

RESULT-SELECTIVISM IN CONFLICTS LAW*

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I. INTRODUCTION

A. *The Classical View: “Conflicts Justice”*

The classical, traditional view of the law of conflict of laws, going at least as far back as Savigny and Story,¹ is grounded on the basic premise that the function of conflicts law is to ensure that each multistate legal dispute is resolved according to the law of the state that has the closest or otherwise most “appropriate” relationship with that dispute. Opinions on defining and especially measuring the “propriety” of such a relationship have differed over the years from one legal system to another and from one subject to the next. Despite such differences, however, all versions of the classical school have remained preoccupied with choosing the proper *state* to supply the applicable law, rather than directly searching for the proper *law*, much less the proper *result*.

Indeed, the implicit—if not explicit—assumption of the classical school is that, in the great majority of cases, the law of the proper state *is* the proper law. But in this context, propriety is defined not in

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1. See 8 FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS (1849), translated in WILLIAM GUTHRIE, PRIVATE INTERNATIONAL LAW, A TREATISE ON THE CONFLICT OF LAWS AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME (1st ed. 1869, 2d ed. 1880); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 201 (1st ed. 1834). Savigny and Story are considered the founders of modern conflicts law in the old and new world, respectively. For a discussion of their influence, see EUGENE SCOLES, PETER HAY, PATRICK BORCHERS & SYMEON SYMEONIDES, CONFLICTS OF LAWS 15–20 (4th ed. 2004).

terms of the content of that law or the quality of the solution it produces, but rather in geographical or spatial terms.² If the contacts between the state from which that law emanates and the multistate dispute at hand are such as to meet certain, usually pre-defined, choice-of-law criteria, then the application of that law is considered proper regardless of the quality of the solution it produces. Whether the actual solution is good or bad depends on whether the applicable law *itself* is good or bad, and that is something about which conflicts law cannot do much. After all, conflicts exist because different societies adhere to different value judgments reflected in their respective laws as to how legal disputes should be resolved.³ As long as multistate disputes are resolved by means of choosing the law of one state over that of another, such a choice is bound to satisfy one society and one party and aggrieve another. This being so, the choice of the applicable law cannot afford to be motivated by whether it will produce a “good” or “just” resolution of the actual dispute.⁴ Hence, conflicts law should strive to achieve “conflicts justice”—that is, to ensure the application of the law of the proper state—but cannot expect to achieve “material justice” (i.e., the same type and quality of justice as is pursued in fully domestic situations). In Gerhard Kegel’s words, “conflicts law aims at the *spatially* best solution . . . [while] substantive law aims at the *materially* best solution.”⁵

2. See Gerhard Kegel, *The Crisis of Conflict of Laws*, in 112 ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INT’L LAW 91, 184–85 (1964) (“[W]hat is considered the best law according to its content, that is, *substantively*, might be far from the best *spatially*.”).

3. See Arthur von Mehren, *American Conflicts Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 133, 134 (2000) (“[T]he difficulties posed for instrumental or teleological analysis are far greater when the controversies to be resolved are not localized in a single legal order that holds shared values and policies and has a unified administration of justice that can authoritatively weigh competing values and decide which shall prevail when conflicts arise.”). See also *id.* at 137 (“[T]he same degree of justice usually cannot be given in matters that concern more than one society as is provided in matters that concern only one society and its legal order.”).

4. DAVID F. CAVERS, *THE CHOICE OF LAW PROCESS* 22–23 (1965) (“[T]o say that each state must seek the result which it regards as just . . . is simply to deny the existence and purpose of the conflict of laws [N]ot only is this a denial of true justice, . . . but also a denial of the law itself.” (quoting Erwin Griswold, *Renvoi Revisited*, 51 Harv. L. Rev. 1165 (1938))).

5. Gerhard Kegel, *Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers*, 27 AM. J. COMP. L. 615, 616 (1979).

B. The Second View: “Material Justice”

A second view begins with the premise that multistate cases are not qualitatively different from fully domestic cases and that a court should not abdicate its responsibility to resolve disputes *justly and fairly* the moment it encounters a case containing foreign elements. Resolving such disputes in a manner that is substantively fair and equitable to the litigants should be an objective of conflicts law as much as it is of internal law. Conflicts law should not be content with a different or lesser quality of justice—so-called conflicts justice—but should aspire to attain material or substantive justice. Thus, this view rejects the classical presumption that the law of the proper state is necessarily the proper law and instead directly scrutinizes the applicable law for determining whether it actually produces the proper *result*. Again, opinions differ on defining the propriety of the result, but all versions of this view agree that the propriety must be determined in material rather than in spatial terms.

This view is much older than is generally believed. Historical precedents include the Byzantine commentators’ preference for the *philanthropon* result,⁶ the Italian statisticians’ preference for the forum’s *statuta favorabilia* over foreign *statuta odiosa*,⁷ and Magister Aldricus’s call for the application of the *potior et utilior* law.⁸ However, for at least eight centuries, this view remained in the periphery of choice-of-law thinking—until the second half of the twentieth century, when it found a more hospitable climate.

C. Leflar’s Better-Law Approach

In the United States,⁹ the material justice view is chiefly associated with Professor Robert A. Leflar. In the 1960s, Leflar

6. See Michael Maridakis, *L’inaapplicabilité du droit étranger à Byzance*, 2 MÉLANGES FREDERICQ 79 (1965). The Greek word *philanthropon* is the comparative form of the word *philanthropos* (which is the root of the English word “philanthropic”). It would loosely translate as the more philanthropic, humane, benevolent, or merciful result.

7. See I LAINÉ, INTRODUCTION AU DROIT INTERNATIONAL PRIVÉ 146, 264 (1888).

8. See Code Cisianus E.VIII. 218 § 46.

9. For other countries, see, *inter alia*, Tom de Boer, *Facultative Choice of Law: The Procedural Status of Choice-of-Law Rules and Foreign Law*, in 257 ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INT’L LAW 223, 293–297 (1996); Konrad Zweigert, *Zur Armut des internationalen Privatrechts an sozialen Werten*, 37 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 435 (1973). See also C. JOERGES, ZUM FUNKTIONSWANDEL DES KOLLISIONSRECHT, DIE “GOVERNMENTAL INTEREST ANALYSIS” UND DIE “KRISE DES INTERNATIONALEN PRIVATRECHTS” (1971); J. González Campos,

proposed the following five “choice-influencing considerations” to guide the judicial choice of the applicable law: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum’s governmental interest; and (5) the application of the “better rule of law.”¹⁰ Although the better-law factor was, in Leflar’s words, “only one of five, more important in some types of cases than in others, almost controlling in some but irrelevant in others,”¹¹ nothing prevented that factor from becoming decisive in all of the cases (and there are many) in which the other four factors are not dispositive. This is precisely how courts employed this factor (at least in the early years), treating it as dispositive while paying lip service to the other four.¹² Consequently, Leflar’s approach is deservedly known as the “better-law approach” and may be criticized or praised on that basis. The main criticisms are that (1) a better-law approach can become a euphemism for a *lex fori* approach,¹³ and (2) it provides a convenient cover for judicial subjectivism. Although Leflar admonished against subjective choices, arguing that judges are capable of recognizing when foreign law is better than forum law,¹⁴ there is considerable evidence to support the conclusion that these risks are real.¹⁵

The courts of five states of the United States have each adopted, at some point, Leflar’s approach for tort conflicts: New Hampshire, Wisconsin, Minnesota, Rhode Island, and Arkansas. However, by the end of the twentieth century, the last four of those states had begun

Diversification, spécialisation et matérialisation des règles de droit international privé, in 287 ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INT’L LAW 9 (2000); P. Gutzwiller, *Von Ziel und Methode des “IPR,”* ANN. SUISSE DROIT INT’L 161 (1968).

10. See Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Robert A. Leflar, *Conflicts of Law: More on Choice Influencing Considerations*, 54 CAL. L. REV. 1584 (1966).

11. ROBERT A. LEFLAR, LUTHER MCDUGAL & ROBERT FELIX, *AMERICAN CONFLICTS LAW* 300 (4th ed. 1986).

12. See SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 82–83 (2006).

13. A *lex fori* approach is one that proceeds with a strong presumption that the law of the forum state applies to all multistate cases in the absence of extraordinary circumstances justifying the application of the law of another state. For states following such an approach, see *id.* at 76–81.

14. See *id.* at 298–299. (“Judges can appreciate . . . the fact that their forum law in some areas is anachronistic . . . or that the law of another state has these benighted characteristics.”).

15. See SYMEON C. SYMEONIDES, *AMERICAN PRIVATE INTERNATIONAL LAW* 243–247 (2008).

combining this with other approaches. In contract conflicts, only Minnesota and Wisconsin continue to follow Leflar's approach.¹⁶

The early cases that followed Leflar's approach provided ample vindication for most of the philosophical and methodological criticisms leveled against the approach. Indeed, it is not surprising that an approach that authorizes an ad hoc, unguided, and ex post choice of the better law produces choices that reflect the subjective predilections of the judges who make the choices. To the extent that judges tend to prefer domestic over foreign law, plaintiffs over defendants (foreign or domestic), or domestic over foreign litigants (plaintiffs or defendants), these preferences are bound to be reflected in the judges' decisions. The early cases from the five states that followed Leflar's approach exhibit all three of these tendencies to a greater than usual degree.¹⁷ Although these tendencies are not parallel, they all stem from the same source: the judicial subjectivism that the better-law approach legitimizes.

