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Can Better Law Be Married with Corrective Justice or Evil Laws?

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Résumé de l'article

Cet article propose une compréhension novatrice de l'approche du meilleur droit en matière de conflits de lois. Il fournit une analyse complète de la nature de l'approche du meilleur droit en abordant les erreurs terminologiques de la littérature traditionnelle et contemporaine en matière de conflits de lois, en dépeignant la distinction conceptuelle entre les deux versions de cette approche, et en faisant un lien entre celle-ci et deux notions centrales en théorie du droit, soit la justice corrective et les lois immorales.

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McGill Law Journal — Revue de droit de McGill

CAN BETTER LAW BE MARRIED WITH CORRECTIVE JUSTICE OR EVIL LAWS?

*Sagi Peari**

This article offers an innovative understanding of the better law approach to choice of law. Through addressing the terminological fallacies of traditional and contemporary choice of law literature, depicting the conceptual distinction between the two versions of better law, and making a link between the better law approach and two central notions of legal theory—corrective justice and evil laws—this article provides a comprehensive analysis of the nature of better law.

Cet article propose une compréhension novatrice de l'approche du meilleur droit en matière de conflits de lois. Il fournit une analyse complète de la nature de l'approche du meilleur droit en abordant les erreurs terminologiques de la littérature traditionnelle et contemporaine en matière de conflits de lois, en dépeignant la distinction conceptuelle entre les deux versions de cette approche, et en faisant un lien entre celle-ci et deux notions centrales en théorie du droit, soit la justice corrective et les lois immorales.

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Introduction

> There are times when those who write about the common law of private international law are forced to concede that the terminology used to express the doctrine is liable to mislead.[1]

The choice of law question asks which law courts should apply when a foreign element is involved in the factual matrix of a case. According to the better law approach, the answer to this question lies in the substantive evaluation of the involved laws' provisions and determination of which law is "better". Thus, in the case of a contract signed between Ontario and Quebec residents in New York with respect to delivery of goods in Brazil, the better law approach supports a comparative evaluation of the substantive merits of Ontario's, Quebec's, New York's, and Brazil's contract law provisions and chooses from those provisions that which is the "better" one. But which law is considered to be "better"? Indeed, presented in these terms, this approach has not received much support in court decisions and, most commonly, has been quickly dismissed by commentators on grounds that point to the lack of objective criteria in the "better" law.[2]

This article argues that the story of better law is a story of missed points for academic scholarship. In line with the above-cited quotation, choice of law literature has been preoccupied with terminological misconceptions and miscategorizations[3] that have greatly contributed to contemporary underestimation and misunderstanding of better law. I will argue that, in contrast to the conventional view, better law is deeply rooted in choice of law thought and constitutes one of the most central elements of choice of law process. Academics have missed the point that in fact one can conceptually delineate not one but two versions of the better law approach, which prompts a further logical analogy between better law and the following two central notions of legal theory: corrective justice and evil laws.

In particular, I will do the following three things. First, as I have mentioned, I shall argue that there are in fact two versions of the better law approach: the unpopular version of better law as a primary rule and the very popular version of better law as a subsidiary or complementary rule. By offering various accounts of better law and analyzing its various aspects, choice of law commentators have neglected to make a conceptual

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1 Adrian Briggs, "Recognition of Foreign Judgments: A Matter of Obligation" (2013) 129 Law Q Rev 87 at 87.

2 For discussion of this point, see *infra* notes 17–19 and accompanying text.

3 For discussion of this point, see *infra* notes 24–26, 39, 74–75 and accompanying text and Part III.B.1., below.

distinction between these two versions.[4] One can argue, however, that this distinction should be made. Both versions of better law refer to the merits of the substantive content of the laws involved. It is, however, one thing to defend a pure account of better law that insists on a direct application of its methodology to choice of law process. Thus, we can say that in the car accident between Ontario and Quebec residents that took place in New York, the "better" tort law rule of negligence should apply through the comparative analysis of the respective Ontario, Quebec, and New York tort law provisions.[5]

Yet, it is another thing to make a reference to better law as a subsidiary substantive doctrine within the operational mechanics of other choice of law methods. Consider a contract made between Ontario and Quebec corporations with respect to the delivery of goods in Brazil. According to the subsidiary version of better law, the Ontario judge might discredit the ordinary choice of law rule of the place of contract performance (i.e., Brazilian contract law) because of the substantive merits of this provision. Accordingly, while both versions of better law refer to the merits of the substantive content of the laws involved, the subsidiary version of better law

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4 For representative examples of comprehensive works on better law, see Robert A Leflar, "Choice-Influencing Considerations in Conflicts Law" (1966) 41:2 NYUL Rev 267 [Leflar, "Considerations"]; Friedrich K Juenger, *Choice of Law and Multistate Justice* (Dordrecht: Martinus Nijhoff, 1993) at 169–90 [Juenger, *Multistate Justice*]; Symeon C Symeonides, "Result-Selectivism in Conflicts Law" (2009) 46:1 Willamette L Rev 1 [Symeonides, "Result-Selectivism"].

