CHOICE OF LAW AND STATUTORY SPECIFICATIONS OF SCOPE

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I. INTRODUCTION

Choice of law problems, it is often said, arise because legislatures do not specify the scope of their statutes: they do not state explicitly to whom a law grants rights, or where.[1] One might think that if a legislature does explicitly address the issue of geographic scope, they have helped the choice-of-law analysis, and their specification should be accepted by courts.[2]

Somewhat surprisingly, this commonsense view has turned out to be quite controversial in the drafting of the Third Restatement of Conflict of Laws, for which I am the Reporter. There has been considerable debate among the American Law Institute members who participate in the drafting as Advisers or members of the Members Consultative Group. There has been a motion urging the full membership to refuse to approve a draft at an annual meeting. Most recently, the issue has spilled out into the pages of law reviews.[3]

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1. As Willis Reese, Reporter for the Second Restatement of Conflict of Laws, wrote, "[t]he vast run of statutes are enacted with only the intrastate situation in mind." Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 961 (1952).

2. As Reese continued, "[if] the legislature has actually addressed itself to the choice of law problem, the courts … must give effect to its intentions." *Id*.

3. *See* Carlos M. Vázquez, *Non-Extraterritoriality*, 137 HARV. L. REV. 1290 (2024).

These two contexts have been disconnected, and a reader of the law reviews could come away significantly misinformed, both about the substantive issues and about the process of drafting the Third Restatement. This essay attempts to present a clearer picture and to draw some lessons for legal scholarship more generally.

II. THE THEORETICAL FRAMEWORK

Before diving into the debate, it is worth, first, trying to clarify what the disagreement is about. A statutory specification of scope is a provision articulating the geographical scope of a statute, such as a wrongful death act providing claims for deaths "caused in this state." The question of how to understand such a provision was raised quite early in the process of drafting the Third Restatement—it was raised in the discussion of Preliminary Draft 1, the very first draft presented to the Advisers and Members Consultative Group.[4] The draft took the position that a statutory specification of scope was part of the content of a state's law: that it was a specification of the rights created by that law. The main significance of this characterization is that, because states are authoritative about the content of their law, a scope restriction that is understood as part of the content of a state's law is binding on the courts of other states. Thus, all courts considering a wrongful death act creating claims for deaths "caused in this state" would have to accept that it did not create claims for deaths caused outside the state.

Professors Lea Brilmayer (an Adviser to the Third Restatement) and Carlos Vázquez (a member of the Members Consultative Group) submitted comments and wrote letters arguing that statutory specifications of scope should be understood instead as choice-of-law rules.[5] The main significance of this characterization is that, because states need not follow other states' choice-of-law rules, a scope restriction that is understood as a choice-of-law rule is not binding on the courts of other states. A more complete perspective on the disagreement requires a bit more

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4. The process of drafting a Restatement is somewhat complex, and it will be discussed in more detail later. Briefly, the Reporters prepare a Preliminary Draft, which is presented to and discussed with the Advisers and the Members Consultative Group. Based on those discussions, the Reporters prepare a Council Draft, which is presented to the Council of the American Law Institute. If the Council votes to approve the draft, in whole or in part, approved material may then be presented to the full membership at an Annual Meeting. Material approved by the membership, subject to revisions consistent with the discussion at the Annual Meeting, represents the official position of the American Law Institute.

5. Advisers, such as Professor Brilmayer, are experts in the field selected for that reason by the Reporters and the American Law Institute. Members who are not selected as Advisers, such as Professor Vázquez, may appoint themselves to the Members Consultative Group and participate in the drafting process.

discussion of the draft Third Restatement's conceptual structure, which in turn requires a brief history of the development of choice of law.

A. A Brief History of Choice of Law

Choice-of-law questions arise when a case has contacts with more than one jurisdiction. (These can be nations, or States of the United States, or other subnational units. I will use the term "state" to indicate any jurisdiction with a distinct body of law.) In such cases, it may not be clear which state's law should be selected to govern a particular issue. [6]

Choice-of-law analysis, described most generally, proceeds in two steps. First, a court must decide which states' laws are relevant—that is, which are candidates for selection. If only one state's law is relevant, then the analysis can terminate at that step: the only relevant state's law will govern. If more than one state's law is relevant, a court must proceed to a second step: it must decide which relevant law will be given priority—that is, which law will be selected to govern a particular issue. Different approaches to choice of law differ in the ways in which they identify relevant laws, and also in how they select among relevant laws, but they all share this basic structure. Understanding how statutory specifications of scope relate to it requires a discussion of the development of choice of law through the Restatements.

The First Restatement of Conflict of Laws, published in 1935, was the brainchild of its Reporter, Harvard Law Professor Joseph Beale. Beale believed that law was by its nature territorial: a state's law governed everything that happened within its borders and nothing outside them.[7] To put it in ordinary legal language, we would say that the geographic scope of a state's law was limited by state boundaries.

Given this territorial premise, laws could never overlap and conflict. All legal events would come within the geographic scope of one and only one law, and First Restatement choice-of-law analysis could simply select that law. At least, this would be true as long as any legal event could be localized to a particular state. In order to localize legal events, Beale created the "last act" rule, which provided that a legal event occurred in the location of the last

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6. The process of performing separate choice-of-law analyses for different issues within a case is called depecage. Although disfavored under traditionalist thinking, it is common in modern approaches. *See generally* Symeon C. Symeonides, *Issue-by-Issue Analysis and Depecage in Choice of Law*, 45 U. TO. L. REV. 751 (2014).

7. *See* Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2455 (1999) (discussing Beale).

necessary act or event.[8] Because a tort is complete upon injury, for example, the last act rule identifies the place of injury as the place of the tort. Similarly, because a contract is complete upon acceptance, it identifies the place of acceptance as the place of contracting.

Armed with the territorialist premise and the last act rule, the First Restatement provided that the law governing any legal event was the law of the state where it occurred, which was the only relevant law. That seemed simple and logical, but for two reasons, it turned out to produce some arbitrary results.[9] First, the last act rule selected a single connecting factor to localize a legal event—injury for torts, acceptance for contracts, and so on. But contracts and torts have multiple elements—torts also involve wrongful conduct, for instance; contracts involve performance. And the location of some of those other elements, as well as other connecting factors such as the domicile of the parties, might matter to choice-of-law analysis. Second, these different connecting factors might have different significance for different issues. For the issue of whether a defendant was negligent, for instance, the location of conduct might matter a lot and the parties' domicile might matter less. But for the issue of interspousal tort immunity, for instance, the parties' domicile might matter more and the location of conduct less.

In some cases, the place of injury might be the only contact with a state, while all other connecting factors, including the most important ones, pointed to another state. For instance, a married couple from New York might get into a car accident in Connecticut.[10] Should Connecticut's law of interspousal immunity determine the rights of New York spouses just because they happened to have crossed the state line before it occurred? Or an Alabama employee might seek to recover from his Alabama employer after a co-worker's negligence in Alabama caused him to be injured in Mississippi.[11] Should Mississippi law control the question of whether the employer could be held vicariously liable just because the injury happened to occur within its borders? Faced with cases like this, courts and scholars alike began to question the rigid rules of the First Restatement.

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8. *See id*.

9. I use "arbitrary" here in the conventional choice-of-law sense: selecting a particular state's law to govern an issue is arbitrary if thinking about the policies of the relevant states, the ways in which the connections between the states and the facts of the case implicate those policies, and the expectations of the parties, suggest that a different state's law is more appropriate.

10. *See* Mertz v. Mertz, 3 N.E. 2d 597 (1936).

11. *See* Carroll v. Alabama Great Southern Railroad, 11 So. 803 (Ala.1892)

The Second Restatement of Conflict of Laws rejected those rigid rules. Instead, it told judges what to think about and essentially set them loose to reach sensible decisions. For torts, the Second Restatement prescribed that the relevant laws were those of the state of conduct, the state of injury, the parties' domiciles, and the state where the relationship (if any) between the parties was centered.[12] For contracts it provided a slightly longer list: the place of contracting, the place of negotiation, the place of performance, the location of the subject matter of the contract, and the parties' domicile.[13] This list of relevant laws made clear that laws could indeed overlap and conflict. To perform the second step, to decide which law should get priority, courts were to consider these contacts in light of seven different factors.[14]

Second Restatement analysis, if done correctly, could avoid the problem of arbitrary results. But it was time-consuming and labor intensive, and even the Reporter of the Second Restatement did not think that it was an approach that should be followed indefinitely. Instead, he understood it as a method of allowing judges to identify sensible outcomes that could then be captured in appropriately narrow rules.[15]

Decades of judicial application of the open-ended Second Restatement did produce outcomes that could be sorted into categories and stated as rules. It also produced insights that explained why the results converged. To put it generally, returning to the example of torts, contacts other than the place of injury matter. And, as suggested earlier, certain contacts matter more for some issues than for others. For some issues, commonly called "conduct-regulating" issues, territorial contacts like the place of conduct and the place of injury are the most important.[16] For other issues, commonly called "loss-allocating" issues, personal contacts like the parties' domicile are most important.[17] Based on the

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12. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 145 (AM. L. INST. 1971).