A preference for forum law is a by-product of the human tendency to gravitate to the familiar. With human nature being what it is, one should not be surprised if judges tend to consider their own law—with which they are most familiar—as the better law. More often than not, this is precisely what judges applying the better-law approach have done.¹⁸ In this sense, the Wisconsin Supreme Court was refreshingly forthright in essentially equating its own adherence to Leflar's approach with a strong presumption in favor of the *lex fori*.¹⁹

A preference for forum law often (but not always) translates into a preference for plaintiffs. This is because of the wide latitude plaintiffs usually enjoy in choosing a forum and the strong likelihood that they will choose a forum whose conflicts law and substantive law favor recovery. For example, in four of the five post-*lex loci delicti* tort conflicts that reached the Rhode Island Supreme Court in which the plaintiff's recovery depended on the applicable law, the court applied the pro-recovery law of the forum for the benefit of a foreign

16. For citations, see SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 81 (2006).

17. *See id.* at 82–85.

18. *See id.* 82–83.

19. *See State Farm Mut. Auto. Ins. Co. v. Gillette*, 641 N.W. 2d 662, 676 (Wis. 2002) (prefacing its application of the five Leflar factors with a statement that the primary choice-of-law rule in Wisconsin is that “the law of the forum should presumptively apply unless it becomes clear that nonforum contacts are of the greater significance”).

plaintiff.²⁰ Similarly, of the six tort conflicts cases decided by the New Hampshire Supreme Court, two cases applied forum law for the benefit of a forum plaintiff, three cases applied forum law for the benefit of a foreign plaintiff, and the sixth case applied forum law for the benefit of a forum defendant.²¹

As the last mentioned case illustrates, sometimes the preference for a forum litigant (plaintiff or defendant) prevails over other preferences, including the preference for forum *law*. For example, in two of the three cases in which the Minnesota Supreme Court applied foreign law, that law benefited a forum plaintiff.²² If this is not coincidental, it suggests that, when forced to choose between forum law and protecting forum litigants, courts tend to choose the latter.

The above-described biases are less pronounced in the cases decided around and since the end of the twentieth century. This change is probably related to the fact that most of the states that initially adopted Leflar's approach began to combine it with other approaches and to de-emphasize the better-law factor. The trend towards an eclectic approach is more prominent in Rhode Island,²³ Arkansas,²⁴ and Minnesota, where Leflar's approach is often combined with other approaches, such as the Restatement (Second), interest analysis, or a presumptive *lex fori* approach. For example, in *Nodak Mutual Insurance Co. v. American Family Mutual Insurance Co.*,²⁵ the Minnesota Supreme Court twice described its approach as "the significant contacts test"²⁶ and noted that "this court has not placed any emphasis on [the better-law] factor in nearly 20 years."²⁷ The court dutifully listed the five Leflar choice-influencing factors—including the better-law factor—but, after quickly finding the first three factors to be inconclusive, the court spent the balance of the opinion discussing the fourth factor: advancement of the forum's

20. See SYMEONIDES, *supra* note 12, at 83.

21. See *Id.* at 83–84.

22. See *id.* at 84.

23. See *Cribb v. Augustin*, 696 A.2d 285, 288 (R.I. 1997) (combining Leflar's approach with the Restatement (Second) and interest analysis).

24. See *Wallis v. Mrs. Smith's Pie Co.*, 550 S.W.2d 453 (Ark. 1977), *Williams v. Carr*, 565 S.W.2d 400 (Ark. 1978), and *Schlemmer v. Fireman's Fund Ins. Co.*, 730 S.W.2d 217 (Ark. 1987) (combining Leflar's approach with the Restatement (Second)); *Gomez v. ITT Educ. Servs. Inc.*, 71 S.W.3d 542 (Ark. 2002), *Schubert v. Target Stores, Inc.*, 2005 WL 174757 (Ark. 2005) (combining Leflar's approach with a presumptive *lex fori* approach).

25. 604 N.W.2d 91 (Minn. 2000).

26. *Id.* at 94, 96.

27. *Id.* at 96.

governmental interest.²⁸ However, at the end of this discussion, the court concluded that it was not the forum's interests that needed advancement but rather those of the other state.²⁹

As *Nodak* indicates, the better-law criterion seems to play a far less significant role in recent decisions than it did three decades ago. Indeed, as documented elsewhere, some courts in recent years have expressed misgivings regarding their ability to determine which law is better, or have tried to dispel the notion that better law and forum law are synonymous terms, while other courts have employed the better-law criterion only as a tie-breaker or ignored it altogether.³⁰ Nevertheless, in the absence of choice-of-law legislation or clear judicial precedent to the contrary, the better-law criterion remains available for judges to employ when encountering cases in which its use is considered necessary or expedient.

D. Other Result-Selective Approaches

The material justice view has also had other adherents among American scholars, including Professors Friedrich Juenger,³¹ Luther McDougal,³² and, to a lesser extent, Professors David Cavers,³³ Russell Weintraub,³⁴ and, recently, Joseph Singer.³⁵

28. *Id.*

29. The other state's law was more favorable to the Minnesota party than was Minnesota law.

30. For documentation, see SYMEONIDES, *supra* note 12, at 85–87.

31. See FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 145–73, 191–208, 233–37 (1993). See FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 145–73, 191–208, 233–37 (1993).

32. See Luther L. McDougal III, *Toward the Application of the Best Rule of Law in Choice of Law Cases*, 35 MERCER L. REV. 483 (1984).

33. See DAVID F. CAVERS, THE CHOICE OF LAW PROCESS 181 (1965) (proposing result-oriented principles of preference for contracts); David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933) (arguing that “justice in the individual case” should be an important consideration in choice-of-law decisions); David F. Cavers, *The Proper Law of Producer's Liability*, 26 INT'L & COMP. L. Q. 703 (1977) (proposing a result-oriented principle for product liability conflicts).

34. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 360, 397–98 (3d ed. 1986) (proposing a plaintiff-favoring rule for tort conflicts and a rule of validation for contract conflicts).

35. See Joseph William Singer, *Pay No Attention to That Man Behind the Curtain: The Place of Better Law in a Third Restatement of Conflicts*, 75 IND. L.J. 659 (2000); Joseph William Singer, *Justice and the Conflict of Laws*, 48 MERCER L. REV. 831 (1997); Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731 (1990).

Professor Juenger advocated a type of better-law approach that was more unconventional than Leflar's version. Unlike Leflar, who argued for choosing the better between the existing laws of the involved states, Juenger argued that the court should construct and apply to the case at hand a new substantive rule derived from the laws of the involved states.³⁶ For example, in product liability conflicts, Juenger proposed that the court should draw from among the laws of the states of conduct, injury, product acquisition, and domicile of the parties, and then construct a substantive rule that "most closely accords with modern standards of products liability."³⁷ Not coincidentally, Juenger called his approach a "substantive-law" approach,³⁸ a purposefully chosen term that evokes the most ancient approach to resolving conflicts problems: the approach of the Roman *praetor peregrinus*, who, in resolving disputes between Roman and non-Roman citizens, constructed ad hoc substantive rules derived from the laws of the involved countries. Indeed, Juenger rejected both unilateralism and multilateralism, the two branches of the conflictual method of conflicts law, in favor of the third and oldest method—substantivism.³⁹

Professor Luther McDougal took a step beyond both Leflar and Juenger when he proposed his best-law approach. Unlike Leflar and Juenger, who thought that the courts' choices—albeit different—should be confined to the laws of the states involved in the conflict, McDougal argued that "[c]ourts are not so limited in their choice"⁴⁰ and they should be in principle free to look beyond those states in constructing the best rule of law. McDougal described the best rule as "one that best promotes net aggregate long-term common interests,"⁴¹ and gave two examples of such rules: first, for non-economic losses, he proposed a rule that permits "complete recovery of all losses, pecuniary and nonpecuniary, and of all reasonable costs incurred in obtaining recovery, including reasonable attorneys' fees and litigation

36. JUENGER, *supra* note 31, at 236.

37. *Id.* at 196–97.

38. *See id.* at 172 (advocating "an unabashedly teleological substantive law approach").

39. For the difference between these methods, see Symeon C. Symeonides, *American Choice of Law at the Dawn of the 20th Century*, 37 WILLAMETTE L. REV. 1, 4, 11–16 (2001); Symeon C. Symeonides, *Accommodative Unilateralism as a Starting Premise in Choice of Law*, in BALANCING OF INTERESTS: LIBER AMICORUM PETER HAY 417 (2005).

40. McDougal, *supra* note 32, at 483–484.

41. *Id.* at 484

costs.”⁴² Second, for claims concerning punitive damages, he proposed a rule that imposes such damages “on individuals who engage in outrageous conduct and who are not adequately punished in the criminal process.”⁴³

Unlike Leflar’s approach, the approaches of Professors Juenger and McDougal have not garnered any appreciable judicial following.⁴⁴

E. “Only in America”?

The brief foregoing description of result-selective approaches may cause some non-American readers to quickly conclude that “only in America” could such approaches take root. Maybe so, but this does not mean that foreign conflicts systems are oblivious to material-justice considerations. For example, in another publication, this author discussed numerous examples in which material-justice considerations play a significant—albeit de facto—role in the judicial resolution of conflicts cases in uncodified conflicts systems.⁴⁵ This article focuses on codified conflicts systems in which the classical view is supposed to dominate and examines the degree to which these systems *officially* sanction the pursuit of material justice in the choice-of-law process.⁴⁶

While most of these systems are unlikely to endorse ideas like those advanced by Juenger or McDougal, or to entrust judges with the same degree of open-ended discretion envisioned by Leflar, nothing prevents the pursuit of material justice through other means, such as statutory rules designed for this purpose. This article surveys a representative number of recent conflicts codifications from five continents and identifies a fairly significant number of choice-of-law

42. *Id.* at 533.