5 For the purposes of the argument made in this article, I do not differentiate between so-called interprovincial private interactions (such as a contract made between Quebec and Ontario residents in Nova Scotia) in federal systems such as Canada and the United States and international interactions (such as a contract made between Ontario and New York residents in Germany). The literature and the case law on the question of whether private international law mechanics should differentiate between the two is fairly confused. Some voices have expressed the view that such a distinction should be made (see e.g. Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws*, 6th ed (Markham: LexisNexis/Butterworths, 2005) (loose-leaf updated 2015, release 51) vol 1 at 2-9 to 2-11; *Beals v Saldanha*, 2003 SCC 72 at paras 171–74, 200–04, [2003] 3 SCR 416, Lebel J, dissenting [*Beals*]; *Tolofson v Jensen*, [1994] 3 SCR 1022 at 1053–55, 120 DLR (4th) 289 [*Tolofson*]). This article, however, simply joins what seems to be the prevailing view that denies the significance of this distinction for the choice of law question and treats the instances of interprovincial and international private interactions equally. For support of this view within choice of law literature and jurisprudence, see Stephen GA Pitel & Nicholas S Rafferty, *Conflict of Laws* (Toronto: Irwin Law, 2010) at 85–86, 132, 168, 252; *Beals*, *supra* note 5 at para 19 (majority opinion); Gerhard Kegel, "The Crisis of Conflict of Laws" (1964) 1964:2 Rec des Cours 95 at 95–96 [Kegel, "Crisis"]; Christopher A Whytock, "Myth of Mess? International Choice of Law in Action" (2009) 84:3 NYUL Rev 719 at 729, n 53.

does so as a complementary doctrine to other methodologies.[6] Presented in these terms, the subsidiary version does not conceive the normative structure of the choice of law question as a unitary enterprise that is based purely on the substantive notion of better law, but rather as a complex conjunction and interplay of several key foundational blocks with better law being one of them.[7]

Second, this article suggests making a conceptual link between the primary version of better law and the theory of corrective justice. As a full-blown theory of private law, corrective justice seems to be a natural companion of this version of better law. One can argue that better law supporters have missed the following point. Since private international law cases address private interactions, a theory based on private law and private law categories (i.e., tort, contracts, restitution, and property) can provide the answer to the fundamental challenge of better law: which law is better? As the leading theory of private law, corrective justice seems to be a suitable candidate for providing the much needed normative criteria of better law. Yet, it will be argued that, despite its apparent attractiveness, corrective justice's own theoretical basis is still incompatible with better law as a primary rule.

Third, the article suggests making a parallel between the subsidiary version of better law and the notion of "evil laws" in legal theory. Addressing admittedly different cases and operating on different levels and in different contexts, the striking similarity in rhetoric and implementation between the two notions is evident. As we will see, evil laws theory is not just capable of providing a normative justification of better law as a subsidiary rule, but also explains why this version of better law seems to be immune from the significant challenges that have been raised against the primary version of better law. In this way, the suggested consideration of marrying better law with corrective justice or evil laws purports to provide a normative justification for both: the remarkable scarcity of better law as a primary rule and the vast popularity of better law as a subsidiary rule.

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6 See Charles T Kotuby Jr, "General Principles of Law, International Due Process, and the Modern Role of Private International Law" (2013) 23:1 Duke J Comp & Intl L 411. By discussing the various substantive exceptions to the choice of law process in the context of international arbitrations, Kotuby explicitly limited the scope of his argument to the subsidiary version of better law. As he puts it: "What I am suggesting comes *after* a choice of law is made" (*ibid* at 436–37 [emphasis in original]).

7 For further discussion of the subsidiary version of better law and the conglomerate normative structure of choice of law that this version of better law presupposes, see *infra* notes 48–51, 81, 214 and accompanying text.

The article is structured around the above-mentioned three points. Part I delineates the two versions of better law and analyzes its presence within traditional and contemporary choice of law thought. Part II discusses the possibility of marrying the primary version of better law with the private law theory of corrective justice. Part III discusses the possibility of marrying the subsidiary version of better law with the notion of evil laws.

I. Two Forms of Better Law

A. Better Law as a Primary Rule

The popularity and use of better law as a primary doctrine is relatively rare. In Europe[8] and Canada[9], this version of better law has been entirely rejected. In the United States, it has received only marginal support, primarily through the writings of Robert Leflar[10] and Friedrich Juenger.[11] Leflar suggested governing the choice of law process through an amalgam of the following five "choice-influencing considerations": "[p]redictability of results"; "[m]aintenance of interstate and international order"; "[s]implification of the judicial task"; "[a]dvancement of the forum's governmental interests"; and "[a]pplication of the better rule of law."[12] As one can notice immediately, the last consideration of the "better rule of law" is only one of five considerations. Its actual influence within Leflar's other four considerations is somewhat vague and has been broadly understood amongst choice of law commentators and courts as a mere call for the application of the domestic law of the forum—*lex fori*.[13] Based on this

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8 For the European rejection of the primary version of better law, see Jürgen Basedow, "The Law of Open Societies: Private Ordering and Public Regulation of International Relations—General Course on Private International Law" (2012) 360 Rec des Cours 9 at 39, n 9; Kegel, "Crisis", *supra* note 5 at 238–51.

9 Canadian choice of law literature and jurisprudence has also not considered the primary version of better law as a legitimate approach to the choice of law process. See e.g. Pitel & Rafferty, *supra* note 5 at 206–10 (not even mentioning better law as one of the possible solutions to choice of law process); Nicholas Rafferty et al, *Private International Law in Common Law Canada: Cases, Text and Materials*, 3rd ed (Toronto: Emond Montgomery, 2010) at 7–29 [Rafferty et al, *Private International Law*].

10 See Leflar, "Considerations", *supra* note 4; Robert A Leflar, "Conflicts Law: More on Choice-Influencing Considerations" (1966) 54:4 Cal L Rev 1584 [Leflar, "More"].

11 See Juenger, *Multistate Justice*, *supra* note 4.

12 Leflar, "Considerations", *supra* note 4 at 282–304.

13 See e.g. Stanley E Cox, "Applying the Best Law" (1999) 52:1 Ark L Rev 9 at 10–11; Symeon C Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future* (Leiden: Martinus Nijhoff, 2006) at 25–28, 81–87 [Symeonides, *Revolution*].

understanding of Leflar's legacy, among the laws involved, the "better rule of law" is that of the forum adjudicating the case.