13. *See id*. at § 188.

14. *See id*. at § 6. The § 6 factors include things such as the policies of the interested states and the expectations of the parties—that is, they are the sorts of things that make the selection of a state's law sensible rather than arbitrary.

15. *See* Kermit Roosevelt III & Bethan R. Jones, *The Draft Restatement (Third) of Conflict of Laws: A Response to Brilmayer & Listwa*, 128 YALE L. J. FORUM 293, 294-95 (2018) (explaining that Reese understood the Second Restatement as "more of a means of collecting data that would allow future reporters to write better rules").

16. The paradigmatic example of a conduct-regulating rule would be a speed limit: if we want to know whether a driver was speeding, we should obviously consult the speed limit in force at the place of driving.

17. Loss-allocating rules tend to allocate loss on the basis of something other than the mere wrongfulness of conduct. Or, similarly, we could say that they depart from the default allocation of tort law, which is that the tortfeasor pays the victim full compensation. For

distinction between these two types of issues, and particular distributions of contacts, it is possible to write rules that capture the outcome of judicial decisions under the Second Restatement.

The Third Restatement provides those rules. It also tries to explain choice of law in terms that are familiar to ordinary judges and lawyers, rather than choice-of-law specialists. Section 5.01 describes the nature of choice of law.

> Choice-of-law analysis is a two-step process that: (i) identifies the laws that are relevant to the determination of the rights and liabilities of persons involved in matters having connections to more than one state; and, if relevant laws conflict, (ii) selects the most appropriate relevant law to govern particular issues in such matters. [18]

Courts using the Third Restatement, § 5.02 goes on to explain, should first determine whether relevant laws conflict and then, if so, consult the rules of the Restatement to determine which law should be given priority. A law is relevant to an issue, the comments to § 5.02 explain, "if the facts of the case bring the issue within the scope of that law."[19] That is, the Third Restatement adopts the ordinary legal perspective that laws affect legal relations—they give rights or impose obligations—for people and events within their scope. They do not give rights or impose obligations for people and events outside their scope. If a statute specifies its scope and the facts of the case fall outside that scope, the statute is not relevant and may not be selected by any court.

B. A Taxonomy of Choice-of-Law Legislation

The two-step model set out above is intended to restate the methodology of modern choice of law, and to do so in a way that makes it intelligible as ordinary legal analysis.[20] According to this model, a court confronting a case that has contacts with more than one state must do two things. First, it must determine the scope of

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instance, interspousal or charitable immunity provide that the tortfeasor need not pay. A damages cap provides that the tortfeasor need not pay full compensation. Vicarious liability provides that someone other than the tortfeasor must pay. All these issues are commonly considered loss-allocating. By contrast, a defense that negates wrongfulness, like self-defense, presents a conduct-regulating issue. *See* RESTATEMENT (THIRD) OF CONFLICT OF L. TENTATIVE DRAFT 4, § 6.03 (AM. L. INST. 2023).

18. RESTATEMENT (THIRD) OF CONFLICT OF L. TENTATIVE DRAFT 3 § 5.01 (AM. L. INST. 2022).

19. *Id.* at § 5.02.

20. *See id.* at Chapter 5, Introductory Note.

the different states' laws to decide whether more than one law is relevant. Second, if more than one law is relevant (if the case comes within the scope of more than one state's law) and those laws are materially different, the court must then decide which of the conflicting laws should be given priority.

If we accept this model, what is the role of legislatures? One of the benefits of separating the issues of scope (does a state's law reach this case?) and priority (which of two conflicting laws should a court select?) is that it allows us a better understanding of the kinds of interventions legislatures can, and do, make.[21]

Consider the first step first. A legislature can specify the scope of its law: it can say that the law creates legal consequences for people over 18, or employers with over 15 employees, or for employment conducted inside state borders. Importantly, when it does so, it is not enacting a choice-of-law statute. It is simply specifying the content and meaning of its law, and all courts—not just local ones—must follow its specifications. By the same token, a legislature cannot specify the scope of foreign law. What a state's law means is up to that state.

At the second step, a legislature can enact a choice-of-law statute and specify which law should get priority in a conflict. It could resolve a conflict in favor of local law—it could, for instance, provide that insurance contracts payable to locals, or insuring property located in the state, shall be governed by local law. Or it might resolve a conflict in favor of foreign law—it may say that the validity of a marriage performed outside the state shall be determined by the law of the place of celebration, or that descent of personal property for persons domiciled outside the state shall be governed by the law of the foreign domicile.

In contrast to specifications of scope, assignments of priority bind local courts but not foreign courts. No state can tell another state how to resolve conflicts between the laws of co-equal sovereigns.[22] How a state's law interacts with the law of another state is a question on which each state is entitled to make its own determination.

If we survey state statutes and judicial interpretations of them, we can see that legislatures have done all these things.[23]

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21. *See generally id.* § 5.02 (discussing choice-of-law legislation). *See also* Kermit Roosevelt III, *Resolving Renvoi*, 80 NOTRE DAME L. REV. 1821 (2005) (using two-step framework to analyze problem of renvoi)

22. *See* Pacific Emps. Ins. Co. v. Industrial Accident Comm'n of California, 306 U.S. 493, 501 (1939) (holding that when the laws of two States overlap, "the law of neither can by its own force determine the choice of law to be applied in the other").

23. *See* RESTATEMENT (THIRD) OF CONFLICT OF L. TENTATIVE DRAFT 3 § 5.02, comments a-c (AM. L. INST. 2022).

Generally speaking, they do a pretty good job of indicating which of the things (determine scope, assign priority to local law, or assign priority to foreign law) they are doing. When legislatures set scope, they most often do so by using an "in this state" qualifier. Wage and hour acts might be limited to work "performed in this state" and wrongful death acts to deaths "caused in this state." Some vehicle owners' liability statutes impose vicarious liability on owners of vehicles "used or operated in this state."

All of these qualifications are consistently interpreted as limiting the scope of the statutes. Thus, a Wisconsin statute that says it gives a claim for wrongful deaths "caused in this state" gives a claim for deaths caused in Wisconsin and does not give a claims for those caused in Michigan. If the statute has a damages cap, that limitation might protect a defendant who caused a death in Wisconsin, but it will not protect a defendant who caused a death in Michigan. The latter defendant is unprotected not because the relevant choice-of-law rule does not give priority to the defense created by Wisconsin law, but because that defense is not available for deaths caused outside Wisconsin, independent of choice of law. Wisconsin law simply has nothing to say about such deaths: no claim, no defense, nothing. As the Wisconsin Supreme Court put it in just such a case, *Waranka v. Wadena*, because the Wisconsin wrongful death statute is limited to deaths caused in Wisconsin, "we need not undertake a conflict of laws analysis" with respect to a death caused in Michigan.[24] Only Michigan law is relevant.

By contrast, when legislatures intend to assign priority, they tend to use the word "govern." They might, for instance, provide that certain insurance contracts, for instance, "shall be governed" by the state's law. [25] Or they might phrase the statute as a direction to courts conducting a choice-of-law analysis: they might provide that a state's law "shall be applied" in certain cases.[26] Courts consistently interpret these phrasings as instructions to select the state's law. Because they are about priority rather than scope, they bind only the courts of the enacting state.

C. Understanding the Debate

Here's where we are. Modern choice-of-law methodology and judicial practice follow a two-step model. They ascertain the scope of state laws to determine whether there is a conflict between

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24. 847 N.W. 2d 324, 333 (Wisc. 2014).

25. *See, e.g.,* Reddy Ice Corp. v. Travelers Lloyds Ins. Co., 145 S.W.3d 337 (Tex. App.-Hous. 14th Dist. 2004) (construing Tex. Ins. Code 15 Ann. art. 21.42 (Vernon 1981)).

26. *See, e.g.*, OREGON REV. STAT. 465.480(2)(a).

relevant laws, and if there is, they assign priority to one of the competing laws. Legislatures assist courts in this process by specifying the scope of their own laws (binding all courts), and by instructing courts which law to choose in the event of a conflict (binding local but not foreign courts). They use characteristic language that distinguishes statutes about scope (commonly, "in this state") from those about priority (commonly, "govern" or "shall be applied"). One of the main contributions of the Third Restatement is to reveal this structure, and the extent to which legislatures follow it is documented in Tentative Draft 3.[27]

So what is the debate about? Practice is uniform, but other interpretations of "in this state" statutes are, at least in theory, possible. One might be that a statutory specification of scope is also intended to resolve the second step of choice-of-law analysis: it is intended to direct courts to select the law for cases within its scope. A Wisconsin wrongful death statute providing a cause of action for "deaths caused in this state," on this understanding, tells Wisconsin courts to select the statute for cases involving deaths caused in the state. If the statute has a damages cap, for instance, that damages cap will control for a death caused in Wisconsin, even if both parties are from Michigan, and Michigan has no damages cap—at least, it will control for cases brought in Wisconsin courts.[28]

Professor Lea Brilmayer, an Adviser to the Third Restatement, proposed this interpretation in a comment on Preliminary Draft 2, arguing that an "in this state" wrongful death statute should be interpreted as a legislative direction to give priority to that state's law for cases within its scope.[29] (Thus, a Wisconsin statute creating a claim for "deaths caused in this state" would direct Wisconsin courts to select Wisconsin law for such deaths.)[30] That would make it a choice-of-law rule, so it would bind Wisconsin courts but not foreign courts. But this interpretation is

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27. *See generally* RESTATEMENT (THIRD) OF CONFLICT OF L. TENTATIVE DRAFT 3 Chapter 5 (AM. L. INST. 2022) (Choice of Law Introduction).