43. *Id.*

44. *But see In re “Agent Orange” Products Liability Litigation*, 580 F.Supp. 690, 713 (E.D.N.Y. 1984) (proposing the development of a “national consensus law” consisting of judicially created substantive rules for handling a complex product-liability class-action brought by the victims of Agent Orange, a chemical defoliant used during the Vietnam War).

45. See Symeon C. Symeonides, *Private International Law at the End of the 20th Century: Progress or Regress?*, in *PRIVATE INTERNATIONAL LAW AT THE END OF THE 20TH CENTURY: PROGRESS OR REGRESS? I* (Symeon C. Symeonides ed., 1999).

46. This article draws from Symeon C. Symeonides, *Material Justice and Conflicts Justice in Choice of Law*, in *INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM: ESSAYS IN HONOR OF FRIEDRICH K. JUENGER* 125 (Patrick J. Borchers and Joachim Zekoll eds., 2000).

rules that are specifically designed⁴⁷ to produce a particular substantive result.

It should be noted that these rules are classic *choice-of-law* rules, rather than substantive rules, insofar as they authorize courts to choose the existing substantive law of one of the involved states rather than directly providing a substantive solution to the conflict at hand. At the same time, they are *result-selective* or result-oriented rules because they instruct courts to choose a law that produces a particular substantive result, such as upholding a juridical act or favoring a particular party, as explained below. This article compiles an illustrative list of such rules and then attempts to determine how their existence should inform the continuing debate between the proponents of the two views.

II. RESULT-SELECTIVE STATUTORY CHOICE-OF-LAW RULES

Result-selective rules appear in varying shapes and forms. Their common characteristic, however, is that they are specifically designed to accomplish a certain substantive result that is considered *a priori* desirable. More often than not, this result is favored by the domestic law of not only the enacting state but also the majority of states that partake in the same legal tradition. This result may be one of the following:

- (1) favoring the formal or substantive validity of a juridical act, such as a testament, a marriage, or an ordinary contract;
- (2) favoring a certain status, such as legitimacy or filiation, the status of a spouse, or even the dissolution of a status (divorce); or
- (3) favoring a particular party, such as a tort victim, the owner of stolen movable property, a consumer, an employee, a maintenance obligee, or any other party whom the legal order considers weak or whose interests are considered worthy of protection.

The first two objectives (favoring the validity of a juridical act or favoring a certain status) are accomplished by choice-of-law rules that contain a list of alternative references to the laws of several states

47. Material justice can also be pursued through other rules or techniques that are not specifically designed for this purpose. Among them are open ended choice-of-law rules, rules which rely on soft or indeterminate connecting factors, content-oriented choice-of-law rules, statutory escape clauses, the *ordre public* reservation, the characterization process, and *renvoi*. For a comparative discussion of these rules or techniques, see Symeonides, *supra* note 45, at 26–34, 37–42.

connected with the case (*alternative-reference rules*) and authorize the court to select a law that validates the juridical act or confers the preferred status. The third objective (protecting a particular party) is accomplished through choice-of-law rules that: (a) authorize alternative choices to the court as described above; (b) allow the protected party, either before or after the events that give rise to the dispute, to choose the applicable law from among the laws of more than one state; or (c) protect that party from the adverse consequences of a potentially coerced or uninformed choice of law.

A. Rules Favoring the Validity of Certain Juridical Acts

Choice-of-law rules designed to uphold the validity of certain juridical acts existed prior to the twentieth century. In recent decades, however, these rules have proliferated and their scope has expanded. Such rules can now be found in almost every country, and they not only apply to more juridical acts than ever before, but they also encompass formal as well as substantive validity.

1. Testaments (favor testamenti)

One of the oldest and most widely adopted rules of this kind is a rule which, in keeping with the ancient substantive policy of *favor testamenti*, is designed to uphold the formal validity of testaments whenever reasonably possible. This result is guaranteed (or greatly facilitated) by providing a list of alternative references to the laws of several states having a connection with the testament or the testator and authorizing the court to apply whichever one of the listed laws would uphold the testament as to form.

Article 1 of the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (1961), which is in force in 39 countries,⁴⁸ contains one of the longest lists. The article provides that a testament shall be considered formally valid if it conforms to the internal law of any one of the following *eight* potentially different places: the place of the testament's making; the testator's nationality, domicile, or habitual residence at either the time of making or the time of death; and, with regard to immovables, the situs state. Similar rules are found in many national conflicts

48. For the text of the convention and a list of the countries in which it is in force, see http://www.hcch.net/index_en.php?act=conventions.status&cid=40.

codifications.⁴⁹ The Romanian codification increases the list to *ten* potentially different validating laws.⁵⁰ In the United States, the same policy of *favor testamenti* was espoused by the widely followed Uniform Wills Act of 1909 and later by section 2-506 of the Uniform Probate Code.⁵¹

Rules designed to favor the validity of a testament with regard to matters other than form are less common, but they do exist. For example, regarding testamentary capacity, the Louisiana and Austrian codifications provide alternative references to the laws of the testator's domicile at either the time of the testament's making or the testator's death,⁵² while the Swiss codification provides that "[a] person is capable of disposing *mortis causa* if . . . he possesses such capacity under the law of the state of his domicile or of his habitual residence, or the law of one of the states of which he is a national."⁵³ The Chinese Model Private International Law Act adds the law of the place of the testament's making,⁵⁴ as well as the "contents and effect of a will." It first gives the testator a choice from among the above four laws and then provides that, in the absence of such a choice, the law "most favorable to the formation" of the will shall govern.⁵⁵

49. See, e.g., art. 30 of AUSTRIAN PRIVATE INTERNATIONAL LAW (PIL) ACT (Federal Statute of 15 June 15, 1978 on PIL); art. 90(2) of BULGARIAN PIL CODE (Law No. 42 of 2005, as amended by DV 2007 No. 59); art. 26 of EGBGB (Introductory Act to the German Civil Code as amended in 1986 and 1999); art. 26(2) of HUNGARIAN PIL ACT (Law No. 13 of 1979 on PIL); art. 48 of ITALIAN PIL ACT (Act No. 218 of 31 May, 1995 for the Reform of the Italian System of PIL); art. 35 of POLISH PIL ACT (Act of 12 Nov. 1965 on PIL); art. 65.1 of PORTUGUESE CIV. CODE as amended in 1966; art. 50(3) of SOUTH KOREAN PIL ACT (Law No. 6465 of 7 April, 2001); art. 3109(3) of QUEBEC CIV. CODE; art. 93 of SWISS PIL ACT (Federal Law of 18 December, 1987 on PIL); art. 31 of OLD YUGOSLAV PIL ACT (1978). Hereinafter, conflicts codifications that are not part of a civil code (Civ. Code) are referred to as Private International Law (PIL) Acts or codifications without further information.

50. See art. 68(3) of ROMANIAN PIL ACT (Law No. 105 of 22 Sept. 1992/26 Oct. 1993 on PIL) (authorizing the application of five potentially different laws at either the time of the testament's making or the time of the testator's death).

51. See UNIF. PROBATE CODE § 2-506 (amended 2008), 8 U.L.A. 151 (1998) ("A written will is valid . . . if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.").

52. See LA. CIV. CODE ANN. art. 3529 (2009); AUSTRIAN PIL ACT § 30.

53. SWISS PIL ACT art. 94.

54. See CHINESE MODEL PIL ACT art. 142 (Chinese Society of PIL, Model Law of PIL of the People's Republic of China, Sixth Draft, 2000).

55. See CHINESE MODEL PIL ACT art. 144.

2. Other Juridical Acts (*favor negotii*)

Many codifications provide similar validating rules for contracts and other *inter vivos* juridical acts. Even traditional European civil codes, such as the Greek, Spanish, and Italian, provided an alternative-reference rule for the formal validity of *inter vivos* juridical acts. This rule allowed validation under the law of any one of three potentially different laws: the law of the place of making, the law governing the substance of the act, or a law affiliated with the executing party or parties.⁵⁶

Currently, such validating rules are more common and much broader. Article 11 of the European Union's Regulation on the Law Applicable to Contractual Obligations (Rome I) stands out as one characteristic example. That article provides that, subject to certain limitations, a contract is formally valid if it conforms to the law that governs the substance of the contract, or of the law of "either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time."⁵⁷ Parallel provisions are found in the Hague Sales Convention, as well as the German, Swiss, Japanese, South Korean, Romanian, and Tunisian codifications.⁵⁸ Similar rules exist in many recent conflicts law codifications, some of which provide a shorter⁵⁹ and others a longer⁶⁰

56. See GREEK CIV. CODE art. 11; SPANISH CIV. CODE art. 11(1); ITALIAN CIV. CODE 1942 (Prel. Disp.) art. 26. These rules are subject to certain limitations and exceptions not on point here. For similar validation rules in the new ITALIAN PIL ACT, see art. 57 (incorporating the Rome Convention for contracts), art. 28 (marriage), art. 35 (recognition of a child acknowledgment), art. 56 (donations), art. 60 (representation). For somewhat narrower provisions with alternative reference to the *lex loci actum* and the *lex causae*, see CHINESE MODEL PIL ACT art. 70; PERUVIAN CIV. CODE art. 2094 (1984); and TURKISH PIL CODE art. 7 (Law Nr. 5718 of 27 Nov. 2007).