Friedrich Juenger's writings provided another source of potential support of better law as a primary rule. By defending the single criteria of "substantive law" for the choice of law process,[14] he mocked the multiplicity and internal incoherency of Leflar's five choice-influencing considerations.[15] In contrast to Leflar, Juenger supported a pure version of the better law approach that, among the involved laws, creates a special non-state law that applies to the particular case.[16] Thus, for example, in the case of a tort committed between English and French residents, a special ad hoc non-state law must be constructed from the relevant tort provisions of England and France.

Both Juenger's and Leflar's accounts of better law have been vulnerable to the conventional fatal objection that has been immediately mounted against any version of better law: what is considered to be the better law? By pointing to the inherent indeterminacy and arbitrariness of the process through which the judges perform a substantive content merits analysis of various provisions, commentators have tended to quickly dismiss better law as a valid approach to the choice of law question.[17] Indeed, neither Leflar's "better rule of law" nor Juenger's "constructive" version of better law supplied objective criteria for a comparative analysis of the involved laws. This explains why Juenger's version of better law received even less support than that of Leflar.[18] By suggesting the design of special previously non-existent provisions on an ad hoc basis, this version only magnifies the inherent indeterminacy and unpredictability of better law.[19]

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[14] Friedrich K Juenger, "A Third Conflicts Restatement?" (2000) 75:1 Ind LJ 403 at 415–16.

[15] See Juenger, *Multistate Justice*, *supra* note 4 at 173, n 1072, 415–16.

[16] See *ibid* at 194–99, 236.

[17] See e.g. Paul Heinrich Neuhaus, "Legal Certainty Versus Equity in the Conflict of Laws" (1963) 28:1 Law & Contemp Probs 795 at 803; Brainerd Currie, *Selected Essays on the Conflict of Laws* (Durham, NC: Duke University Press, 1963) at 153–54.

[18] See Symeonides, "Result-Selectivism", *supra* note 4 at 7–9 (mentioning that Juenger's version of better law has not "garnered any appreciable judicial following").

[19] Of course, Juenger's "constructive" version of better law deserves much more attention than a mere mention of its inherently indeterminate nature. By incorporating previously non-existent, non-state law into the choice of law process, this version raises deep and interrelated questions about the nature of the formal and substantive constituents of the phenomenon called "law", the notions of legal certainty and legitimacy, and the nature of public legislative authority—all questions that go beyond the scope of this article. For some recent related discussions about the complex possibility of applying non-state provisions as a part of operational choice of law mechanics, see Sagi Peari, "The Choice-Based Perspective of Choice-of-Law" (2013) 23:3 Duke J Comp & Intl L 477 at

From this perspective, the objective criteria challenge seems to present an insurmountable hurdle for better law and explains its marginal role in traditional and contemporary choice of law thought and decisions.

One may challenge the point about the scarcity of better law as a primary rule by arguing that its underlying rationale lies at the basis of several traditional choice of law doctrines and concepts. Thus, one of the central motives of Juenger's[20] and Leflar's[21] writings was grounded in the implicit consistency of a broad spectrum of traditional choice of law rules with better law. The intellectual history of the better law approach has been presented in very broad terms. Although this argument has been made chiefly with respect to the instances of better law as a subsidiary rule, several references to better law as a primary rule were made. In particular, it has been argued that better law holds more sway in reality than one might think because of its reflection in the underlying rationale of the popular "party autonomy"[22] and "validation" principles.[23]

The affiliation of these principles with better law, however, seems to be flawed. Consider the party autonomy principle according to which the parties may agree on the identity of the applied law.[24] So, while signing a

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483–85 [Peari, "Choice-Based"]; Geneviève Saumier, "The Hague Principles and the Choice of Non-State 'Rules of Law' to Govern an International Commercial Contract" (2014) 40:1 Brook J Intl L 1; Ralf Michaels, "Non-State Law in the Hague Principles on Choice of Law in International Contracts" in Kai Purnhagen & Peter Rott, eds, *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Cham: Springer, 2014) 43.

20 See Juenger, *Multistate Justice*, *supra* note 4 at 178, 182–84, 195–99, 202, 207, 214–16. See also Russell J Weintraub, "Choosing Law with an Eye on the Prize", Book Review of *Choice of Law and Multistate Justice* by Friedrich K Juenger, (1994) 15:3 Mich J Intl L 705 at 721–22 (mentioning the multiplicity of traditional doctrines and choice of law rules to which Juenger's version of best law methodology purports to apply).

21 See Leflar, "Considerations", *supra* note 4 at 297, 300–04; Leflar, "More", *supra* note 10 at 1588.

22 For support of the classification of the party autonomy principle under the better law approach, see Juenger, *Multistate Justice*, *supra* note 4 at 183.

23 For support of the classification of the "validation rule" under the better law approach, see *ibid* at 178, 195, 216; Friedrich K Juenger, "How Do You Rate a Century?" (2001) 37:1 Willamette L Rev 89 at 97; Symeon C Symeonides, "Material Justice and Conflicts Justice in Choice of Law" in Patrick J Borchers & Joachim Zekoll, eds, *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K. Juenger* (Ardsley, NY: Transnational, 2001) 125 at 128–32 [Symeonides, "Material Justice"]; Leflar, "Considerations", *supra* note 4 at 297–98.

24 For recent overviews of this principle within the American, Canadian, and European traditions, see Giesela Rühl, "Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency" in Eckart Gottschalk et al, eds, *Conflict of Laws in a Globalized World* (Cambridge: Cambridge University Press, 2007) 153 at 155–76; Pitel & Rafferty, *supra* note 5 at 271–74; Symeon C Symeonides,

contract, the parties can agree on the identity of the law to govern their future disputes over any of the contractual provisions. This principle is grounded on a unique theoretical basis—that of the parties' united choice. By explicitly agreeing on the identity of the framework that will determine their rights and duties, the parties are united in their choices with respect to the question of applied law. The potential motives for the adoption of a particular provision can be various and not necessarily related to the choice of a better or substantively preferred law. The parties may have in mind the content of the chosen law but also such issues as speed and efficiency of the judicial process or simply their familiarity with the chosen law. In other words, what is at stake here is not the question of which law is "better" according to certain subjective or objective criteria, but rather a reflection of the independent normative principle that fundamentally honours the parties' choice. By following the imperative of the parties' united choice, the judicial authority is disinterested and abstracts from the motives that led to this choice.