28. Most modern choice-of-law analysis would select the law of shared domicile to govern a limitation on damages.

29. *See* Lea Brilmayer, *Two-Step Choice of Law Theory and the Draft Restatement (Third) of Conflicts of Law: A Critical Introduction* 1 (2017) (unpublished manuscript, on file with author) (stating that a legislature enacting "a statute that provides a cause of action for 'wrongful deaths caused in this state'" has "instructed" a local judge to apply that statute for such deaths).

30. In response, the REPORTERS' MEMORANDUM FOR COUNCIL DRAFT NO. 2 set out the uniform interpretation of statutes with "in this state" provisions. *See* RESTATEMENT (THIRD) OF CONFLICT OF L. REPORTERS' MEMORANDUM COUNCIL DRAFT NO. 2 (AM. L. INST. 2017), REPORTERS' MEMORANDUM at xvii-xviii. Courts treat such statutes as restricting scope but not assigning priority. Thus, for a case featuring a death caused in Wisconsin, but parties from Michigan, a Wisconsin court would do a choice-of-law analysis to decide which issues should be governed by Wisconsin law and which by Michigan law. It would not interpret the statute as an instruction to select Wisconsin law.

contrary to practice and it has not been advanced in the law reviews.[31]

A second alternative interpretation would be that an "in this state" restriction is about scope, but in an unusual way. It limits some rights and expands others: when a statute prohibits certain conduct, it authorizes everything else. Thus, if it gives a claim to plaintiffs under certain circumstances, it gives a defense to defendants under all others. A law that creates a cause of action for deaths caused "in this state" creates a claim for deaths caused in the state, and a defense against liability for deaths caused outside the state.

This understanding is bizarre. It is all but impossible to imagine a legislature intending such results. It has never been adopted by a court and I am aware of no scholar who has ever suggested it as even plausible. Professor Vázquez, who does not endorse it, calls it "the principal competing view" to his preferred interpretation.[32] That characterization does not reflect the real world, but it does perhaps make his view look better by comparison.

Third and last, we might suppose that the geographic limitation is an oblique method of giving priority to foreign law. On this understanding, it does not limit the rights created by the statute at all. A law that creates a cause of action for deaths caused "in this state" also creates a cause of action for deaths caused outside the state. The phrase "in this state" is not a limit on scope but a direction to courts of that that state to give priority to foreign law for deaths outside the state. If we are talking about a Wisconsin law, when the legislature says "There is a cause of action for deaths caused in this state," what it means is that Wisconsin law creates a cause of action for deaths caused anywhere, but Wisconsin courts should not enforce it for deaths caused outside Wisconsin. But because this instruction is about priority and not scope, it is a choice-of-law rule that Michigan courts should feel free to disregard. If a death is caused in Michigan, a plaintiff could not recover under Wisconsin law if they sued in Wisconsin, but they might be able to recover under Wisconsin law if they sued in Michigan.

This is also a strange way of reading the statute, which seems to have very little connection to what the legislature actually said. It also has never been adopted by a court. But it has one academic champion, which is Professor Vázquez.

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31. *See* RESTATEMENT (THIRD) OF CONFLICT OF L. REPORTERS MEMORANDUM (Addendum) COUNCIL DRAFT NO. 2, xvii-xix (AM. L. INST. 2017). (collecting cases showing that "in this state" provisions are not interpreted as directions to select the state's law).

32. Vázquez, *supra* note 3, at1294. As we will see, Professor Vázquez attributes this understanding to the Third Restatement, which is a serious misunderstanding of the Restatement.

So the debate comes down to how to interpret an "in this state" statute, picking from the possibilities discussed above. Primarily, the choice is between treating it as a restriction on the scope of state-created rights, and hence part of the state's internal or local law, and treating it as a choice-of-law rule. (A state's law may be divided into its internal or local law and its choice-of-law rules.[33]) Again, the main significance of the distinction is that states must respect other states' definitions of their own internal law, but they need not follow other states' choice-of-law rules.

This would be an interesting question if there were no decisions interpreting such statutes, or if there were decisions going in different directions. As the draft Restatement demonstrates, however, judicial interpretations are in fact uniform. That makes the question somewhat less interesting, if one accepts the basic point that state courts are authoritative about the meaning of their laws.[34]

An argument that state courts have all gotten the meaning of their statutes wrong is a strange one. It is not likely to persuade readers or even get noticed. To win attention and make this a debate worth having, what is needed is some kind of support for the different interpretations that the professors put forth. In *Non-Extraterritoriality,* Professor Vázquez claims to find that support in different iterations of the Restatement of Conflict of Laws. Those claims are wrong and misleading. I turn now to that article.

III. NON-EXTRATERRITORIALITY

A. Introduction

In *Non-Extraterritoriality*, Professor Vázquez first comes up with new names for and new ways to describe the possible

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33. The Second Restatement used the phrase "local law" to designate a state's law exclusive of its choice-of-law rules. The draft Third Restatement uses the phrase "internal law" to promote clarity, because "local law" is often used to mean domestic rather than foreign law, or law created by localities. *See* RESTATEMENT (THIRD) OF CONFLICT OF L. TENTATIVE DRAFT 2, § 1.03 (AM L. INST. 2021).

34. Surprisingly, neither Professor Brilmayer nor Professor Vázquez makes any attempt to engage with the caselaw assembled by the Restatement. Instead, they argue from their assumptions about what legislatures intend. *See* Brilmayer, *supra* note 30 at 1 (claiming that in writing an "in this state" restriction "the legislature apparently intended" to direct local courts to select local law); Vázquez, *supra* note 3, at 1349, 1350-51. (suggesting that legislatures limit the scope of state laws to reduce the burden on local courts) Professor Vázquez at times seems to make the slightly different argument that, regardless of what legislatures intend, they simply lack the power to limit the rights they create. *See id.* at 1350-51. (suggesting that states can ignore other states' scope restrictions by characterizing them as procedural). This argument too is strange—it defies the basic premise that the meaning of a state's law is a question for its courts and legislature.

interpretations discussed above. First, the article says, a scope restriction might reflect the legislature's view that the case "should be governed by the law of another state."[35] Thus, the article maintains, the scope restriction "functions as a choice of law rule."[36] And because it *functions* as a choice-of-law rule, it can also be *treated as* a choice-of-law rule, which is to say that it can be disregarded by courts of other states. That is, despite the fact that the state's legislature has said it is not creating claims for out-of-state deaths, other states can nonetheless use the state's law to create them. Michigan courts can use the scope-limited Wisconsin law to give a recovery for a death caused in Michigan. This is the last possibility discussed above, which *Non-Extraterritoriality* calls the "one-sided conflicts" understanding.[37]

Second, *Non-Extraterritoriality* claims, the state might be understood to have "a different substantive law" for the case.[38] If the statute prohibits something, but the case falls outside its geographic scope, the state law should be understood to authorize it. The article calls this "the two-sided substantive approach." This is the second possibility discussed above, and it is a preposterous position, which no one has ever adopted.[39]

A second variant of the two-sided substantive approach, the article mentions in passing, says that although a scope-limited law does not create rights for cases outside its scope, some other law of the state might govern if that law reaches the case.[40] That proposition is trivially true and universally accepted. If a state's law reaches the case, then it might govern, and different laws can have different scope. (A Wisconsin statute giving a cause of action for

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35. Vázquez, *supra* note 3, at 1292. Here again it is unclear whether Professor Vázquez is claiming that the legislature does not intend to restrict the scope of its law, or that it lacks the power to do so.

36. *Id.*

37. Again, Professor Vázquez is not clear on whether he thinks this interpretation is consistent with legislative intent, or whether it is something a legislature simply has no power to prevent. At times he seems to endorse a mix: the legislature has said it is limiting the scope of its rights, but it does not care whether other states respect that limit. *See id.*at 1322.

38. *Id.* at 1294.

