
163. Id.
164. See id. § 6.01, cmt. c, at 420-23 and Reporter’s Note 15 to cmt. c, at 425.
165. See Juenger, supra note 23, at 70-81.
166. See supra note 113.