A related point applies with respect to the "validation" principle, which instructs the courts to select from the involved laws the law that validates a certain institution, such as validity of contract or validity of marriage.[25] This rule seems to be related to the nature of particular legal institutions and to the parties' presumed objective choice with respect to the validity of this institution. Thus, the contracting parties are objectively regarded by the court as having intended to subject themselves to the positive laws of the state under which the contract would be valid. In this way, this doctrine fundamentally relates to the parties' presumed choice and serves as an indicative component of it.[26]

The remarkable scarcity of better law as a primary rule does not need, however, to be explained exclusively through the "objective criteria" challenge. Another line of criticism can be seen to challenge the internal coherence of the better law argument. Even if better law supporters were

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"Party Autonomy in Rome I and II from a Comparative Perspective" in Katharina Boele-Woelki et al, eds, *Convergence and Divergence in Private International Law* (Zurich: Schulthess, 2010) 513 [Symeonides, "Party Autonomy"].

[25] See e.g. Albert A Ehrenzweig, *A Treatise on the Conflict of Laws* (St Paul: West, 1962) at 465–90.

[26] For a somewhat related understanding of the validation rule, see Friedrich Carl Von Savigny, *A Treatise on the Conflict of Laws, and the Limits of Their Operation in Respect of Place and Time*, 2nd revised ed, translated by William Guthrie (Edinburgh: T & T Clark, 1880) at 223–24, 252; Peter E Nygh, "The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort" (1995) 251 Rec des Cours 269 (linking the conceptual origins of the Rule of Validation to the litigating parties' presumed choice at 338–46; stating "[i]t is obvious that the Rule of Validation in general accords with the reasonable expectations of the parties" at 340).

able to provide the much needed objective criteria for determining which law is better (which they appear not to be), they would still need to explain within their own theoretical framework the compromise that this approach entails by what I call the "approximation move" toward a certain ideal.

In order to illustrate this point, consider a motor vehicle collision between Ontario and Quebec residents in New York. Even if the better law supporters had known the objective ideal of the law that was better, one might speak out and ask: why minimize the comparative substantive analysis to the tort law provisions of Ontario, Quebec, and New York? Given that the provisions of these jurisdictions do not meet the ideal version of tort law, the choice of the "better law" would not mean a choice of the "best law". Since the "better law" does not always mean the "best law", better law needs to explain this compromise and the approximation toward its ideal.

The approximation move can be seen in Juenger's and Leflar's works. They both subordinated their accounts to the requirement of "sufficient connection", according to which the pool of involved laws is identified based on the degree of connectedness to the event and to the parties. For Leflar's conception of the choice of law, this requirement perhaps can be explained within its own terms. Recall that, for him, the "better rule of law" consideration is only one consideration among five other choice-influencing considerations. Thus, the combination of the "better rule of law" consideration with the "predictability of results" consideration explains why Leflar's version of better law incorporates the requirement of "sufficient connection" within its internal terms and compromises on the ideal version of the very "best" law.

The "sufficient connection" requirement imposes a more profound challenge for Juenger's version of better law. For him, only the laws of "sufficiently closely related" systems must be considered as relevant to the choice of law process:

> The large majority of cases reveals a simple clash between two rules of decision, one of which is clearly superior to the other. In practical application, the substantive law approach [the better law approach] should prove eminently manageable. The parties to a multistate litigation will avoid complicating their cases, and therefore refrain from relying on rules of a legal system that lacks a sufficiently close relationship with their lawsuit. If nothing else, the enlightened self-interest of counsel ought to assure that the range of potentially ap-

> plicable laws is narrowed to the point where the choice is fairly easy.[27]

Juenger was perhaps right with respect to the factual situation in private law cases of the last century. This is not, however, the case anymore in the contemporary reality of technological progress and the increased mobility of people which have led to complex private international interactions involving multiple links to different states.[28] Furthermore, this shift also has to be explained somehow within the terms of Juenger's theoretical foundation. By criticizing Leflar on the grounds of multiple choice of law considerations,[29] Juenger trips on his own sword. Leflar's previously mocked requirement of predictability now appears in the implementation stage of Juenger's version of better law under the hat of "sufficient connection". Grounded purely on the notion of "multistate justice", his version of the better law approach needs to explain how such a notion incorporates the "approximation move".

B. Better Law as a Subsidiary Rule

While better law is uncommon as a primary rule, this is not the case with respect to the version of it as a subsidiary rule. Better law supporters have pointed to the apparent conceptual consistency between a wide range of exceptions to the choice of law process and this version of better law. It has been associated with such vastly popular rules as: the "public policy" doctrine;[30] the traditional European "rules of immediate application" or "mandatory rules", which apply directly to the case, regardless of the identity of the relevant choice of law rules;[31] and the specially de-

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[27] Juenger, *Multistate Justice*, *supra* note 4 at 206.

[28] On the inherent multiplicity of foreign connecting factors of modern day interactions, see Matthias Lehmann, "Liberating the Individual from Battles Between States: Justifying Party Autonomy in Conflict of Laws" (2008) 41:2 Vand J Transnat'l L 381 at 422. See also Lea Brilmayer & Raechel Anglin, "Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger" (2010) 95:4 Iowa L Rev 1125 at 1148; Basedow, *supra* note 8 at 37–39.

[29] Juenger, *Multistate Justice*, *supra* note 4 at 173, n 1072, 177–78.