39. Professor Vázquez cites an overruled district court decision, Budget Rent-a-Car v. Chappell, 304 F. Supp. 2d 639 (E.D. Pa. 2004) as an example. *See* Vázquez, *supra* note 3, at 1326-27. He misreads that decision. Interpreting a New York statute that imposed vicarious liability on owners of cars "used or operated in New York," the Budget court said that because the vehicle in the case did not fall within the restriction, there was no vicarious liability under New York law. But that simply means that New York law does not impose liability, which is consistent with the idea that the scope limit is part of the content of New York law, what the article calls the one-sided substantive approach (discussed below). It does not mean that the statute protects the driver from liability under another state's law, which is what the two-sided substantive approach implies. Indeed, the court noted that New York had no interest in protecting the driver. *See Budget Rent-a-Car*, 304 F. Supp. 2d. at 650. [Disclosure: I participated as a consultant in the appellate litigation of Budget.]

40. Vázquez, *supra* note 3, at 1294.

deaths "caused in this state" will not give a claim for a death caused in Michigan, but another Wisconsin statute giving a cause of action for "any death caused by a car registered in this state" might.) This proposition is actually consistent with what Professor Vázquez calls the one-sided substantive approach (discussed below), which suggests that perhaps the article's novel terminology is not an advance.

Last, the article mentions what it calls the one-sided substantive approach, which says that a state has no law for cases outside the scope of a statute and that this absence of legal effect is part of the substance of the statute, so that other states must respect it. This, as noted earlier, is the uniform position of courts in the United States, including the United States Supreme Court.[41] And, also as noted above, it has been adopted by the draft Third Restatement.

All of these possibilities can be discussed more easily and clearly in the ordinary legal language that courts already use, although clarity also suggests that the first two are so odd they might not be worth talking about. Rather than an illuminating theoretical framework, *Non-Extraterritoriality* gives us a confused taxonomy most of whose categories bear little relationship to anything courts or scholars have actually said. The real problems, though, arise when the article turns its attention to the Restatements.

B. The Second Restatement

Non-Extraterritoriality claims that the Second Restatement adopted the one-sided conflicts approach—that is, that it views geographical limits in state laws as choice-of-law rules that other states are free to disregard. More, the article claims that this reading of the Second Restatement is "plain[]" and "clear."[42] That Professor Vázquez could maintain this characterization is—to put it gently—surprising. Let's see why.

According to the Second Restatement, a state's law (or, more helpfully, its "entire law") can be divided into its "local law" and its choice-of-law rules. If you wanted to know in which of these categories the Second Restatement placed geographical limits, you might hope that it said something about the nature of geographical limits. It does not. You might then look to the definition of "local law." That simply tells you that a state's local law is its law

41. *See, e.g.,* Morrison v. National Australia Bank, 561 U.S. 247, 254 (2010) ("to ask what conduct [a law] reaches is to ask what conduct [it] prohibits, which is a merits question").

42. Vázquez, *supra* note 3, at 1302-03.

"exclusive of its [choice-of-law] rules… ."[43] You might then look to its definition of choice-of-law rules, at which point you would learn something: In Comment a to Section 6, the Second Restatement describes "a statutory directive on choice of law" as a statute that "provide[s] for the application of the local law of one state, rather than the local law of another state."[44]

This definition seems pretty straightforward and sensible: to be a choice-of-law rule, a statute must actually tell a court which law to choose. By its terms, the definition excludes scope restrictions—at least if we interpret them in the way that all courts do. A Wisconsin statute that specifies it reaches only "deaths caused in this state" does not select any state's law. It tells you that for deaths caused in Wisconsin, the statute provides a plaintiff with a claim. The statute may or may not end up being used to govern all issues relating to such deaths—if the parties are both from Michigan and the issue is a limitation on damages, for instance, courts using a modern choice-of-law approach would likely select Michigan law to govern that issue. The statute will not be selected for deaths outside Wisconsin, but that does not tell us what law will be selected. So the Second Restatement's definition of choice-of-law rules tells us that a geographic scope restriction is not one.[45]

Non-Extraterritoriality does not look at the Second Restatement's definition of choice-of-law rules. (Indeed, we will see later, it appears unaware that the definition exists.) Instead, its main argument comes from Section 8 of the Second Restatement, which discusses *renvoi*—the possibility of selecting another state's *entire* law and thus using that state's choice-of-law rules.[46] (A Wisconsin court that selected the entire law of Michigan for a wrongful death case would proceed to apply not Michigan's wrongful death statute but Michigan choice of law—which might lead it to the law of yet another state.) From this section the article derives a

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43. RESTATEMENT (SECOND) OF CONFLICT OF L. § 4 (AM. L. INST. 1971).

44. *Id.* at § 6 cmt. a.

45. To put the point briefly, in the language of the Third Restatement, to qualify as a choice-of-law rule, a statute must address the issue of priority. Comment *b* to Section 6 supports this understanding; after Comment *a* explains what a choice-of-law rule is, Comment *b* goes on to discuss the apparently distinct issue of the "intended range of application of a statute." It says that "if the legislature intended that the statute should be applied only to acts taking place within the state, the statute should not be given a wider range of application." Oddly, however, this admonition is offered only with respect to local statutes, which introduces some ambiguity. My view is that the Second Restatement lacked the vocabulary to distinguish between scope and priority and is therefore at times conceptually unclear, particularly in its use of the word "apply." For a discussion of the ambiguity inherent in "apply," see RESTATEMENT (THIRD) OF CONFLICT OF L. TENTATIVE DRAFT NO. 3 § 5.03, cmt. c (AM L. INST. 2022).

46. For a discussion of renvoi, *see generally* Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821 (2005).

description of "local law" as "the law that the courts of a state would apply to a case 'involv[ing] facts purely local to it.'"[47] The article proceeds to conclude that this description excludes geographic limits, and that therefore the Second Restatement views such limits as choice-of-law rules.

But this description does not, in fact, tell us that local law excludes geographic scope restrictions. If we imagine a Wisconsin statute creating a claim for wrongful deaths "caused in this state," Wisconsin courts would apply that statute to a purely domestic case. But would they be applying a statute with a geographic restriction, or one from which the restriction had been removed? The description gives us no way to tell, but there is no obvious reason to suppose that the restriction would be removed (why would a court eliminate part of a statute in a purely domestic case?).[48] No reason, that is, unless we assume that the limitation is a choice-of-law rule and not part of the substance of the statute. But that is precisely the question at issue, and so the article's main argument is question-begging.

So this description of "local law" does not tell us what counts as a choice-of-law rule. Perhaps that is not surprising; they are different concepts and Section 8 does not define either of them. If we look to the definition of a choice-of-law rule, as noted above, we will find that geographical limits do not count.

Non-Extraterritoriality goes on instead to discuss an Illustration to Section 8. The Illustration says that if a State X court has selected State Y local law to govern the distribution of a decedent's property in State X, the State X court should decide the case "in the same way as a Y court would have decided if … all … relevant contacts had been located in State Y."[49]

That does seem to suggest that geographic restrictions should be ignored. But the Illustration does not feature a geographic restriction, and if we introduce one, some strange consequences emerge. Suppose that State Y has a law saying that ownership rights to certain "property in this state" are invalid unless a deed is filed with the State Y Registrar of Deeds. State X has no such requirement for that kind of property, and the property has not been registered. Does the selection of Y local law really mean that the court should ignore the geographic restriction and hold that the decedent did not own the property located in State X? (It has not

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47. Vázquez, *supra* note 3, at 1302-03.

48. By way of comparison, imagine a Wisconsin court applying a Wisconsin statute that regulates employers with more than ten employees. If the court applies this statute to an employer with 15 employees, is the numerosity requirement gone?

49. RESTATEMENT (SECOND) OF CONFLICT OF L. § 8 cmt. d, illus. 1 (AM. L. INST. 1971).

been registered with the State Y Registrar; if we decide the case as if it were State Y property, the ownership is invalid …) That seems very strange. And this is not just about property. Suppose State X law says that voting rights are limited to persons "resident in this state." If, as seems sensible, we select State X internal law to govern the issue of who can vote in State X elections, do we decide the case of a State Y resident as if they lived in State X and conclude they are entitled to vote?

If this interpretation of the Illustration produces bizarre results, it might be worth thinking again about whether the Illustration is in fact meant to illustrate that point. Illustrations, the ALI Style Manual instructs, "need to be concise and limited to the facts essential to demonstrating the functioning of the precise rule or principle under discussion. The facts set forth should point unambiguously to a single definitive resolution, which is stated at the conclusion of the Illustration."[50] Given that admonition, it seems rather odd that an Illustration supposedly telling us that geographic scope restrictions are choice-of-law rules that should be ignored by courts of other states does not state that principle and *does not even feature a scope restriction* as part of its fact pattern.

If we look to the text preceding the Illustration—the comment that the Illustration is intended to illustrate—we see that the principle announced there is that when a choice-of-law rule selects the "law" of another state, a court must decide whether the reference is to that state's local law (which excludes choice-of-law rules) or to its entire law (including choice-of-law rules). The significance of this—and the topic of Section 8, *renvoi*—is that if the court consults the entire law, it may be further directed to a different state's law. A State X court that selects the entire law of State Y, that is, may be directed by a State Y choice-of-law rule to pick the law of State Z. A State X court that selects the local law of State Y will simply decide the issue under Y law. Those two possibilities—1) using Y choice-of-law rules and thereby perhaps ending up with a different law, and 2) deciding under Y law with no possibility of being directed to another law—are the "bookends" that the Illustration seeks to distinguish. (The quoted word comes from the Style Manual, which instructs that "a Reporter should conceive of Illustrations typically as 'bookends' that demonstrate fact patterns in which the rule or principle at issue either clearly applies or clearly does not."[51])

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50. CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK, 44 AM. L. INST. (rev. ed. 2015).