57. Regulation 593/2008, art. 11, 2008 O.J. (L 177) 6, 14 (EC) [hereinafter ROME I]. For a similar provision, see art. 9 of the 1980 European Convention on the Law Applicable to Contractual Obligations [hereinafter ROME CONVENTION].

58. See Hague Convention for the Law Applicable to the International Sales of Goods, art. 11, Dec. 22, 1986; EGBGB art. 11; SWISS PIL ACT art. 124. See also *id.* art. 56 (formalities of matrimonial agreements); JAPANESE PIL ACT art. 10 (Law No. 10 of 1898 as amended on 21 June 2006); SOUTH KOREAN PIL ACT art. 17 (2001); ROMANIAN PIL ACT art. 86 (for other juridical acts, see *id.* art. 71); TUNISIAN PIL CODE art. 68 (Law of 27 Nov. 1998 on PIL).

59. See POLISH PIL ACT art. 12 (alternative validating references to the law of the place of making or the *lex causae*); PORTUGUESE CIV. CODE art. 36.2 (same); OLD YUGOSLAV PIL ACT art. 7 (same).

60. See, e.g., LA. CIV. CODE ANN. art. 3538 (2009) (alternative references to *lex loci actum*, the *lex causae*, the law of the common domicile or place of business of the parties, the

list of alternative validating references. Among the latter is the Inter-American Convention on the Law Applicable to International Contracts, which authorizes, *inter alia*, the application of the law of “the State in which the contract is valid.”⁶¹

The trend of favoring validation of juridical acts has even been carried over to issues of capacity, although validation in such situations is placed within narrower parameters than is the case with regard to issues of form. For example, both old and new conflicts codifications favor validation by authorizing the application of the validating rule of the law of the forum state or the state where the act occurred, in lieu of the otherwise applicable personal law of the actor.⁶² Similarly, the codifications of Louisiana and Venezuela provide alternative validating references to the law of the actor’s domicile or the law that governs the substance of the act.⁶³ The Rome I Regulation, as well as the German, Italian, South Korean, Quebec, Romanian, Swiss, and Tunisian codifications, narrowly favor validation by limiting the circumstances under which a party may

law of the place of performance to the extent of performance to be rendered in that state, and the law chosen by the parties); QUEBEC CIV. CODE art. 3109 (1)(2) (alternative validating references to the *lex loci actum*, the *lex causae*, the *lex rei sitae*, and the law of the domicile of one of the parties); VENEZUELAN PIL ACT art. 37 (Law No. 36.511 of 6 August 1998 on PIL) (alternative validation references to the *lex loci*, the *lex causae*, and the law of the domicile of the executing party or parties). *See also* PORTUGUESE CIV. CODE art. 19 (rejecting renvoi where it leads to the invalidity of an otherwise valid juridical act).

61. Inter-American Convention on the Law Applicable to International Contracts, art 13(1), March 17, 1994, 33 I.L.M. 732. This part of the article applies to contracts between parties that are in the same state. It provides that such a contract shall be valid as to form if it conforms to the law designated by the Convention, or by the law of “the State in which the contract is valid” or the law of the place of making. For contracts between parties who are in different states, article 13(2) provides for the application of the law of either state, or the law that governs the substance of the contract, or the law of the place of performance.

62. *See, e.g.*, GREEK CIV. CODE arts. 7, 9; HUNGARIAN PIL ACT art. 15(2)(3); PERUVIAN CIV. CODE art. 2070; PORTUGUESE CIV. CODE art. 28(1); RUSSIAN CIV. CODE art. 1197 (2001); SPANISH CIV. CODE art. 10(8); TURKISH PIL CODE arts. 9(2), 24(4); CHINESE MODEL PIL ACT art. 67. The objective of these rules is not validation for its own sake but rather validation for the sake of preserving security of transactions within the forum state. In contrast, a bilateral rule like Article 14 of the OLD YUGOSLAV PIL ACT which is phrased in forum-neutral terms (giving a choice between the *lex nationalis* and the *lex loci contractus*) is more directly geared towards validation.

63. *See* LA. CIV. CODE ANN. art. 3539 (2009) (providing that a person is considered capable of contracting if he possesses such capacity under either the law of the state in which he is domiciled or the law applicable to the particular issue under the flexible approach provided in art. 3537, the general article for contract conflicts); VENEZUELAN PIL ACT art. 18 (providing that a person lacking capacity under the law of his domicile shall be considered capable if he possesses capacity under the law governing the substance of the act). *See also id.* art. 17 (providing that a change of domicile “does not restrict any acquired capacity”).

invoke the provisions of a law that declares that party incapable of contracting.⁶⁴

In the United States, two influential conflicts scholars have proposed explicit validation rules encompassing, *inter alia*, issues of contractual capacity. Thus, subject to certain exceptions, Professor Weintraub would uphold a contract that is considered valid under the law of “any state having a contact with the parties or with the transaction sufficient to make that state’s validating policies relevant.”⁶⁵ Similarly, in his Principle of Preference No. 6, Professor Cavers would apply the invalidating law of a state only if the party protected by that law is domiciled in that state *and* the transaction is centered there.⁶⁶

B. Rules Favoring a Certain Status

1. Legitimacy

At least until the middle of the twentieth century, illegitimacy carried discriminatory and stigmatizing legal and social effects in virtually every country. Because of these dire consequences, the domestic law of most countries contained several rules designed to ensure that all ambiguities and doubts would be resolved in favor of legitimacy. Because legitimacy was the preferred status in domestic law, it also became the favored status in conflicts law. This preference was reflected in choice-of-law rules which, within certain narrow parameters, were designed to lead to the application of a law that afforded the status of legitimacy.

By now, these rules have multiplied, even though the discriminatory treatment of illegitimate children is decreasing, having

64. See ROME I art. 13; ROME CONVENTION art. 11; EGBGB art. 12; ITALIAN PIL ACT art. 23(2)(3); SOUTH KOREAN PIL ACT arts. 13, 15(1); QUEBEC CIV. CODE art 3086; ROMANIAN PIL ACT art. 17; SWISS PIL ACT art. 36; TUNISIAN PIL CODE art. 40. These articles provide that a person considered capable of contracting under the law of the place of the making may invoke his incapacity resulting from another law only if the other party knew or should have known of the incapacity at the time of the contract.

65. RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 397 (3d ed. 1986).

66. See DAVID F. CAVERS, THE CHOICE OF LAW PROCESS 180 (1965). Although the last two rules have not been explicitly adopted by courts, they arguably reflect judicial practice. See the “rule of validation” extracted from judicial decisions by Professor Ehrenzweig in Albert E. Ehrenzweig, *The Statute of Frauds in the Conflict of Laws: The Basic Rule of Validation*, 59 COLUM. L. REV. 874, 875–80 (1959); Albert E. Ehrenzweig, *Choice of Law: Current Doctrine and “True Rules,”* 49 CAL. L. REV. 240 (1961).

been declared unconstitutional in many countries. For example, Article 19 of the German EGBGB provides—essentially, though not literally—that a child is legitimate if, at the time of birth, the child enjoyed such status under the law that governed the effects of the mother’s marriage, or the national law of either spouse.⁶⁷ Similar provisions are found in other continents. For example, Article 2083 of the Peruvian Civil Code provides that “[m]atrimonial filiation is governed by the law of the place where the marriage was celebrated or of the conjugal domicile at the time the child is born, whichever is more favorable to legitimacy.”⁶⁸ Article 30 of the Japanese Private International Law Act also favors legitimacy by providing that a child is legitimate if he or she enjoys that status under the national law of either parent or the child.⁶⁹

2. Filiation

Even if the distinction between legitimacy and illegitimacy were to disappear, the consequences attaching to the status of a child (legitimate or illegitimate) will continue to provide justification for other result-oriented rules favoring that status. One example is the Quebec Civil Code, which provides that filiation is governed by “the law of the domicile or nationality of the child or one of his parents . . . whichever is more beneficial to the child.”⁷⁰ The Tunisian codification also allows the court to choose the most favorable from among the laws of the nationality or domicile of the defendant or of the child.⁷¹ The EGBGB contains a similar rule, providing that paternity is determined by alternative references to the national law of either parent or the law of the habitual residence of the child.⁷² The

67. For a similar rule regarding legitimation by subsequent marriage, see EGBGB art. 21. *See also* AUSTRIAN PIL ACT § 21 (providing that “[i]n case of different personal status laws of the spouses, the one more favorable to the child shall be determinative”). *See id.* § 22 (legitimation by subsequent marriage). *See also* FRENCH CIVIL CODE art. 311–16.1.

68. PERUVIAN CIV. CODE art. 2083. *See also* PORTUGUESE CIV. CODE art. 19(1) (providing that *renvoi* will not be followed if it would render illegitimate a status which otherwise would be legitimate); ITALIAN PIL ACT art. 33(2) (legitimacy governed by the national law of either parent), art. 34 (legitimation by subsequent marriage governed by the child’s national law or the national law of either spouse).

69. JAPANESE PIL ACT art. 30 (2006). *See also* SOUTH KOREAN PIL ACT art. 42.

70. QUEBEC CIV. CODE art. 3091. *See also* OLD YUGOSLAV PIL ACT art. 43 (providing that, if the parents do not have the same nationality, filiation is governed by the national law of either parent, whichever is more favorable to the child).

71. *See* TUNISIAN PIL CODE art 52.