[30] See Robert A Leflar, *American Conflicts Law*, 3rd ed (Indianapolis: Bobbs-Merrill, 1977) at 255–56 [Leflar, *Conflicts*]. For further discussion (and defence) of public policy doctrine as a reflection of a subsidiary version of the better law approach, see text accompanying notes 48–70, 75–81 and Part III.B.1., below.

[31] See Juenger, *Multistate Justice*, *supra* note 4 at 182, 202; Symeon C Symeonides, "American Choice of Law at the Dawn of the 21st Century" (2001) 37:1 Willamette L Rev 1 [Symeonides, "Dawn"] (defining "rules of immediate application" as "substantive rules of law which are intended to apply to multistate cases 'immediately' or 'directly' in the sense of bypassing the ordinary choice-of-law rules" at 33–34). Despite the lack of adoption in official private international law jurisprudence and legislative provisions, one can argue that the "mandatory" rules are not exclusive to the European landscape

signed protective rules for cases of inherently asymmetrical relationships between the parties, such as consumer and employee contracts.[32] In addition, one can add another set of exceptions that appear throughout the literature and judicial decisions as substantive limitations on ordinary choice of law process to this list. Among them are the central principles of "equality of treatment",[33] substantive limitations on a party's potential choice under the party autonomy principle,[34] human rights,[35] constitutional "constraint[s]",[36] due process,[37] and "minimum international standard[s] of justice."[38]

While the classification of some of the above-mentioned doctrines and concepts within the better law camp may be misplaced,[39] the vast majority

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and frequently slip "under the radar" of private international law scholars in other jurisdictions (see e.g. *Privacy Act*, RSBC 1996, c 373, s 4 which apparently grants exclusive jurisdiction to British Columbia courts regardless of any other relevant private international law rules). Although dealing with the question of jurisdiction (rather than choice of law), and given various interpretations (see e.g. the recent case *Douez v Facebook Inc*, 2015 BCCA 279, 387 DLR (4th) 360), one can argue that this British Columbia provision substantively correlates with the European "mandatory" rules in the sense that it bypasses the ordinary private international law process. For a somewhat related point (albeit using an English law example), see Pitel & Rafferty, *supra* note 5 at 282–83. On this phenomenon of mandatory rules slipping under the radar within the American private international law landscape, see Symeonides, *Revolution*, *supra* note 13 at 7–11.

32 See Symeonides, "Material Justice", *supra* note 23 at 135–38; Juenger, *Multistate Justice*, *supra* note 4 at 207.

33 See RH Graveson, "Philosophical Aspects of the English Conflict of Laws" (1962) 78 Law Q Rev 337 at 361–63; Elliott E Cheatham & Willis LM Reese, "Choice of the Applicable Law" (1952) 52:8 Colum L Rev 959 at 963; Kermit Roosevelt III, "The Myth of Choice of Law: Rethinking Conflicts" (1999) 97:8 Mich L Rev 2448 ("[e]quality of treatment under conflicts rules is clearly fundamental" at 2517).

34 See Symeonides, "Party Autonomy", *supra* note 24 at 522–30; Rühl, *supra* note 24 at 167–75; Patrick J Borchers, "Categorical Exceptions to Party Autonomy in Private International Law" (2008) 82:5 Tul L Rev 1645 at 1657–59; Basedow, *supra* note 8 at 343–50.

35 See Ralf Michaels, "Public and Private International Law: German Views on Global Issues" (2008) 4:1 J Priv Intl L 121 at 131.

36 Jan Paulsson, "Unlawful Laws and the Authority of International Tribunals" (2008) 23:2 ICSID Rev 215 at 218–21. I will return to the question of the "constitutionality" of the better law approach in the context of the "state equality" objection that has been raised against better law (see text accompanying notes 103–25, below). For further literature on the constitutional aspects of various choice of law approaches, see Roosevelt, *supra* note 33 at 2518–33.

37 See *Society of Lloyd's v Ashenden*, 233 F (3d) 473 at 477, 2000 WL 1741677 (7th Cir).

38 Kotuby, *supra* note 6 at 413.

39 The European "mandatory" rules and "specially designed" protective rules are primary examples of this mischaracterization. First, consider the mandatory rules. By bypassing

of them are indeed variations of a subsidiary version of the better law approach. Despite the vast multiplicity of the titles and labels within the myriad of choice of law doctrines and concepts, through their inherent reference to evaluation of the substantive merits of the laws involved, they effectively confirm better law as a subsidiary rule. In this way (and in sharp contrast to the primary version of better law), the subsidiary version of better law seems to be deeply rooted in choice of law thought and constitutes one of the most central elements of the choice of law process.

One can indeed trace the subsidiary version of better law as constituting one of the most central elements of classical and modern choice of law methodologies.[40] While the operational mechanics and normative basis of these methodologies is indifferent to the substantive merits of the applied laws, they still incorporate a limited version of the better law approach as an inherent component of their choice of law process. In order to illustrate

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the ordinary choice of law process, these rules represent the priority of certain values of a domestic forum over the choice of law process. In this way, the mandatory rules are not interested in the substantive merits' evaluation of better law, but rather they focus on the implementation of the forum state's policies for a particular dispute (*cf* Joost Blom, "Public Policy in Private International Law and Its Evolution in Time" (2003) 50:3 Nethl Intl L Rev 373 at 379–82; Basedow, *supra* note 8 at 429). Secondly, a related point applies with respect to specially designed protective rules. Both American and European systems tend to intervene in the parties' potential choice under the party autonomy principle in the case of inherently asymmetrical relationships between the parties. Among these special provisions are various geographical restrictions on parties' potential choices in the case of consumer, employment, and insurance contracts. The point of the restrictions of specially designed protective rules is that, in the circumstances of such contracts, one of the parties is likely to be in a weaker bargaining position. Presented in these terms, these restrictions do not seem to be a reflection of better law, but intrinsically related to the party autonomy principle itself. According to this understanding, the case of asymmetrical relationships presents an exceptional case for law where a party's consent has been presumptively vitiated. Note that, as with respect to the mandatory rules (see *supra* note 31), one can argue that the protective rules are not exclusive to the American and European landscapes, but have been incorporated in several common law jurisdictions through the common law doctrines that address the various instances of unfairness in the bargaining process: "duress", "undue influence", and (especially) the "unconscionability" doctrine. For an overview of these contract law doctrines, see e.g. Mitchell McInnes, Ian R Kerr & J Anthony VanDuzer, *Managing the Law: The Legal Aspects of Doing Business*, 4th ed (Toronto: Pearson, 2014) at 251–55. One can argue that, by questioning the validity of various contracts, these traditional common law doctrines follow the restrictive and protective European rules for certain types of contracts in many ways.