51. *Id.*

Neither of these possibilities has anything to do with how to treat a geographic scope limitation. It seems quite likely, then, that the formulation "decide the case in the same way as a Y court would have decided if … all … relevant contacts had been located in Y" was adopted in order to push the facts to one bookend outcome—to make clear that there is no possibility of choosing another state's law. Whatever Y's choice-of-law rules are, a Y court will not consult them in a case in which all contacts are located in Y.

This description, then, was most likely written to make clear that Y's choice-of-law rules will not be consulted. It was not written to define what counts as a Y choice-of-law rule. Its implications for geographic scope restrictions, most likely, were simply not considered—because, again, *there is no scope restriction* in the facts.

The article's presentation of the Second Restatement is strained and unconvincing. Relying on implications from an Illustration of a different concept, rather than the explicit definition of choice-of-law rules, is an odd choice. But to get a real sense of the article's quality, it helps at this point to broaden the scope of analysis to include the discussions within the American Law Institute and the judicial interpretation of the Second Restatement.

A casual reader of the Second Restatement might overlook the definition of choice-of-law rules. A superficial reading of Illustration 1 to Section 8 might not consider the strange results that flow from *Non-Extraterritoriality*'s interpretation. So an outsider to the process might well find the argument at least superficially plausible. But all of these issues were raised repeatedly in the internal debates around the Third Restatement. Preliminary Draft 2, for instance, lists the strange results that would follow from treating scope limits as choice-of law-rules and requests comment on that issue.[52] Council Draft 1 notes that no comments attempting to justify those results were received.[53] Tentative Draft 2, presented to and adopted by the full membership, discusses Illustration 1 to § 8 and observes that an Illustration "dealing with a different issue [is] presumably not intended to override the definitions of Sections 6 and 8."[54] It quotes the Second Restatement's definition of choice-of-law rules and states that "According to these definitions, the second Restatement would place specifications of scope in the

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52. *See* RESTATEMENT (THIRD) OF CONFLICT OF L. REPORTERS' MEMORANDUM TENTATIVE DRAFT NO. 2 xxiii (AM. L. INST. 2016).

53. *Id.*; *See* RESTATEMENT (THIRD) OF CONFLICT OF L. REPORTERS' MEMORANDUM TENTATIVE DRAFT NO. 1 xiv (AM. L. INST.2017).

54. RESTATEMENT (THIRD) OF CONFLICT OF L. REPORTERS' MEMORANDUM TENTATIVE DRAFT NO. 1, xxiii (AM. L. INST.2017); RESTATEMENT (THIRD) CONFLICT OF L. TENTATIVE DRAFT NO. 2 § 1.03, cmt. c (AM L. INST. 2021).

category of internal law."[55] That is the official position of the American Law Institute, the institutional author of the Second Restatement. According to the ALI, that is, the Second Restatement does not consider specifications of scope to be choice-of-law rules. But *Non-Extraterritoriality*, which elsewhere breathlessly announces that it is rejecting "one of the official positions of the American Law Institute"[56] (more on that later) does not find this fact worth mentioning.

If the official position of the American Law Institute does not carry weight with respect to the interpretation of the Second Restatement, one might look elsewhere. If the Second Restatement is, as the article asserts, "clear" and "plain[]" in its indications that courts should ignore geographic limits, one would think that courts following the Second Restatement have understood that. It might surprise readers that *Non-Extraterritoriality* does not mention any cases endorsing that understanding.

The omission becomes less surprising, but somewhat more disappointing, when one learns that courts applying the Second Restatement have in fact *uniformly rejected* this idea. As the Seventh Circuit put it in *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, "The [Second] Restatement excludes from 'local law' only the choice-of-law rules of the state, not any territorial limitations contained in the statute."[57] The fact that Professor Vázquez's interpretation of the Second Restatement runs counter to every reported decision was raised repeatedly during the drafting of the Third Restatement, and several different sections, Reporters' Notes, and Reporters' Memoranda discussed the case law in detail.[58] *Non-Extraterritoriality* mentions none of this.

So how does *Non-Extraterritoriality* treat the Second Restatement? It asserts that its preferred interpretation is "clear" and "plain" despite the fact that it relies on an ambiguous phrase in

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55. RESTATEMENT (THIRD) CONFLICT OF L. TENTATIVE DRAFT NO. 2 § 1.03, cmt. c (AM L. INST. 2021).

56. Vázquez, *supra* note 3, at 1297.

57. Cromeens, Holloman, Sibert, Inc. v. AB Volvo, 349 F.3d 376, 386 (7th Cir. 2003). Other similar cases include Rabe v. United Air Lines, Inc., 636 F.3d 866 (7th Cir. 2011); Gravquick A/S v. Trimble Navigation Int'l, 323 F.3d 1219 (9th Cir. 2003) (California choice of law); Generac Corp. v. Caterpillar, Inc., 172 F.3d 971 (7th Cir.1999) (Wisconsin choice of law); *Highway Equip. Co. v. Caterpillar, Inc.*, 908 F.2d 60 (6th Cir. 1990) (Ohio choice of law); Peugeot Motors of Am., Inc. v. Eastern Auto Distrib., 892 F.2d 355 (4th Cir. 1989) (Virginia choice of law); Bimel-Walroth Co. v. Raytheon Co., 796 F.2d 840 (6th Cir. 1986) (Ohio choice of law); Cotter v. Lyft, Inc., 60 F. Supp. 3d. 1059, 1065 (N.D. Cal. 2014) (California choice of law); Avery v. State Farm Mut. Auto Ins. Co., 835 N.E.2d 801 (Ill. 2005); Sawyer v. Market Am., Inc., 661 S.E.2d 750, 753 (N.C. Ct. App. 2008); Baldewein Co. v. Tri-Clover, Inc., 606 N.W.2d 145 (Wis. 2000).

58. *See, e.g.,* RESTATEMENT (THIRD) CONFLICT OF L. TENTATIVE DRAFT NO. 3 § 5.01 (AM. L. INST., 2023).

a section about a different concept and an Illustration that does not feature the issue (a scope-limited law) that it is alleged to resolve. It does not mention that the actual definition of choice-of-law rules runs contrary to its preferred interpretation. It does not mention numerous bizarre consequences that follow from that interpretation. It does not mention that the interpretation has been unanimously rejected by courts applying the Second Restatement. It does not mention that the interpretation has been rejected by the American Law Institute, the institutional author of the Second Restatement. And finally, it does not mention that all of these points have been discussed within the American Law Institute for years and made directly to the author.

C. The Third Restatement and Tentative Draft 2

ALI is the author of the Second Restatement, but it was written decades ago, and perhaps the official position of the ALI should not matter in interpreting an older document. Somewhat more surprisingly, *Non-Extraterritoriality* goes on to reject the official position of the ALI and the authors of the Third Restatement with respect to the interpretation of *that* document as well.

The article starts its discussion of the Third Restatement by noting that it "maintains" that a choice-of-law rule is one that "selects the law of one state rather than another."[59] Geographic scope restrictions, the article appears to agree, do not meet that definition: geographic scope limits "fail that test because they do not indicate which state's law applies."[60] (Astonishingly, the article conducts this whole discussion without acknowledging that this definition *comes from the Second Restatement*—a move we will see again.)

From this point, the article proceeds to claim that "the draft Third Restatement's definition of internal law embraces the two-sided substantive understanding"—that is, that the Third Restatement maintains that a state that limits a cause of action to deaths caused in its territory provides a defense against liability to people who cause deaths elsewhere.[61] This is, as noted above, a strange interpretation that no court has ever adopted and no scholar has ever defended. One might hesitate before attributing it to a Restatement, or demand clear evidence, or perhaps even consider the views of the authors. *Non-Extraterritoriality* instead proceeds

59. Vázquez, *supra* note 3, at 1304.
60. *Id.*
61. *Id.* at 1305.

again via analysis of an Illustration, in this case Illustration 1 to Section 1.03 of Tentative Draft 2.

That Illustration posits a State X wrongful death statute limited to deaths "caused in this state." The statute places a limit on the damages that may be recovered. What effect does it have on a suit between two X domiciliaries for a death caused in State Y? The Illustration says that "the statute does not operate to limit recovery."

When I wrote this Illustration, it seemed pretty clear to me what it was saying. Because the statute is limited in its scope, it attaches no legal consequences for events outside its scope. In particular, on the precise issue the Illustration was chosen to illustrate, it does not give the X defendant a defense against unlimited liability. That point is what is stated as the conclusion. Thus, if Y law imposes unlimited liability, the X defendant cannot invoke the X damages cap to protect him, even though, in a suit between two X domiciliaries, it would likely be selected if it were not geographically limited.