72. *See* EGBGB art. 20. *See also* ITALIAN PIL ACT art. 13(3) (providing that *renvoi* shall be taken into account only if it leads to the application of a law that allows filiation to be

Turkish codification provides that descent may be established under *six* potentially different laws,⁷³ while the Swiss codification also increases to six the number of potentially different laws under which the acknowledgment of a child can be validly made in Switzerland,⁷⁴ or under which an acknowledgment or legitimation made abroad can be recognized in Switzerland.⁷⁵ Finally, the Chinese Model Private International Law Act provides that the personal relations between parents and children are governed by the law most favorable to “the weaker party” from among the laws of nationality, domicile or habitual residence of any of the parties.⁷⁶

3. Adoption

The Belgian experience with adoption offers another example of material-justice considerations making inroads into conflicts justice in a country known for its strong adherence to the classical view. A 1969 Belgian law that required compliance with the national laws of both parents for a valid adoption was subjected to repeated manipulation by Belgian courts. In 1987, that law was replaced with a new law that favors adoption by providing that compliance with either the national law of the adopting parent or with Belgian law will suffice for a valid adoption in Belgium by parties having stable Belgian connections.⁷⁷ The new Belgian codification provides that the conditions for adoption are governed by the personal law of “the adopter or both adopters,” but also authorizes the application of Belgian law if the foreign law is “clearly harmful to the higher interest of the adoptee” and either the adoptee or the adopters have

established).

73. See TURKISH PIL CODE art. 16. The six laws are those of the child’s nationality, habitual residence, place of birth, the national law of either parent, or the law of the parents’ common habitual residence.

74. See SWISS PIL ACT art. 72. These laws are the law of the child’s habitual residence or nationality, or the law of the domicile or nationality of either parent. The same article provides that the contestation of acknowledgment is governed exclusively by Swiss law. See also ITALIAN PIL ACT art. 35 (acknowledgment, wherever made, is governed by the national law of the child or of the acknowledging parent, whichever is more favorable to acknowledgment).

75. See SWISS PIL ACT arts. 72–73; ROMANIAN PIL ACT art. 28 (providing that the filiation of a child who has dual foreign citizenship is governed by whichever of two laws is more favorable to the child).

76. CHINESE MODEL PIL ACT art. 135.

77. See Marc Fallon & Johan Meeusen, *Belgian Private International Law at the End of the 20th Century: Progress or Regress?*, in PRIVATE INTERNATIONAL LAW AT THE END OF THE 20TH CENTURY: PROGRESS OR REGRESS? 110–11 (Symeon C. Symeonides ed., 1999).

certain contacts with Belgium.⁷⁸ The Inter-American Convention on Conflict of Laws Concerning Adoption of Minors provides that the law of the domicile of the “adopter (or adopters)” governs the requirements for adoption, unless that law imposes “manifestly less strict” requirements than the law of the adoptee’s habitual residence, in which case the latter law applies.⁷⁹

4. Marriage and Divorce

Until the middle of the twentieth century, most countries imposed strict requirements for the substantive validity of marriages and to the granting of divorce, and conflicts law did likewise. The substantive validity of a marriage was judged either exclusively under a single law or cumulatively under the personal laws of both prospective spouses. Divorce was also exclusively governed by a single law, usually the law of the spouses’ common domicile or nationality. By the end of the twentieth century, the substantive law of most countries had become more liberal, and so had conflicts law.

Regarding marriage, the notion of *favor matrimonii* has gained wider acceptance and is pursued through choice-of-law rules with alternative connecting factors. With regard to the form of a marriage, the most generous rule is probably found in the Chinese Model Act. Article 131 provides that a marriage is valid as to form if it complies with the requirements of “the law of the place of celebration, or the national law of any of the parties, or the law of the domicile or habitual residence of any of the parties.”⁸⁰ The corresponding provision of the Quebec Civil Code gives essentially the same choices.⁸¹ The Italian codification is only slightly narrower, providing for alternative validation references to the place of the celebration of the marriage, the national law of either spouse, or the law of their common habitual residence.⁸²

78. BELGIAN PIL CODE art 67 (Law of 16 July 2004). *See also id.* art. 68 (providing that consent to adoption is governed by the law of the adoptee’s habitual residence, but also authorizing application of Belgian law if the foreign law does not require consent or does not know the institution of adoption). *Cf. id.* art. 62 (providing that filiation by voluntary act is governed by the law of nationality but if such law does not require consent then the law of habitual residence governs).

79. Inter-American Convention on Conflict of Laws Concerning Adoption of Minors, art. 4., May 24, 1984, 24 I.L.M. 460.

80. CHINESE MODEL PIL ACT art. 131.

81. *See* QUEBEC CIV. CODE art. 3088 (formal validity of marriages governed by the *lex loci celebrationis*, or by the law of domicile or nationality of either spouse).

82. ITALIAN PIL ACT art. 28.

With regard to substantive requirements, the Swiss codification provides that a marriage between foreigners in Switzerland is to be considered valid if it conforms to the substantive requirements prescribed by Swiss law or by the national law of *either* prospective spouse.⁸³ The corresponding German provision begins by requiring compliance with the national law of *each* prospective spouse, but if neither law allows the marriage, then German law applies if either spouse is a resident or citizen of Germany and the foreign law is “incompatible with freedom of marriage.”⁸⁴ The Bulgarian codification follows a similar approach,⁸⁵ as does (to a lesser extent) the Romanian codification.⁸⁶

It remains to be seen whether the above pro-validation provisions will be extended to same-sex marriages, but at least one recent codification contains a result-oriented rule that specifically addresses same-sex marriages. Article 46 of the Belgian codification provides that the substantive requirements of marriage are governed by the national laws of each prospective spouse at the time of the celebration of the marriage. However, if one of those laws prohibits same-sex marriages, that law does not apply if the other spouse is a national or maintains his or her habitual residence in a state that allows such marriages.⁸⁷

Regarding divorce, the policy of *favor divortii* has gained wider acceptance in recent years. In its more extreme form, this policy can be seen in the United States, where the pro-divorce law of the forum has been applied to all cases subject to its jurisdiction, which may even include cases in which neither spouse is domiciled in the forum state.⁸⁸ In other countries, a more moderate policy of *favor divortii* is

83. SWISS PIL ACT art. 44.

84. EGBGB art. 13. This article also provides that the prospective spouses must have taken reasonable steps to comply with their national law. The article also gives examples of foreign laws that violate the principle of freedom to marry by providing that “a marriage shall not be prevented by a previous marriage of either engaged person, if the validity of the previous marriage has been set aside by a decision made or recognized within the country, or if the spouse of either engaged person has been declared dead.”

85. See BULGARIAN PIL CODE art. 76.

86. See ROMANIAN PIL ACT of 1992 art. 18 (providing that if a foreign law imposes an impediment to the marriage that is incompatible with the right to marry under Romanian law, the impediment may not prevent a marriage in Romania if one of the prospective spouses is a Romanian citizen).

87. BELGIAN PIL CODE art. 46.

88. See SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW §§ 534–541 (2008).

pursued through the alternative application of the law of the forum if that law allows divorce and at least one of the parties has a certain affiliation with the forum state. For example, Article 17 of the EGBGB provides for the alternative application of either the law that governs the effects of marriage or of German law, whichever allows divorce.⁸⁹ The Belgian codification precludes the application of a law that does not allow divorce and also allows the parties to opt for the application of Belgian law.⁹⁰ The Romanian and Swiss codifications provide that the *lex fori* displaces the otherwise applicable foreign law if that law does not allow or severely restricts divorce and one of the spouses is a citizen or domiciliary of the forum state.⁹¹ Similar pro-forum and pro-divorce practices are followed in other countries, such as Hungary, the Netherlands, Serbia, and, most recently, Italy.⁹² The Chinese Model Act allows spouses who pursue divorce by mutual consent to agree to the application of “either party’s or both parties’ nationality, domicile, or habitual residence.”⁹³

C. Rules Favoring One Party

By favoring the validity of a juridical act or a certain status, the choice-of-law rules described above also favor, directly or indirectly, the party or parties whose interests depend on the particular act or status. Other rules, however, are even more explicitly designed to directly benefit one of the parties to a legal dispute. This party can be a tort victim, a maintenance obligee, a consumer, an employee, or any other party whom the legal order considers weak or whose interests are considered worthy of protection. This party is favored through one or more of the following means: (a) granting that party, either before or after the events that give rise to the dispute, the right to choose the applicable law from among the laws of more than one state, or allowing the court to make a choice for the benefit of that party; or (b) protecting that party from the adverse consequences of a potentially coerced or uninformed choice of law. These means are described below.

89. The application of German law is conditioned on the plaintiff’s German citizenship at either the time of the marriage or the time of filing the petition.