40 This three-way conceptual classification of choice of law methodologies into "better law", "classical", and "modern" is found under various terms in many writings on the subject. See e.g. Perry Dane, "Conflict of Laws" in Dennis Patterson, ed, *A Companion to Philosophy of Law and Legal Theory*, 2nd ed (Malden: Wiley-Blackwell, 2010) 197; Symeonides, "Dawn", *supra* note 31 (following the three-way classification in roughly related terms: "Conflicts Justice" (as the classical methodology); "Currie's Unilateralism" (as the modern methodology); and "Material Justice" (as better law methodology)).

this point, the following paragraphs offer a brief outline of the classical and American "modern" choice of law methodologies and trace the centrality of a limited version of better law within their operation.

1. Classical Choice of Law Methodology

The classical choice of law methodology offers a pattern of predetermined single or multiple connecting factors to given legal categories. This is the general approach of the American First and Second Restatements,[41] the traditional English choice of law jurisprudence,[42] the Canadian courts,[43] and the recent European Rome Regulations.[44] Once the given facts are characterized by the court as belonging to one of the recognized categories of tort law, contract law, property law, or family law, the classical methodology offers predetermined connecting factors (such as the place of residence, the place of tort, the place of business) which are completely irrelevant to the content of the potentially applied laws.

The principle of state sovereignty has usually served as a normative justification of various connecting factors.[45] According to this principle, the reason for a particular connecting factor lies in the execution of the state's sovereignty over a particular act that occurred within its territory.[46] Thus, according to this approach, the New York court should apply Ontario tort

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[41] *Restatement of the Law of Conflict of Laws* (1934), § 377 [*First Restatement*]; *Restatement (Second) of the Law of Conflict of Laws* (1971), § 6 [*Second Restatement*].

[42] See e.g. Adrian Briggs, *The Conflict of Laws*, 3rd ed (Oxford: Oxford University Press, 2013) at 13–38 [Briggs, *Conflict*].

[43] See generally Pitel & Rafferty, *supra* note 5 at 209–10; Castel & Walker, *supra* note 5 at 1-51 to 1-52, 3-1 to 3-15.

[44] See e.g. EC, *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)*, [2007] OJ, L 199/40 at 41; EC, *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)*, [2008] OJ, L 177/6 at 7; EC, *Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession*, [2012] OJ, L 201/107 at 109.

[45] See e.g. Kegel, "Crisis", *supra* note 5 at 183–84; Peari, "Choice-Based", *supra* note 19 at 479–80.

[46] See e.g. Joseph H Beale, *A Treatise on the Conflict of Laws* (New York: Baker, Voorhis, 1935) vol 1 at 45–47, 58, 62–63 (basing his "last act" theory of connecting factors on the sovereignty principle); Peari, Choice-Based", *supra* note 19 at 480, n 17; LV Bar, *The Theory and Practice of Private International Law*, translated by GR Gillespie (Edinburgh: William Green & Sons Law Publishers, 1892) at 634–37 (arguing that the very commission of a tortious act on state's sovereign territory leads to recognition of the state's right to govern the dispute between the parties).

law with respect to an accident that has occurred in the territory of Ontario. Another, albeit less known, justification is that of the "choice-based" conception of choice of law.[47] According to this conception, the various connecting territorial factors of classical methodology are a flip side of the above-mentioned party autonomy principle. By referring to various territorial connections between the event and the parties, the connecting factors serve as indicators of parties' presumed territorial choice with respect to the identity of the framework to govern their dispute. The ultimate connecting factor under this approach of both the party autonomy principle and the various connecting factors is that of the parties' choice.

Irrespective of the identity of the normative justification of the classical methodology, the important point is this: both justifications are at odds with the evaluation of substantive content. The choice-based justification at its fundamental level honours the parties' explicit or presumed choice irrespective of the substantive merits of the chosen law. The same point applies with respect to the state sovereignty justification. According to this justification, the reason for the application of a certain connecting factor lies in the execution of the state's sovereignty over its territory irrespective of whether this law is "good" or "bad".

At this point, the so-called doctrine of "public policy" enters the picture. One can argue that the classical choice of law methodology does inherently incorporate within its mechanics a substantive evaluation of the involved provisions through this doctrine, as well as through its other effectively substantive exceptional doctrines for the choice of law process.[48] Indeed, the terminological meaning of the phrase "public policy" appears to suggest a reference to certain economic and social policies of particular states, rather than to the evaluation of substantive merits. The terminological title, however, does not always matter.[49] In contrast to this conventional view, this article willingly joins those commentators who have

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[47] See Peari, "Choice-Based", *supra* note 19; Sagi Peari, "Savigny's Theory of Choice-of-Law as a Principle of 'Voluntary Submission'" (2014) 64:1 UTLJ 106 [Peari, "Savigny"]. See also Mathias Reimann, "Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century" (1999) 39:3 Va J Intl L 571 at 575–98.

[48] For a list of other substantive exceptional doctrines in choice of law process, such as "international human rights" and "international due process", see *supra* notes 33–38 and accompanying text.