The Reporters' Note to Section 1.03 explains the Illustration in just those terms, noting the case upon which it is based:

> Illustration 1 is based on *Waranka*, 847 N.W.2d 324. Wisconsin has a wrongful-death statute limited to deaths caused within Wisconsin. The statute includes a cap on noneconomic damages. The Wisconsin Supreme Court held that, as a matter of statutory interpretation rather than choice of law, neither the wrongful-death statute nor the damages cap applied to a suit between Wisconsin domiciliaries for a death caused in Michigan.[62]

Non-Extraterritoriality rejects this explanation. Instead, it claims, the Illustration means that State X has a law "authorizing unlimited damages" for deaths caused in State Y.[63]

This interpretation is perverse: that is not what the Illustration says, and not what the case upon which it is modeled says either. It is incoherent: if the State X limit on damages is understood to impose unlimited damages for cases outside its scope, the State X law on liability should also be understood to give a defense for cases outside its scope, which creates an internal conflict within State X law. And again, to get a real sense of the quality of

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62. RESTATEMENT (THIRD) CONFLICT OF L. TENTATIVE DRAFT NO. 2 § 1.03 (AM. L. INST. 2021).

63. Vázquez, *supra* note 3, at 1306.

the analysis, it helps to consider the discussions within the American Law Institute and the drafting process.

The correct interpretation of the Illustration was discussed at length both in meetings and via direct communications. For example, one email from the author of the Illustration to the author of *Non-Extraterritoriality* read in part

> I have said to you several times that I believe a state has no law for events outside the scope of its law. This is one of the consequences of taking seriously what states say about the scope of their law, as opposed to thinking that maybe they do have an invisible law that other states can conjure contrary to the express words of the statute (and if other states, why not parties using a choice of law clause?). Yet you characterize the draft as suggesting that a state has "a law prescribing non-regulation" for events outside the scope of its law. I suppose I'm not sure what you mean by "a law prescribing non-regulation," but if you mean by it what I think—rights that could be invoked against regulation under another state's law—then it's completely contrary to the draft. I believe I said exactly this to you in a recent email. If there is any way I can clarify this further, please let me know.[64]

Again, *Non-Extraterritoriality* does not find this worth mentioning. Its refusal to acknowledge the expressed intentions of the author of the Illustration is, however, at least consistent with Professor Vázquez's conduct during the drafting process. After receiving this email he submitted a motion to recommit the draft for further discussion, asserting that Illustration 1 took the position that "State X *has a law* for deaths caused in State Y, and that law permits unlimited damages in such cases."[65] Other participants suggested that this interpretation was mistaken: during discussion of Section 1.03 before the annual meeting, an Adviser wrote to Professor Vázquez "I do agree that there is no State X internal law for State Y deaths. But Section 1.03 never says that there is; that characterization comes from your motion."[66] Again, Professor Vázquez was undeterred.

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64. Email from Kermit Roosevelt III, to Carlos Vázquez, Scott K. Ginsburg Professor of Law, Georgetown U. L. Ctr., (Oct. 28, 2020) (on file with author).

65. Motion to recommit Section 1.03 at 3 (emphasis in original).

66. Email from William S. Dodge, Lobingier Professor of Comparative Law and Jurisprudence, George Washington University L. School, to Kermit Roosevelt III (June 1, 2021) (on file with author).

The motion was defeated. Recognizing my inability to convince Professor Vázquez that his absurd interpretation was not what I intended, and receiving no response to my request for assistance in making that clear, I then removed the Illustration entirely in the hopes of making it more difficult for him to spread his misinterpretation. All project participants were notified.[67] Even that step seems to have had no effect. *Non-Extraterritoriality* declares with no embarrassment that "The draft Third Restatement … rejects the view that a state has no law for cases beyond the statute's specified external scope" and bases this assertion on the now-nonexistent Illustration 1.[68] I simply do not know how to describe this course of events. What I can say is that the article's bold claim that it advocates rejecting "one of the official positions of the American Law Institute"[69] is not true and would be false even if the article were correct in its interpretation. We need no longer argue about what Illustration 1 means. It literally does not exist.

So how does *Non-Extraterritoriality* handle the Third Restatement? It offers an interpretation (which again it calls "clear"[70]) that makes no sense at all and that no court or scholar has ever adopted—surely a strange thing for a Restatement to do. It bases that interpretation on an Illustration that does not state the principle the article attributes to it, and which both the author of the Illustration and others said did not support that principle. And it maintains this interpretation even after the Illustration was removed in an effort to avert it.

None of this information, of course, would be available to a reader of *Non-Extraterritoriality*—not to an Articles Editor reviewing the submission, not to a cite-checker, and not to a scholar, judge, or practitioner seeking to understand the Third Restatement. It is too late to correct the process that led to the article's publication in this form, but anyone reading it now should understand that its characterization of Tentative Draft 2 is simply disconnected from reality.

D. The Third Restatement and Tentative Draft 3

Non-Extraterritoriality has a bit more to say about the Third Restatement. "[T]he ALI," it suggests, "might be moving toward the

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67. *See* RESTATEMENT (THIRD) CONFLICT OF L. PRELIMINARY DRAFT NO. 7 (AM. L. INST. 2021) (noting the removal of the Illustration).

68. Vázquez, supra note 3, at 1306

69. *Id.* at 1297.

70. *Id.* at 1305.

one-sided substantive view."[71] Rather than supposing that a statute creating a claim for wrongful deaths "caused in this state" is intended to protect people who cause deaths outside the state, that is, the ALI "might be moving" towards the view that the statute is intended simply to do what it says: create a claim for deaths caused in the state.

Non-Extraterritoriality bases this assertion on Chapter 5 of the Third Restatement, approved by the membership as part of Tentative Draft 3 at the 2022 Annual Meeting. Chapter 5 sets out the draft Restatement's understanding of choice of law, what it calls the two-step model. According to this model, choice of law is a process of first identifying relevant laws and second, if they conflict, selecting one. A state's law is relevant "if the facts of the case bring an issue within the scope of the state's law."[72] Thus, if the facts of a case fall outside the scope of a state's law—if, for instance, a statute restricts its scope to deaths caused "in this state" and a death is caused outside the state—the statute creates no rights and imposes no obligations.

Non-Extraterritoriality is correct that this is the view of the ALI. It is incorrect that this is a change. If one finds sections of a Restatement that are inconsistent with an interpretation of other sections, it might be worth considering whether what is going on is not that the ALI has changed its position but that the earlier interpretation was incorrect—especially if, as noted above, everyone involved in the drafting process said so. *Non-Extraterritoriality* appears to base its assertion that there has been a change on the fact that Tentative Draft 3 was approved in 2022, at the Annual Meeting following the 2021 meeting at which Tentative Draft 2 and § 1.03 were approved.

Again, this argument might seem plausible to an outside observer. 2022 comes after 2021; a position approved in 2022 might represent a change from one approved in 2021. And again, broadening the focus to include a perspective on what happened inside the ALI is helpful.

Restatement drafts go through several stages. First, Reporters prepare a Preliminary Draft, which is presented to and discussed with the Advisers and members such as Professor Vázquez who have appointed themselves to the Members Consultative Group. Second, that draft is revised and presented to the ALI Council as a Council Draft. Only after material is approved by the Council may it be presented to the full membership at an

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71. *Id.* at 1307.

72. RESTATEMENT (THIRD) CONFLICT OF L. TENTATIVE DRAFT NO. 3 § 5.01, Comment b (AM. L. INST. 2023).

Annual Meeting, as a Tentative Draft. What that means is that the date on which a provision is approved by the members has no necessary relation to the date on which it was drafted or approved by the Council. Provisions drafted together might even be approved separately.

Tentative Draft 3 explains how that process worked for the choice of law introduction in Chapter 5.

> The Introduction to Choice of Law was first presented to the Advisers as part of Preliminary Draft No. 1 in September 2015. It was revised in response to Adviser comments and presented and discussed again as part of Preliminary Draft No. 2 in September 2016. It was revised in response to the comments received at that meeting and presented to the Council in November 2016. Because the Council meeting did not provide sufficient time for a full discussion of those Sections, they were revised and presented to the Council again as part of Council Draft No. 2 in September 2017. At that meeting, the Council voted to approve the Choice-of-Law Introduction along with the more general introductory Sections, 1.01–1.04.[73]

Thus, it is not the case that Section 1.03 precedes Chapter 5 in any meaningful sense. All of the introductory material (Chapter 5, the introduction to choice of law, and Chapter 1, the general introduction) was drafted together, and it was presented together as part of Preliminary Draft 1 to the Advisers and the MCG. From that very first moment—the very first project meeting—the draft took what *Non-Extraterritoriality* calls the one-sided substantive position.[74]

Chapter 5 in Preliminary Draft 1 stated in Comment *b* to § 5.02 that "[a] court will not apply a statute if the litigated transaction or occurrence falls outside the scope of that statute." Illustration 2 to that Comment posited a wrongful death statute limited to deaths caused in State A and observed that for a death caused in State B "the court may not apply the State A statute, because the litigated occurrence falls outside its scope." The language from Tentative Draft 3 quoted above (that a state's law is relevant "if the facts of the case bring an issue within its scope")

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73. RESTATEMENT (THIRD) CONFLICT OF L. REPORTER'S MEMORANDUM TENTATIVE DRAFT NO. 3 (AM. L. INST. 2023).