90. See BELGIAN PIL CODE art. 55.

91. See ROMANIAN PIL ACT art. 22; SWISS PIL ACT art. 61. For a similar provision, see BULGARIAN PIL CODE art. 82.

92. For authorities, see Symeonides, *supra* note 45, at 56.

93. CHINESE MODEL PIL ACT art. 132.

1. Choice of Law by, or for the Benefit of, One Party

Rules which allow one party⁹⁴ the right to select the applicable law are par excellence result-oriented because that party is likely to choose the law that he or she considers best. Although this is clearer when the choice is exercised after the dispute (see below), it is also true when the choice is made in advance, as in the case of testate succession.

a. Pre-Dispute Choice by One Party

Indeed, a testator chooses a certain law to govern his or her succession not only for the certainty which that law provides, but also for the substantive solutions (e.g., avoiding forced heirship) which that law ensures. Rules that require such a choice to be respected reflect a societal substantive choice in favor of testamentary freedom at the expense of other substantive succession policies, such as protecting heirs. In this sense, the new choice-of-law rules that allow a testator to select, within certain geographical and substantive limits, the law that will govern his or her succession, provide another example of a recent concession to material-justice considerations. Such rules are found in the 1989 Hague Convention on the Law Applicable to Estates, the Uniform Probate Code in the United States, and the Belgian, Bulgarian, Chinese, Italian, South Korean, Quebec, Romanian, and Swiss codifications.⁹⁵

The most far-reaching example of a result-oriented and self-serving rule is found in a New York statute which, unlike the aforementioned codifications, imposes no substantive and virtually no geographic limitations on the testator's choice of law. The statute provides that, with regard to immovable *or movable* property situated in New York, a testator with no other connections to that state may elect to have New York law apply to "*the intrinsic validity, including the testator's general capacity, effect, interpretation, revocation or*

94. Rules that allow both parties to a bilateral act, such as an ordinary contract, to pre-select the applicable law should not be considered result-oriented (although they are content-oriented) in that they are motivated primarily (or at least as much) by conflicts-justice consideration as by material-justice considerations. See Symeonides, *supra* note 45, at 38–39.

95. See Hague Convention on the Law Applicable to Estates, art. 5, Aug. 1, 1989, 28 I.L.M. 150 (this convention is not in force); UNIF. PROBATE CODE § 2-602 (amended 2008), 8 U.L.A. 385 (1998); BELGIAN PIL CODE art. 79; BULGARIAN PIL CODE art. 89; CHINESE MODEL PIL ACT art 144; ITALIAN PIL ACT art. 46 (successions), art. 56 (donations); SOUTH KOREAN PIL ACT art. 49; QUEBEC CIV. CODE arts. 3098–99; ROMANIAN PIL ACT art. 68(1); SWISS PIL ACT arts. 90(2), 91(2), 87(2), 95(2), (3).

alteration of any such disposition” of the New York property.⁹⁶ In so providing, the statute enables foreign testators who deposit money in New York banks to evade the laws of their own countries.

b. Post-Dispute Choice by One Party in Torts (favor laesi)

Material justice considerations are even more prevalent in choice-of-law rules that allow one party to choose the applicable law *after* the events giving rise to the dispute have occurred, such as a cross-border tort in which conduct in one state caused injury in another. Many recent codifications now allow the victim of a cross-border tort (or the court, on the victim’s behalf) to choose between the laws of the place of the injurious conduct and the place of the resulting injury. Some countries, such as Estonia,⁹⁷ Germany,⁹⁸ Hungary,⁹⁹ Italy,¹⁰⁰ Portugal,¹⁰¹ Quebec,¹⁰² Serbia,¹⁰³ Slovenia,¹⁰⁴ Tunisia,¹⁰⁵ and Venezuela,¹⁰⁶ allow this choice in all cross-border torts,¹⁰⁷ while other countries limit it to certain torts. For example:

96. NEW YORK ESTATES, POWERS AND TRUSTS LAW § 3-5.1(h) (McKinney 1998) (emphasis added).

97. See LAW OF 28 JUNE 1994 ON THE GENERAL PRINCIPLES OF THE CIVIL CODE § 164(3) (Estonia).

98. See EGBGB art. 40(1) (providing for the application of the law of the state of conduct unless the victim requests application of the law of the state of injury). This solution is traceable to an 1888 decision of the German Reichsgericht. See Decision of 20 November 1888, 23 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 305 (1888).

99. See HUNGARIAN PIL ACT art. 32(2) (providing for the application of the law of the state of conduct unless the law of the state of injury is “preferable” to the victim).

100. See ITALIAN PIL ACT art. 62(1) (providing for the application of the law of the state of injury unless the victim requests the application of the law of the state of conduct).

101. See PORTUGUESE CIV. CODE art. 45 (providing that the law of the place of conduct governs but “[i]f the law of the state of injury holds the actor liable but the law of the state where he acts does not, the law of the former state shall apply, provided the actor could foresee the occurrence of damage in that country as a consequence of his act or omission”).

102. See QUEBEC CIV. CODE art. 3126.

103. See OLD YUGOSLAV PIL ACT art. 28. See also art. 1102(4) of Act no. 402 of 30 March 1978 (applicable to internal inter-republic conflicts and providing that damages for torts are governed by “that law which is most favorable for the injured party”).

104. See PRIVATE INTERNATIONAL LAW AND PROCEDURE ACT 56/99, July 13, 1999, art.30(1) (Slovenia).

105. See TUNISIAN PIL CODE art. 70 (providing for the application of the law of the state of conduct unless the victim requests the application of the law of the state of injury).

106. See VENEZUELAN PIL ACT art. 32 (providing for the application of the law of the state of injury unless the victim requests the application of the law of the state of conduct).

107. For generic torts, article 112 of the CHINESE MODEL PIL ACT allows a choice between the laws of the place of conduct or injury. For defamation, article 125 allows the victim of defamation to choose from among the laws of the victim’s domicile, habitual

Belgium allows such a choice only in cases of defamation and in direct actions against insurers;¹⁰⁸ Turkey adds products liability;¹⁰⁹ the Rome II regulation does so only in environmental torts, certain cases involving anti-competitive restrictions, and direct actions against insurers;¹¹⁰ Switzerland does so in cases involving emissions, injury to rights of personality, and products liability;¹¹¹ and Romania does likewise in cases of defamation, unfair competition, and products liability.¹¹²

In products liability conflicts, the Italian, Quebec, Swiss, and Turkish codifications allow the plaintiff to choose from among the laws of: (a) the tortfeasor's place of business or habitual residence, or (b) subject to a proviso, the place in which the product was

residence, the place of dissemination of the defamatory material, or the place of the injury.

108. *See* BELGIAN PIL CODE art. 99(2)(1) (applicable to defamation; allowing plaintiff to choose between the laws of the state of conduct and, subject to a foreseeability proviso, the state of injury); art. 106 (applicable to direct actions against the tortfeasor's insurer; providing that the action will be allowed if it is allowed by either the law governing the tort or the law governing the insurance contract).

109. *See* TURKISH PIL CODE art. 35 (applicable to defamation; allowing plaintiff to choose between the laws of the defendant's habitual residence or place of business and, subject to a foreseeability proviso, the states of the victim's domicile or injury);, art. 34(4) (applicable to direct actions against the tortfeasor's insurer; providing that the action will be allowed if it is allowed by either the law governing the tort or the law governing the insurance contract); art. 36 (applicable to products liability; allowing plaintiff to choose between the laws of the defendant's habitual residence or place of business, and the law of the state of the product's acquisition).

110. *See* Regulation 864/2007, art. 7, 2007 O.J. (L 199) 40 (EC) [hereinafter ROME II] (applicable to environmental torts; applying the law of the state of injury unless the plaintiff opts for the law of the place of conduct); art. 6(3)(b) (allowing the plaintiff to choose between the otherwise applicable law and the law of the forum in certain cases involving anti-competitive restrictions); art.18 (authorizing a direct action against the insurer if such action is allowed by either the law applicable to the tort or the law applicable to the insurance contract).

111. *See* SWISS PIL ACT art. 138 (applicable to emissions; allowing victim to choose between the laws of the state of conduct and the state of injury); art. 139 (injury to rights of personality; giving victims a choice from among the laws of the tortfeasor's habitual residence or place of business, and—subject to a foreseeability defense—the victim's habitual residence or the place of the injury); art. 135 (allowing victims to choose between the laws of the state of the defendant's principal place of business and, subject to a defense, the state of the product's acquisition).

112. *See* ROMANIAN PIL art. 112 (applicable to defamation; allowing victim to choose between the laws of the defendant's domicile or residence and—subject to a foreseeability proviso—the plaintiff's domicile or residence, or the state of injury); arts. 117–118 (applicable to unfair competition; applying the law of the state of injury but also allowing the victim to choose another law in certain cases); art. 114 (applicable to products liability; allowing plaintiff to choose between the laws of plaintiff's domicile and the place of the product's acquisition).

acquired.¹¹³ The Russian Civil Code adds the plaintiff's domicile to these choices,¹¹⁴ and the Tunisian codification adds the state of injury.¹¹⁵ The Romanian codification allows the plaintiff to choose between the plaintiff's domicile and the place of the product's acquisition,¹¹⁶ while the Hague Convention on the Law Applicable to Products Liability also allows the plaintiff to choose between the law of the tortfeasor's principal place of business or the law of the place of injury, if certain contingencies are met.¹¹⁷

Similar rules have been proposed in the United States for product liability conflicts¹¹⁸ and have been adopted in one state, Oregon, for cross-border torts other than tort conflicts.¹¹⁹

113. See ITALIAN PIL ACT art. 63; Quebec Civ. Code art. 3128; Swiss PIL Act art. 135(1); Turkish PIL Code art. 36.

114. See RUSSIAN CIV. CODE art. 1221.

115. See TUNISIAN PIL CODE art. 72.

116. See ROMANIAN PIL ACT art. 114.

117. See Hague Convention on the Law Applicable to Products Liability, arts. 4–5, 6, October 2, 1973, 1065 U.N.T.S. 192. For the text of the convention and a list of the eleven countries in which it is in force, see http://www.hcch.net/index_en.php?act=conventions.status&cid=84.

118. See David F. Cavers, *The Proper Law of Producer's Liability*, 26 INT'L & COMP. L.Q. 703, 728–29 (1977) (letting the plaintiff choose from among the laws of: (a) the place of manufacture; (b) the place of the plaintiff's habitual residence if that place coincides with either the place of injury or the place of the product's acquisition; or (c) the place of acquisition, if that place is also the place of injury); Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 148 (giving both the victim and the tortfeasor a choice under certain circumstances); Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 IND. L. REV. 437, 450–51, 472–74 (2000) (same notion but different choices). Professor Juenger's proposed rule instructs the court to choose the rule of decision that most closely accords with modern products liability standards. JUENGER, *supra* note 31, at 197.