[49] Note that, even in the science of linguistic meaning and interpretation, modern linguistic approaches to interpretation have departed from a strict textual interpretation and tended more toward context- and substance-related approaches to interpretation (see generally Deirdre Wilson & Dan Sperber, "Relevance Theory" in Laurence R Horn & Gregory Ward, eds, *The Handbook of Pragmatics* (Malden, Mass: Blackwell Publishing, 2004) 607).

viewed this doctrine as an inherent part of better law.[50] As we will see in Part III, a close analysis of the rhetoric and actual implementation of this doctrine by the courts in the paradigmatic choice of law cases in English language literature on public policy reveals remarkable similarity to the subsidiary version of better law and the fallacy of the terminological label.[51]

This better law understanding of the public policy doctrine disconnects the classical choice of law methodology from its own content-free theoretical basis. Representing an inherent part of choice of law process[52] and as "a common feature of all systems of conflicts of laws,"[53] public policy doctrine seems to be constantly substantively evaluating the applied laws. The doctrine has been designed to divert, in extraordinary circumstances, the classical choice of law methodology from its normal path of classifying and applying predetermined connecting factors. So, if the judge thinks that the foreign law provision is incompatible with "some deep-rooted tradition of the common weal"[54] or that it "shocks the morals of the forum,"[55] or is simply "unbearable",[56] the judicial authority has the ability under the public policy doctrine to ignore the ordinary choice of law process in favour of the application of domestic law—*lex-fori*. In other words, the public policy doctrine has served as a safety valve for judges to disqualify the application of the foreign law that would have been followed from the primary connecting factors path of classical choice of law methodology.

The doctrine was formulated in what seems to be highly substantive exceptional terms. It was coined as a doctrine of "last resort",[57] relating to provisions that "drag on the coat tails of civilization,"[58] to be applied to

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50 For support of the classification of "public policy" doctrine within the "better law" camp, see Leflar, *Conflicts*, *supra* note 30 at 255–56.

51 See Part III.B., below for a close analysis of the usage of public policy doctrine in influential American (*Loucks v Standard Oil Co of New York*, 120 NE 198, 224 NY 99 (Ct App 1918) [*Loucks* cited to NE]) and English (*Oppenheimer v Cattermole*, [1976] AC 249, [1976] 72 ILR 446 (HL (Eng)) [*Oppenheimer* cited to ILR]; *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*, [2002] UKHL 19, [2002] 125 ILR 603 [*Kuwait Airways* cited to ILR]) cases.

52 For the exceptional popularity of the public policy exceptional rule within the classical methodology of connecting factors, see e.g. CMV Clarkson & Jonathan Hill, *The Conflict of Laws*, 4th ed (Oxford: Oxford University Press, 2011) at 50–58.

53 *Kuwait Airways*, *supra* note 51 at 681.

54 *Loucks*, *supra* note 51 at 202.

55 Herbert F Goodrich, "Foreign Facts and Local Fancies" (1938) 25:1 Va L Rev 26 at 35.

56 Briggs, *Conflict*, *supra* note 42 at 208.

57 Juenger, *Multistate Justice*, *supra* note 4 at 199.

58 Cheatham & Reese, *supra* note 33 at 980.

"obsolete laws"[59] and "grossly unjust" foreign rules.[60] Even recent adherents of a different view that supports the wholesale extension of public policy doctrine to other areas in the field,[61] have openly admitted the revolutionary nature of their proposal by admitting that this doctrine has usually been reserved in private international law cases for "serious cases".[62]

Consider the provisions of the American First Restatement, which adopted the rigid rule of the place of injury[63] in determining the law in tort cases, the place where the contract was signed[64] to determine the law in contract cases, and the place of the property[65] to determine the law in property cases. Section 612 of the First Restatement adopted the exceptional "public policy" rule. According to this rule, in extreme cases, the court is entitled to disqualify a foreign law provision that would have followed from the application of a relevant connecting factor.[66]

The Canadian choice of law jurisprudence on public policy is another example of a radical understanding of public policy doctrine. Canadian courts have refused to give effect to a broader interpretation of this doctrine and prefer to stick to the very narrow traditional English understanding of this doctrine. In *Boardwalk Regency Corp. v. Maalouf*,[67] the Ontario Court of Appeal stated that the doctrine cannot be directed to cases of mere differences between various private law provisions of various jurisdictions and should be applied only to situations where the foreign laws violate "conceptions of essential justice and morality."[68] In a similar vein, in *Beals v. Saldanha*, the majority of the judges of the Su-

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59 Larry Kramer, "Rethinking Choice of Law" (1990) 90:2 Colum L Rev 277 at 334–36 [Kramer, "Rethinking"].

60 Gerhard Kegal, "Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers" (1979) 27:4 Am J Comp L 615 at 632 [Kegel, "Dream Home"].

61 See Richard Garnett, *Substance and Procedure in Private International Law* (Oxford: Oxford University Press, 2012) at 339, 362 (suggesting the public policy doctrine as an appropriate tool for grasping the nature of the distinction between substance and procedure).

62 *Ibid* at 338.

63 *First Restatement*, *supra* note 41, § 377.

64 *Ibid*, § 311.

65 *Ibid*, § 208.

66 *Ibid*, § 612. See also Beale, vol 3, *supra* note 46 at 1651, 1939–41.

67 (1992) 88 DLR (4th) 612 at 615, 6 OR (3d) 737 (CA) [*Boardwalk*].

68 *Ibid* at 615.

preme Court of Canada held that "[t]he defence of public policy should continue to have a narrow application."[69]

Stated in these terms, the doctrine of public policy seems to be an integral part of classical choice of law methodology as reflecting the exceptional doctrine to the ordinary operational mechanics of this methodology. Its actual rare implementation does not mean that the courts do not consider it in every single choice of law case.[70] Although not explicitly mentioned or applied in the majority of choice of law cases, this doctrine is an integral conceptual part of classical methodology's choice of law adjudicative process.