74. Because the new terminology is not illuminating, I would prefer just to say that it understands specifications of scope as part of internal law, or that it reads statutes as written.

appears verbatim twice in Council Draft 2, from 2017.[75] And all of these sections were approved by the Council as part of a single draft, five years before Tentative Draft 3.

So *Non-Extraterritoriality* is wrong to suggest that the ALI has changed its position during the drafting process. It is also wrong to suggest that the ALI's position marks a change from the Second Restatement. *Non-Extraterritoriality* asserts that the current position departs from the Second Restatement "through terminological fiat. It defines a choice-of-law rule as a rule that 'select[s] the law of one state rather than another.'"[76]

"Terminological fiat" sounds a bit shady, and *Non-Extraterritoriality* goes on to speculate about why the draft Third Restatement engages in it (apparently it was "driven by the … view that [scope restrictions] substantively limit the reach of laws and that no court may apply a law beyond its specified reach."[77]) That view actually sounds pretty sensible to me. But before asking *why* the draft made a change, it might be worth asking *whether* it did so. And it might be relevant to that point that the "terminological fiat" supposedly changing the Second Restatement is in fact *the Second Restatement's definition of a choice-of-law rule.* It is, to put it gently, not obvious how adopting a prior Restatement's definition amounts to changing it by terminological fiat.

So how does *Non-Extraterritoriality*'s second encounter with the draft Third Restatement go? It asserts that a provision approved by the membership in 2021 has been changed by one that was written in 2015—one that was presented in 2015 to the author of the article and discussed with him for years, one that was approved at the same Council meeting as part of the same draft as the provision it supposedly changed. And it asserts that the Third Restatement changes the Second Restatement by adopting, verbatim, a definition from the Second Restatement. Again, I am simply at a loss to describe this.

E. Choice-of-Law Clauses and Section 8.04

Non-Extraterritoriality goes on to spill considerable ink critiquing the two-sided substantive theory and attempting to make plausible the one-sided conflicts theory. This is really a waste of time. As noted earlier, no one has ever endorsed the two-sided substantive theory. Whether the one-sided conflicts theory is correct

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75. RESTATEMENT (THIRD) CONFLICT OF L. Reporters' Memorandum TENTATIVE DRAFT NO. 2 § 1.03, xx (AM. L. INST. 2021).

76. Vázquez, *supra* note 3,. at 1311

77. *Id.*

is really a question of statutory interpretation, and here Professor Vázquez is simply arguing that all the courts to have interpreted such statutes have gotten the legislative intent wrong. (The New York Court of Appeals, for instance, warned that extending an "in this state" consumer protection act would unleash "a tidal wave of litigation against businesses … not intended by the Legislature."[78] The North Dakota Supreme Court observed that "[c]learly, the intention of the Minnesota Legislature in enacting [an "in this state" owners' liability statute] was that its provisions should apply only in case the operation of a borrowed motor vehicle was within the state of Minnesota … .'")[79]

If we wanted to take this argument seriously, though, the most relevant evidence would be what legislatures have done. As Tentative Draft 2 pointed out, in response to a judicial decision extending the Wisconsin Fair Dealership Law to a dealership located outside Wisconsin, the Wisconsin legislature amended the statute to add an "in this state" restriction.[80] "[T]he legislative history," the Sixth Circuit noted, "makes it abundantly clear that the language was intended to ensure that WFDL would only be applied to Wisconsin dealers … ."[81] And, crucially for this argument, the legislature acted not in response to a Wisconsin decision—to which the appropriate response might have been to enact a choice-of-law rule—but in response to a *Tennessee* decision.[82] The legislature was not trying to enact a choice-of-law rule that would bind only Wisconsin courts; it was trying to change the decisions in foreign courts by changing the substance of Wisconsin law. So there is strong direct evidence that legislatures enacting "in this state" restrictions do in fact intend to prevent courts of other states from using the scope-limited statute extraterritorially and do understand those restrictions as part of internal law—which is also what all the decisions say.

Ignoring both what courts have said and what legislatures have done in favor of armchair speculation about what they "likely"[83] intend is strangely self-indulgent and not particularly useful. There is, however, one remaining question worth some discussion,

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78. Goshen v. Mutual Life Ins. Co., 774 N.E.2d 1190, 1196 (N.Y. 2002).

79. Armstrong v. Miller, 189 N.W.2d 688, 692-93 (N.D. 1971).

80. RESTATEMENT (THIRD) CONFLICT OF L. Tentative Draft No. 2 § 1.03, Comment C (AM. L. INST. 2021).

81. Bimel-Walroth Co. v. Raytheon Co., 796 F.2d 840, 842 (6th Cir. 1986); *see also* Highway Equipment Co. v. Caterpillar, Inc., 908 F.2d 60, 63-64 (6th Cir. 1990). These cases flatly contradict Professor Vázquez's claim that legislatures are indifferent to whether courts of other states give extraterritorial effect to their laws.

82. *See* Boatland Inc. v. Brunswick Corp., 558 F.2d 818, 821 (6th Cir. 1977) (Tennessee choice of law).

83. Vázquez, *supra* note 3, at 1355.

which *Non-Extraterritoriality* gets to in Section I.B. What happens if the parties to a contract select, via a choice-of-law clause, a statute whose scope restriction excludes them?

The question is interesting, and identifying the appropriate outcome requires some thought. The two-step framework developed earlier offers a useful way of understanding what a choice-of-law clause does: for a contract that comes within the scope of more than one state's law, the choice-of-law clause (like a choice-of-law rule) assigns priority to the chosen law.[84] But if the contract is not within the scope of a particular law, the choice-of-law clause cannot give that law priority. That is, a choice-of-law clause selecting a law whose scope excludes the contract will be ineffective. The contract will be governed by whatever law would govern in the absence of the clause.

That is what Section 8.04 of the Third Restatement provides, adding that the parties' selection of a scope-limited law may be interpreted as an attempt to incorporate the content of that law.[85] The parties can do that, if they want, to the same extent as they could write the content of that law into the contract explicitly. Importantly, the consequence of incorporation is not that the parties get *statutory* rights, but that they get contractual rights.

What happens if instead, we adopt the one-sided conflicts perspective? According to the one-sided conflicts theory, remember, the geographical limit is simply a choice-of-law rule, which a choice-of-law clause can displace. Parties outside the geographic scope of the law still have rights under it and can enforce those rights if choice-of-law analysis selects that law, as the choice-of-law clause instructs.

Importantly, these rights are not contractual in nature. They come from the statute itself, just as they would if the statute had no limit and applied of its own force. The parties are in exactly the same situation as if the statute did not have a geographic scope limitation. (Because this point is so important, I confirmed it via email with Professor Vázquez.[86]) One consequence of this is that corporations that select their home law to govern sales contracts will subject themselves to nationwide class actions under a local

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84. The conventional requirement that the parties or transaction have some connection to the state whose law is chosen, *see, e.g.*, RESTATEMENT SECOND OF CONFLICT OF LAWS § 187(2)(a), is perhaps best understood as a test for whether the contract comes within the scope of that law. *See generally* RESTATEMENT (THIRD) CONFLICT OF L. 431 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 206 (2023) (discussing contractual choice-of-law clauses).

85. *See* RESTATEMENT (THIRD) CONFLICT OF L. TENTATIVE DRAFT NO. 5 § 8.04 (AM. L. INST. 202X).

86. *See* Email from Carlos Vázquez, Scott K. Ginsburg Professor of Law, Georgetown U. L. Ctr., to author (Feb. 19, 2021) (on file with author).

consumer protection statute, even if the statute explicitly limits its scope to "goods sold in this state."

Professor Vázquez seems to like that idea, since he spends a lot of time discussing one intermediate Illinois decision that appears to have followed that approach, *Hall v. Sprint Spectrum L.P.*[87] But *Hall* is an outlier, hard to square with the Illinois Supreme Court's proclamation in *Avery v. State Farm Mutual Automobile Insurance Co.* that a determination that the statute "does not apply, by its own terms, to the out-of-state transactions at issue in this case would render it unnecessary to address . . . choice-of-law . . . arguments."[88] It has been explicitly rejected by another Illinois intermediate court, in *International Profit Associates v Linus Alarm Corp.*[89]

What do other states' courts think of the idea of disregarding the explicit words of a statute? Readers of *Non-Extraterritoriality* will not know because, again, the article withholds the existence of relevant authority. But members of the American Law Institute, including the article's author, do know, because this issue was discussed repeatedly in drafts and at meetings. What the New York Court of Appeals said, as quoted above, was that this approach would subject corporations to a "tidal wave of litigation . . . not intended by the Legislature."[90] *Goshen* appears in no fewer than six Restatement drafts; *Avery*, in five. They appear in *Non-Extraterritoriality* not at all.