119. Enacted in 2009, Section 8(c) of OR. REV. STAT. ___ provides, in pertinent part, that in cross-border torts (other than products liability), the law of the state of conduct governs. However, this provision also allows the application of the law of the state of injury, if: (a) the activities of the tortfeasor were such as to make foreseeable the occurrence of injury in that state; and (b) the victim formally requests the application of that state's law by a pleading or amended pleading. In such a case the request shall be deemed to encompass all claims and issues against the particular defendant. *Id.* This provision is subject to an exception if a party demonstrates that the application to a disputed issue of the law of another state is substantially more appropriate under the principles of section 9 (which articulates the codification's residual choice-of-law approach), in which case the law of the other state applies to that issue. For a discussion of this provision by its drafter and its differences from the corresponding provisions of other codifications, see Symeon C. Symeonides, *Oregon's New Choice-of-Law Codification for Tort Conflicts: An Exegesis*, 88 OR. L. REV. (forthcoming 2010).

c. Post-Dispute Choice by Owner of Stolen Property

The Belgian codification extends the concept of post-dispute choice by one party to the owner of stolen cultural property or other movable property. Article 90 of the Code provides that a state seeking to recover cultural property illegally exported from its territory may choose between its own law and the law of the state in which the property is found at the time of the claim. The article also provides that, if the claimant state chooses its own law and that law does not grant any protection to good faith possessors, the defendant may invoke the protection accorded such possessors by the law of the state in which the property is located at the time of the claim.¹²⁰ In addition, Article 92 of the same code gives the same choices to the owner of other stolen goods.¹²¹

The Romanian codification also contains two interesting articles applicable to movable things claimed by *usucapion* or acquisitive prescription. Article 145 of the Act provides that prescription is governed by the law of the state in which the thing was located at the beginning of the applicable prescriptive period. Article 146 provides that, if the thing is moved to another state in which the prescriptive period expires, “the owner” can request the application of the law of the latter state if “all the conditions required by the . . . law [of the former state], beginning from the date of the removal of the thing, are met.”¹²² It seems that the quoted word “owner” refers not to the previous owner of the thing but rather to the possessor of it who claims to have acquired ownership of it by acquisitive prescription.¹²³ If this interpretation is correct, then, in contrast to the Belgian article discussed above, the Romanian article favors possessors over owners. In any event, even if the two articles favor a different outcome, they both provide good examples of result-selective choice-of-law rules.

d. Court Choice for the Benefit of Maintenance Obligees

In areas other than torts, choice-of-law rules expressly designed

120. See BELGIAN PIL CODE art. 90.

121. See BELGIAN PIL CODE art. 92 (allowing the owner to choose between the laws of the state from which the goods were stolen or the state in which the goods are located at the time of revindication, but allowing the defendant to invoke the protection accorded good faith possessors by the law of the former state if the owner opts for the law of the latter state).

122. ROMANIAN PIL ACT art. 146.

123. Also, the phrase “all conditions” apparently means all conditions other than the length of the prescriptive period.

to favor one party are fairly common in domestic relations matters. In addition to the rules involving status discussed earlier, other rules of this kind are those which authorize the court, in child and spousal support disputes, to choose from among several laws that which is most favorable to the obligee. One example is Article 18 of the German EGBGB, which, subject to certain qualifications, allows a choice of the law most favorable to the maintenance obligee from among the laws of the obligee's habitual residence, the common nationality of the obligor and the obligee, and the law of the forum.¹²⁴ Similar rules are found in the 1956 Hague Convention on the Law Applicable to Maintenance Obligations Towards Children,¹²⁵ the 1973 Hague Convention on the Law Applicable to Maintenance Obligations,¹²⁶ the 1989 Inter-American Convention on Support Obligations,¹²⁷ the Belgian Code,¹²⁸ the Dutch Act of 1992,¹²⁹ the French Civil Code,¹³⁰ the Hungarian Act,¹³¹ and the Quebec Civil Code.¹³² The Tunisian codification allows the court to choose from among four potentially different laws the one most favorable to the obligee. The four laws are those of the obligee's nationality or

124. See EGBGB art. 18.

125. See Hague Convention on the Law Applicable to Maintenance Obligations Towards Children, arts. 1–3, Oct. 24, 1956, 510 U.N.T.S. 161 (choice between the *lex fori* and the law of the child's habitual residence). For the text of the convention and a list of the thirteen countries in which it is in force, see http://www.hcch.net/index_en.php?act=conventions.status&cid=37.

126. See The Hague Convention on the Law Applicable to Maintenance Obligations, arts. 4–6, Oct. 2, 1973, 1056 U.N.T.S. 199 (choice from among the laws of the forum, the obligee's habitual residence, or the common national law of the obligor and the obligee). For the text of the convention and a list of the fourteen countries in which it is in force, see http://www.hcch.net/index_en.php?act=conventions.status&cid=86.

127. See Inter-American Convention on Support Obligations, art. 6, July 15, 1989, 29 I.L.M. 73 (choice from among the laws of the habitual residence or domicile of either obligor or obligee).

128. See BELGIAN PIL CODE art. 74.

129. See Katharina Boele-Woelki, Carla Joustra & Geert Steenhoff, *Dutch Private International Law at the End of the 20th Century: Progress or Regress?*, in PRIVATE INTERNATIONAL LAW AT THE END OF THE 20TH CENTURY: PROGRESS OR REGRESS? 309–311 (Symeon C. Symeonides ed., 1999) (also describing Dutch jurisprudence on child custody, filiation, and maintenance).

130. See FRENCH CIV. CODE arts. 311–18 (giving the choice directly to the child).

131. See HUNGARIAN PIL ACT art. 46 (with regard to the status, family relationships, and maintenance rights of children living in Hungary, Hungarian law applies whenever it is more favorable to the child than the otherwise applicable law).

132. See QUEBEC CIV. CODE art. 3094 (choice between the law of the domicile of the obligee or the obligor).

domicile, or the obligor's nationality or domicile.¹³³

2. *Protecting Consumers or Employees from the Consequences of an Adverse Choice-of-Law Clause*

In contrast to the above rules, which protect tort victims by granting them the right to choose the applicable law, other rules seek to protect consumers and employees from the adverse consequences of their own potentially coerced or uninformed assents to choice-of-law clauses. The best known examples are Articles 5 and 6 of the Rome Convention, which are reproduced without material changes in the new Rome I regulation.¹³⁴ These articles provide that a choice-of-law clause in a consumer contract or an employment contract may not deprive the consumer or employee, respectively, of the protection afforded by the mandatory rules of the country whose law would govern the contract in the absence of such a clause. Similar provisions are found in the laws of many countries, including Austria,¹³⁵ Germany,¹³⁶ Japan,¹³⁷ South Korea,¹³⁸ Quebec,¹³⁹ Romania,¹⁴⁰ Russia,¹⁴¹ Switzerland,¹⁴² and Turkey.¹⁴³ Thus, a choice-of-law clause can expand but cannot contract the protection available to consumers or employees. Again, the materially desirable result of protecting members of a protected class is given preference over conflicts-justice considerations.

133. See TUNISIAN PIL CODE art. 51.

134. See ROME CONVENTION arts. 5–6, and ROME I, arts. 6, 8.

135. See AUSTRIAN PIL ACT § 41 (providing that consumer contracts are to be governed by the law of the consumer's habitual residence if that law grants the consumer "special private law protection as a consumer" and if the contract was solicited in that state; a choice-of-law clause shall be disregarded to the extent it deprives the consumer of the protection provided by the mandatory rules of that state). See also *id.* § 44(3) (providing that a choice-of-law clause in an employment contract may not deprive the employee of the protection provided by the mandatory rules of the otherwise applicable law).

136. See EGBGB arts. 29–30.

137. See JAPANESE PIL ACT arts. 11–12.

138. See KOREAN PIL ACT of 2001 arts. 27–28.

139. See QUEBEC CIV. CODE arts. 3117–18.

140. See ROMANIAN PIL ACT arts. 101–102 (employment contracts).

141. See RUSSIAN CIV. CODE art. 1212.

142. See SWISS PIL ACT art. 120(2).

143. See TURKISH PIL CODE arts. 26–27.

III. CONCLUDING THOUGHTS

A. Not “Only in America”

Although the above list of result-selective statutory choice-of-law rules is illustrative rather than exhaustive, it is also sufficiently long and diverse to provide a convincing answer to the rhetorical question of whether material-justice views prosper “only in America.” The list demonstrates that, despite significant differences among themselves and from the American system, foreign conflicts systems—even the codified ones—are far from indifferent to material justice considerations.

To be sure, differences exist between the rules described above and, for example, Leflar’s better-law approach or, especially, Juenger’s substantive-law approach. However, many of these differences, discussed below, are attributable to the different role of legislators and judges in their respective legal systems. Indeed, in many respects, much of what American approaches endeavor to do judicially, other systems endeavor to do legislatively. However, the very use of different implements tends to magnify the real and apparent differences in implementation. American solutions appear more ad hoc, more subjective, and more extreme. European solutions appear more objective, consistent, and moderate. Yet the real differences are often differences in degree rather than substance.

