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# Choosing Law and Giving Justice

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## Choosing Law and Giving Justice\*

Louise Weinberg\*\*

The doctors have a prime directive: "At least do no harm." Medical science cannot always restore health, but at least physicians can try not to make things worse. Judges probably could use a prime directive too: "At least do no injustice." Courts cannot right every wrong, but at least judges can try not to make things worse.

Judges, however, come up against a paradox when they try to avoid an unjust outcome in a case. This paradox is especially poignant in cases presenting multistate problems. Judges doing a commendable job of choosing law to govern a multistate problem—commendable by our "modern" lights—may find themselves in a position in which it is very difficult *not* to do an injustice. In most states of this Union, and in many countries, judges today try to choose law based on the *connection* between the sovereign whose law is sought to be applied and the problem before the court. This connection—set of contacts—nexus—has become all important to a choice of law. The appeal of this modern theory is an appeal to reasonableness. To most of us, the more connections an event may have with, say, Barataria, the more reasonable it will seem to let Barataria law govern the consequences of that event. And the fewer connections between Barataria and the case, the more unreasonable becomes its governance.

We are right to think such governance unreasonable. When law is irrelevant it falls into the common lawyers' category of "arbitrary and irrational." In the United States irrelevant law is not only arbitrary and irrational, it is unconstitutional. Law irrelevant to the parties' case cannot be "due process." Thus, if an irrelevant law is the only law that could avoid injustice, legal theory and constitutional principle combine to tell us that judges must do the "reasonable" thing even if it means an "unjust" result. There you have the paradox.

Justice versus principle. This paradox is like the teasing puzzles of childhood that have no known solution. But unlike those puzzles, the choice-of-law paradox is painful. Injustice causes human suffering. The consequence for legal theory has been a great, impassioned debate. It has gone on for decades, perhaps centuries. On one side are those who see clearly that law without justice is insupportable. On the other are those who see equally clearly that justice without law is insupportable. These are two main schools of legal thought. Both, of course, are right. This has been the great crisis of legal theory in our field. It has also been a crisis in other fields, notably in constitutional interpretation. It is a fundamental problem of jurisprudence.

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\* This little essay is dedicated to my good friend, Symeon Symeonides, though he will agree with only so much of it. I offer it along with best wishes for his future achievements as law dean at Willamette. These remarks are brief and unfootnoted only because the multitude of participants in this symposium/festschrift in his honor have been asked of necessity to try to limit their contributions in that way, but I have tried to say something I care about.

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And yet all of this is very academic. Judges have known for a long time how to reason in a justice-seeking way. Most good judges can do this without any sacrifice of principle or reasonableness. They let academics like us hammer away at each other and they pay very little attention to us. There is nothing unfamiliar about judicial processes that are justice-seeking. Consider, for a moment, that a court in a state that *is* relevant to the problem before it can always reasonably apply its own law. If that law seems unjust on the facts, with or without a multistate setting, a judge will have a look at what is going on in other courts. If judges find that they prefer a rule that Barataria judges use, they say so. For their purposes it does not matter that Barataria may have zero connection with the case before them. The reason it does not matter is that they are not "choosing" Baratarian law. Rather, they are *adopting* a rule of law as their own, for cases on these particular facts.

It does happen that there may be a fixed statutory substantive command to the contrary by the forum's own legislature. But even then good judges, of course, try to construe the legislation so as not to work an injustice. This is a familiar canon of judicial process in domestic cases and is hardly forgotten in multistate ones. If necessary a good judge will even carve out a nonstatutory exception to the legislation. In such tasks, too, a judge is much assisted by surveying the work of other courts that have dealt with similar legislation on similar facts.

It is now a near-universal problem that courts hold themselves bound to labor under some fixed method of choice of law. The tedious formulaic recitals in the judicial opinions of the late twentieth century became longer than the analyses actually applying the formulas. Yet even the best of formulas cannot guarantee just results. A directive, let us say, to choose the best law available, could not compare in efficacy to the everyday normal practices of a justice-rendering court. That is because the possibility of an unjust application of law is not, in the nature of the thing, usually foreseeable to the original lawmaker. If it were, presumably the lawmaker would have created the necessary exception without waiting for the judges to do it.

Sometimes there are only two states with relevant laws: the forum, and perhaps one other state—let us call it Caledonia. It might turn out that the laws of both states, alas, are unsatisfactory in the particular case. It would be helpful, however, if lawyers noted the existence of better law elsewhere. Judges, too, are allowed to visit their own libraries. Even eschewing the arts of construction and interpretation, even refraining from fashioning or adopting better law, courts can nevertheless say, "Nor do we agree that on these facts Caledonia would apply its current law. The great weight of authority increasingly takes the Barataria position. We think that, on the question before us, Caledonia would adopt the Barataria rule."

In the twentieth century it became fashionable to deride such judicial maneuvers as "escape devices." But it is not clear why devising an escape from injustice is to be derided. The best theorists of law in the twentieth century, the American Legal Realists, taught us, after all, that much judicial reasoning is only attempted justification of a predetermined result. They should have seen that this is true of all judicial reasoning, the best as well as the worst. They should have seen

that if judicial reasoning does in fact become persuasive, it makes no difference that its author sought to justify a predetermined result.

Sometimes, fearing the risk of injustice inherent in rigid rules of choice of law, the better twentieth century conflicts theorists advised courts to choose law that would advance the policies underlying the particular laws sought to be applied. Today that advice is hard to follow. What if the policy underlying the legislation in question is to protect the wrongdoer at the expense of the injured? To be sure, legislatures have good and sufficient reasons to protect gainful enterprises from liability to some extent, whatever harms those enterprises may cause. The policy underlying tort reform legislation, in whole or in part, is protection, rather than regulation, of enterprise; some risk, rather than remediation, of harms. Of course when such legislation cannot be struck down as unconstitutional—much of it is—tort reforms must be, and are, respected. But exigent justice often finds ways to triumph anyway, the kinds of canonical ways we have been talking about. Of course courts must defer to legislation. But courts also must dispense justice, sometimes even in the teeth of legislation. Choosing law, or adopting new law, or construing and interpreting existing law, will usually give judges legitimate ways of ruling by their best lights.

The deeper question, of course, is, "What is justice?" We can complain, quite accurately, that the judges are simply setting their views of justice against those of our elected representatives. But we can also acknowledge that the policies underlying judge-made law are, time out of mind, compensatory and deterrent, and that, in courts, this is what justice is. We can also acknowledge that narrow interpretations of law or choices of other law are the traditional paths by which independent courts open dialogue with legislatures or with other courts. Such judicial rulings remain open to legislative revision and overrulings. These rulings must withstand the test of time: And so these sorts of rulings sometimes are constructive on a broader scale than the individual case. There are many familiar stories of repeal of substandard law by legislatures that have learned that courts both abroad and at home will not enforce it.

The moral of the story seems to be that in the twenty-first century we conflicts theorists could benefit from a prime directive of our own (we could share it with compulsive gamblers): "At least swear by no system." I fear that it is too late to persuade judges that they need not resort to one or another of our elaborate, now-quaint twentieth century choice-of-law "methods." Would that they could treat conflicts cases just the way they treat domestic ones, using traditional canons of construction and interpretation. At bottom, that is what the greatest of the twentieth century writers in the conflicts field taught. Perhaps I am too optimistic, but I have the temerity to believe that American judges, even in conflicts cases, even weighed down as they now are with methodological baggage, will go on finding ways to get on with their real work.