Authority on the topic of contractual choice-of-law clauses is uniform, except for *Hall*, and uniformly against Professor Vázquez's theory. The key to understanding the caselaw is the distinction between a statute applying of its own force, creating statutory rights, and incorporation of the terms of a statute into a contract, creating contractual rights. Symeon Symeonides explained this clearly thirteen years ago, in an article Professor Vázquez fails to cite: "Both the case law and the Restatement (Second) recognize the difference between choice-of-law clauses and incorporation clauses."[91] The Third Restatement explains it at considerable length in Section 8.04.[92] Courts agree on the following points. First, parties cannot select a state's law to govern issues outside its scope. They cannot give themselves statutory rights that the legislature

87. Hall v. Sprint Spectrum L.P., 876 N.E.2d 1036 (Ill. App. Ct. 2007).

88. Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801, 849 (Ill. 2005).

89. Int'l Profit Assocs., Inc., v. Linus Alarm Corp., 971 N.E.2d 1183, 1189-92 (Ill. App. Ct. 2012).

90. Goshen v. Mutual Life Ins. Co. of N.Y., 774 N.E.2d 1190, 1196 (N.Y. 2002).

91. Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMPAR. L. 303, 366 (2011).

92. *See* RESTATEMENT (THIRD) CONFLICT OF L. TENTATIVE DRAFT NO. 5 § 8.04 (AM. L. INST. 202X).

intended to withhold. But second, they may, if it is within their contracting power, incorporate the substance of that law into their contract. Whether they intended to do so is a question of contract interpretation. Whether they had the power to do so depends whether they could include such a provision under the law that would otherwise govern the contract.[93]

Non-Extraterritoriality seems not to understand the distinction between incorporation of the content of a statute and a statute applying of its own force, or how its theory affects that distinction. It says that "[t]he divergent understandings of [territorial scope limitations] mainly affect the presumptions that courts will apply in interpreting the [choice-of-law] clauses."[94] But that is wrong. What the one-sided conflicts theory does is to eliminate all that analysis, along with the possibility of incorporation. There is no room for interpretation or for presumptions; there is no opportunity for a court to ask whether the parties were trying to incorporate the law. The scope limitation is simply disregarded, like any other choice-of-law rule would be, and the statute applies in exactly the same way as if it did of its own force. (Again, as we discussed whether there was any way to fit this idea into the Third Restatement, Professor Vázquez confirmed that "exactly the same" is his view.)

That is contrary to almost uniform authority. And it leads to clearly incorrect conclusions. If the parties select a scope-limited federal law (say, Title VII, which does not reach the foreign operations of foreign employers), the one-sided conflicts theory maintains that they nonetheless have statutory rights—claims under Title VII. Those federal claims will create federal question jurisdiction. But that implies that parties can create federal question jurisdiction via a choice-of-law clause, and that is clearly wrong.[95]

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93. *See id.*; RESTATEMENT (THIRD) CONFLICT OF L. TENTATIVE DRAFT NO. 5 § 8.04 cmt. C, D (AM. L. INST. 202X).

94. Vázquez, *supra* note 3, at 1311.

95. Bizarrely, *Non-Extraterritoriality* discusses at considerable length a Seventh Circuit case in which the parties selected Title VII to govern conduct beyond its scope, apparently under the impression that the case supports its approach. *See id.* at 1312 (discussing Rabé v. United Air Lines, Inc., 636 F.3d 866 (7th Cir. 2011). But the *Rabe* court took pains to emphasize that federal question jurisdiction existed not because of the choice-of-law clause but "because plaintiff has asserted a colorable claim for coverage directly under the terms of the federal statutes . . . . ." *Rabé*, 636 F.3d, at 872. That is, it recognized that the contractual choice-of-law clause did not bring the plaintiff within the scope of the statute, and therefore he was not in "exactly the same" position as he would have been if the scope limitation had not existed. His claims were contractual, not statutory.

IV. CONCLUSION

There are three points that I hope this Essay makes clear. The first is about the state of the law. Courts have uniformly taken the position that a statute that says it is limited to in-state events is in fact so limited. They do not purport to apply state laws to facts that the enacting legislature has said are outside their scope. Legislatures have confirmed that this is their intent by amending statutes to make clear that scope is limited, in order to reverse judicial decisions giving exterritorial effect to ambiguous statutes. There is no conflict and no ambiguity in the caselaw.

The second point is about the content of the Second and draft Third Restatements of Conflict of Laws. The Second Restatement never explicitly considered the issue of laws with limited geographical scope, but I believe the better reading is that it would have considered such limits to be part of the content of the law. It seems unlikely that it would have taken a position that produces bizarre consequences and is unsupported by a single judicial decision, and its definition of choice-of-law rules excludes geographic limits from that category. The Third Restatement does explicitly consider the issue, and it takes the same position as every court: a state legislature can limit the scope of rights that it creates. Such limits are part of the content and meaning of the law; they are part of the internal law of the state rather than choice-of-law rules.

The third point is about *Non-Extraterritoriality,* Restatements, and legal scholarship more generally. To begin with, let's review the claims *Non-Extraterritoriality* makes. It offers an interpretation of the Second Restatement that disregards the actual definitions of the Restatement in favor of inferences from an Illustration addressing a different subject. The interpretation has been rejected by every court to have considered it. It has been rejected by the American Law Institute. *Non-Extraterritoriality* declines to mention any of that and calls its interpretation "clear" and "plain."

The article's first interpretation of the Third Restatement is in some ways strikingly similar. It is based on an Illustration, rather than the language of the relevant sections. It has never been adopted by a court. And it has been rejected by the American Law Institute. The problems go even further, though: the interpretation has also been rejected by the drafter of the Illustration, repeatedly and explicitly. And the Illustration itself has been removed from the

draft. Again, *Non-Extraterritoriality* mentions none of that. Again, it calls its interpretation "clear" and "express[]."[96]

The article's second interpretation of the Third Restatement is actually correct, and the article correctly notes that it is inconsistent with the first. But rather than reconsidering its first interpretation, *Non-Extraterritoriality* decides that the ALI must have changed its position—despite the fact that all the relevant sections were drafted together, presented together to the Advisers and Members Consultative Group, and approved by the Council as part of a single draft. The article also claims that the draft departs from the Second Restatement by a "terminological fiat" that consists of adopting verbatim a definition from the Second Restatement.

This collection of missteps is simply extraordinary. To be blunt, *Non-Extraterritoriality* should never have been published at all. Yet here it is in the Harvard Law Review. What lessons can we learn?

Most of the defects in the article would not be apparent to a student editor. Some of them, such as the "terminological fiat" of repeating a definition, could perhaps have been picked up. And it is somewhat discouraging that when these problems were pointed out explicitly, the Harvard Law Review declined to correct the article or even to allow a response, asserting simply that the article had been through "rigorous technical and substantive editing processes."[97] But to fully understand what is wrong with the article, one would really have to know what happened in the Restatement drafting process.

The student editors did not. Professor Vázquez, of course, did. Yet *Non-Extraterritoriality* does not mention this. Professor Vázquez received all the drafts and memos setting out the problems with his positions. He exchanged dozens of emails with the drafters discussing the different views and interpretations. He participated in meetings. He submitted and contested a motion about the central issue in the article. But he never mentions his own involvement, or the contrary arguments, or the contrary authority, or the actual process of drafting and approval, or the fact that his argument hangs on a part of the draft that was removed precisely because of his unusual persistence in making that argument—not in the text, not in an author's footnote, not at all.

An article that did disclose all of that might have been less appealing to Articles Editors. But law professors should put honesty and candor ahead of prestigious placement. Ultimately, the

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96. Vázquez, *supra* note 3, at 1305.

97. Email to author (June 10, 2024) (on file with author).

responsibility for the integrity of legal scholarship rests with authors. We can do better than this. And we should. One-sided or incomplete presentations about arcane legal theories probably don't matter that much. To borrow an example from Chief Justice Roberts, not much harm comes from an inflated or lopsided claim about Kant's influence on Bulgarian rules of evidence.[98] But Restatements are different. Restatements are intended to guide courts, to work in the real world. Misleading readers about their content has the potential to work real mischief.

Members of the American Law Institute, in particular, should feel at least some loyalty to the Institute's mission to clarify the law, or, failing that, some respect for the other members who contribute their time and expertise in a good-faith effort to advance that mission. Professor Vázquez could have used his intimate knowledge and extensive participation in the drafting of the Third Restatement to advance public understanding of the draft and the underlying issues. His failure to acknowledge his participation, to engage with any of the arguments presented during the process, or even to accurately describe the process and current content of the drafts instead seriously misleads readers. That is a missed opportunity. More, it is a shame.

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98. *See* C-SPAN, *A Conversation with Chief Justice Roberts*, at 30:47 (June 25, 2011), www.c-span.org/video/ ?300203-1/conversation-chief-justice-roberts ("Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.").