In any event, the fact that so many codified conflicts systems—typically perceived as the bastions of conflicts justice—saw fit to enact so many choice-of-law rules specifically designed to accomplish a particular substantive result suggests that this perception is either wrong or outdated. During the course of the twentieth century, the material-justice view has gained significant ground over the classical view. Indeed, we have moved from an era in which material justice was officially unmentionable to an era in which it has become an important—and, in some instances, almost co-equal—goal with conflicts justice. At the dawn of the twenty-first century, the dilemma is no longer (and perhaps it never should have been) an “either-or” choice between conflicts justice and material justice.¹⁴⁴

144. Cf., e.g., Bernard Audit, *Le droit international privé français vers la fin du vingtième siècle: Progress ou recul?*, in PRIVATE INTERNATIONAL LAW AT THE END OF THE 20TH CENTURY: PROGRESS OR REGRESS? 191, 194 (Symeon C. Symeonides ed., 1999) (“La simple justice des conflits est susceptible de degrés.”). See also *id.* at 195 (“Il y a donc une ‘justice de répartition.’”).

Rather, it is a question of when, how, and how much the desideratum of material justice should temper the search for conflicts justice.

Professor Friedrich K. Juenger, an ardent and eloquent proponent of the material justice view, concluded that the existence of so many result-oriented rules: (a) “contradicts the proposition that our discipline is value-free”,¹⁴⁵ (b) demonstrates that “teleology can be reduced to statutory form”,¹⁴⁶ and (c) strengthens his argument that “teleology” or result-selectivism should be elevated into a controlling choice-of-law criterion, at least in uncodified conflicts systems like the American system.¹⁴⁷

The first two propositions are not disputed here. Indeed, our discipline is not value-free; it is not and should not be indifferent to material-justice considerations; and contemporary legislatures are perfectly capable of taking cognizance of these considerations.

Before addressing Juenger’s third proposition, however, it may be helpful to clarify the meaning of teleology in this context. Juenger’s teleology was substantive, judicial, and exclusive. It was substantive because, unlike Leflar, who argued for choosing the better between the existing laws of the involved states, Juenger advocated the creation of a new substantive rule of law for each multistate case.¹⁴⁸ In this sense, Juenger’s proposed method was not a choice of *law*, but rather a choice of substantive *result*. Juenger’s teleology was judicial because, like Leflar, Juenger envisioned the judge as both the pilot and the captain of the choice-of-law ship, entrusted with virtually unfettered discretion subject to very few restraints, among which geography was not one. Finally, Juenger’s teleology was exclusive because, in his view, teleology should be the controlling principle to the exclusion of all others, not a “corrective to be used in exceptional circumstances” or as “merely complimentary to the ordinary choice-of-law process.”¹⁴⁹

B. The Difference

Like Juenger, I too believe in teleology. However, my teleology is *spatial* rather than substantive, *legislative* rather than judicial, and

145. See JUENGER, *supra* note 31, at 185.

146. *Id.* at 185. See also *id.* at 179 (“In legislation, as in adjudication, teleology can take various shapes.”).

147. See *id.* at 179, 192–95 *passim*.

148. See *supra* Part I.D.

149. JUENGER, *supra* note 31, at 191–94.

supplemental rather than exclusive. The distinction between substantive and spatial teleology is just another name for the old dilemma between material justice and conflicts justice. Unlike Juenger, I continue to lean toward the conflicts-justice view, subject to the qualifications described later in this article. I believe that: (1) conflicts of laws should be resolved by choosing extant law rather than creating new law; (2) a judge's choices are limited to the laws of the states that have pertinent contacts with the case; and (3) from among those laws, the judge should choose the one that is spatially most appropriate.

Defining the spatially appropriate law is of course *the* grand question. But it is a question of *choosing* a law, *not creating* one. The judge is the one to make the choice, but in so choosing, the judge should always examine the purpose or *telos* (hence the term teleology) of each of the laws involved in the conflict. In many cases, this examination will reveal whether the particular law was intended to reach the multistate case at hand (*volonté d'application*). In turn, this will enable the judge to diagnose the type of conflict the case presents and to proceed accordingly. Juenger steadfastly rejected this type of teleology.

Juenger and I agree on the propriety of the legislative-*substantive* teleology that is embodied in the many result-selective statutory choice-of-law rules described earlier in this essay. However, Juenger and I draw different conclusions from the existence and numerosity of these rules. This is why I disagree with Juenger's third proposition that the existence of these result-selective rules signifies or militates for a *wholesale* reorientation of conflicts law toward substantive justice.¹⁵⁰ As important as these rules may be, they remain exceptional and they cover a relatively modest range of conflicts problems. More importantly, these rules are designed to produce results which the *collective* will considers desirable and non-controversial. The existence of these rules demonstrates that even codified conflicts systems are capable of making targeted adjustments where such are needed. In turn, this militates in favor of preservation and against condemnation and demolition of the system. Such adjustments are structurally and philosophically easier in uncodified systems, and the real value of the result-oriented rules described above is that they pinpoint the areas in which uncodified systems can make similar adjustments in favor of material justice.

150. *See id.* at 191.

However, it is one thing to speak of selective pre-authorized adjustments in favor of material justice and another thing to advocate an ad hoc method in which material justice completely displaces conflicts justice. Like Juenger, I recognize that result-orientation is often the most realistic explanation of the outcome of most American conflicts cases. But I see serious dangers in ratifying this de facto state of affairs and elevating it to a de jure method of conflicts resolution. It is, to say the least, “inadvisable to elevate a fact of human weakness to a principle of legislative policy.”¹⁵¹ Unlike Juenger¹⁵² and Leflar,¹⁵³ I remain apprehensive about the dangers of judicial subjectivism, and this apprehension has not been reduced by my reading of myriad conflicts cases during the last three decades.¹⁵⁴

I believe that there is an important qualitative difference between result-selectivism in legislation and result-selectivism in adjudication as advocated by Leflar and especially Juenger. In the former, the desirable result is determined in advance and *in abstracto* through the consensus mechanisms of the collective democratic processes. In the latter, the result is chosen ex post facto and *in concreto* and often by a single judge who, with the best of intentions, cannot easily avoid the dangers of subjectivism.¹⁵⁵ For this reason, I applaud the selective, targeted use of result-oriented rules in choice-of-law legislation, such as the ones described in this essay, but I remain highly skeptical of unguided and freewheeling result-selectivism in choice-of-law adjudication.

Yet again, I am mindful of Juenger’s caustic statement that “those who actually draft conflicts statutes are frequently academicians beholden to one or the other orthodox doctrine.”¹⁵⁶ As an academician who, as fate would have it, has drafted three such

151. Otto Kahn-Freund, *General Problems of Private International Law*, in 143 ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INT’L LAW 139, 466 (1974) (“However much . . . in practice the judge’s choice of law may be influenced by his preference for the content of one law or another, it is inadvisable to elevate a fact of human weakness to a principle of legislative policy.”).

152. See JUENGER, *supra* note 31, at 199–208.

153. See LEFLAR ET AL., *supra* note 10, at 298–99.

154. See my annual surveys of American choice-of-law cases published annually in the *American Journal of Comparative Law* from 1988 to 2009.

155. As Peter Nygh pointed out, “One court’s better law may be another’s worse. It is only by reference to an ideology that a court can in some cases make a choice as to which is the better law; there needs to be a commitment in some cases to allowing the ‘collective good’ to prevail.” PETER E. NYGH, *CONFLICT OF LAWS IN AUSTRALIA* 29 (6th ed. 1995).

156. JUENGER, *supra* note 31, at 179.

statutes,¹⁵⁷ I must acknowledge and disclose the possibility of my own biases, although, as this article illustrates, I do my best to confront them. Unlike the majority of conflicts scholars, including both Juenger and Leflar,¹⁵⁸ I believe that choice-of-law legislation is both feasible and desirable.¹⁵⁹ For reasons noted earlier, I also believe that result-selective rules like the ones described in this essay have a legitimate—indeed deserved—place in such legislation. To be sure, in uncodified conflicts systems—like that of the United States—in which choice-of-law legislation is so uncommon, there is no vehicle for adopting such rules. This, however, should not serve as an excuse for unrestricted judicial result-selectivism, especially because (as noted earlier) the line between such selectivism and judicial subjectivism is much too thin. At the same time, the long list of result-selective rules discussed in this article suggests that there is no good reason to banish material justice considerations from the list of factors that a court should consider in resolving conflicts of laws, especially those conflicts that the established methods fail to resolve satisfactorily.

157. See Symeon C. Symeonides, *The Conflicts Book of the Louisiana Civil Code: Civilian, American, or Original?*, 83 TUL. L. REV. 1041 (2009); Symeon C. Symeonides, *Private International Law Codification in a Mixed Jurisdiction: The Louisiana Experience*, 57 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 460 (1993); Symeon C. Symeonides, *Oregon's New Choice-of-Law Codification for Tort Conflicts: An Exegesis*, 88 OR. L. REV. (forthcoming 2010); Symeon C. Symeonides, *Revising Puerto Rico's Conflicts Law: A Preview*, 28 COLUM. J. TRANSNAT'L L. 601 (1990). In drafting these codifications, I resorted to result-oriented rules only in cases in which the accumulated collective experience provided clear guidance on what the proper material result ought to be. See Symeon C. Symeonides, *Les grands problèmes de droit international privé et la nouvelle codification de Louisiane*, 81 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 223, 253–56 (1992).

158. See Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403 (2000); Robert A. Leflar, *Choice-of-Law Statutes*, 44 TENN. L. REV. 951 (1977).

159. For discussion of this point, see SYMEONIDES, *supra* note 15, at 423–37.