2. Modern Choice of Law Methodology

The principal irrelevance of the laws' substantive merits alongside the adoption of public policy doctrine as a secondary rule can be also traced within the operational mechanics of the American "modern" methodology of interest analysis.[71] Interest analysis is grounded on the notion that choice of law process serves to effectuate and promote certain states' social and economic policies.[72] Choice of law cases under this approach are resolved on a case-by-case basis through realization of statutes' underlying policies in particular situations. Thus, for example, in respect of a car accident involving two New York residents during a short trip to Ontario,

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69 *Beals*, *supra* note 5 at para 75. Even Justice LeBel in his dissenting opinion (which supported the traditional understanding of public policy doctrine as a reflection of particular policies of specific systems and supported the extension of this doctrine) characterized the public policy doctrine in the following somewhat universal terms: "While the question is always whether the foreign law violates Canadian ideas of essential justice and morality, *the relevant precepts of morality and justice are so basic that they can be said to have a universal character and will generally be respected by all fair legal systems*" (*ibid* at para 222 [emphasis added]). For further support of an exceptionally "narrow" understanding of public policy doctrine within Canadian jurisprudence, see Castel & Walker, *supra* note 5 at 8-10 to 8-14; Pitel & Rafferty, *supra* note 5 at 30–33.

70 See Karen Knop, Ralf Michaels & Annelise Riles, "From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style" (2012) 64:3 Stan L Rev 589 ("[e]ven when the public policy exception is invisible, because the dispute is resolved without recourse to it, the existence of the exception means that the decisionmaker has chosen not to apply it, and hence the ethical moment [the consideration of public policy exception] is always reached" at 641).

71 For comments on the rejection of the "modern" American methodology of interest analysis everywhere outside of the United States, see Castel & Walker, *supra* note 5 ("Canadian courts have not used Professor Currie's analysis" at 1-57); Pitel & Rafferty, *supra* note 5 at 222; Clarkson & Hill, *supra* note 52 at 12–18.

72 See generally Currie, *supra* note 17.

interest analysis would claim that the Ontario tort law is not interested in being applied with respect to New York domiciles.[73]

The normative basis of interest analysis thus lies on the premise that sovereign laws sometimes have extraterritorial scope and are interested in being applied to certain situations. Accordingly, modern methodology should not be confused with better law. While the better law approach differentiates itself from other approaches in its evaluation of the concerned laws' substantive merits, their substance is irrelevant for interest analysis. By focusing on the advancement and effectuation of states' interests in particular cases, it is fundamentally disinterested in the substantive merits of the laws themselves. Despite the terminological usage of the word "substance",[74] interest analysis is only interested in advancing and effecting states' interests in particular cases rather than engaging in the substantive evaluation of the provisions concerned. One choice of law commentator has framed this point about interest analysis neutrality in the following terms:

> It [interest analysis] does not classify a rule of substantive tort law as "progressive" or "regressive," "good or bad." It looks only to the policy reflected in a state's law and that state's interest in applying its law in order to implement that policy in the particular case.[75]

It is interesting that, despite its rejection of the better law approach on its most fundamental level, interest analysis incorporates the better law approach as a complementary doctrine. This incorporation is particularly striking because of the apparent terminological meaning of the phrase "public policy". This meaning seems to refer to the primary doctrine of interest analysis (i.e., the process of effectuating the various policies of the states) rather than to evaluation of the substantive content of the laws involved. Stated in these terms, the doctrine of public policy seems to mirror governmental interests: what matters is not whether the

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[73] *Cf Babcock v Jackson*, 191 NE (2d) 279, 12 NY (2d) 473 (Ct App 1963). The factual basis of this case indeed involved a car accident between two New York residents during a short trip to Ontario and claimed to be a representative example for interest supporters (see e.g. Brainerd Currie, "Comments on *Babcock v Jackson*, A Recent Development in Conflict of Laws" (1963) 63:7 Columbia L Rev 1212 at 1233–43).

[74] Currie, *supra* note 17 at 183–84; Friedrich K Juenger, "Conflict of Laws: A Critique of Interest Analysis" (1984) 32:1 Am J Comp L 1 at 9–10 [Juenger, "Critique"] (mentioning the process of ascertaining relevant policies and interests from "substantive rules" as part of the inherent mechanics of interest analysis).

[75] Robert A Sedler, "Interest Analysis, 'Multistate Policies,' and Considerations of Fairness in Conflicts Torts Cases" (2001) 37:1 Willamette L Rev 233 at 235. See also Laura E Little, "Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism" (2004) 37:4 UC Davis L Rev 925 at 958–60 (mentioning the inherently formalistic nature of interest analysis).

given law is "good" or "bad", but rather the question of whether a given law is important to the particular state.

This was indeed the position of the foundational father of the classical version of interest analysis—Brainerd Currie. While the classical methodology enabled a resort to substantive evaluation of foreign law provisions, Currie unequivocally rejected the public policy doctrine as a component of the choice of law process. Currie conceived this doctrine as a part of the broad spectrum of tools called escape devices, with which the courts equipped themselves in order to escape from the mechanical application of classical choice of law methodology.[76] Since interest analysis has already by definition embedded policy-based analysis, it has left no room for any public policy exception in the choice of law process.

Currie has, however, been alone in his insistence on the dissolution of public policy doctrine within the internal logic of interest analysis. His position on public policy has not been followed by interest analysis' contemporary supporters who could not agree on the elimination of this traditional doctrine for exceptional cases of "anachronistic" or "aberrational" laws.[77] The interest analysis-inspired American Second Restatement[78] also did not follow Currie's precept and incorporated this doctrine into its provisions.[79] Similar to the classical choice of law methodology, interest analysis supporters could not stand the idea that, no matter how outrageous the substantive content of the applied laws might be, this content is irrelevant to the choice of law determination process. They have realized, for example, that interest analysis' understanding of slavery law provisions, under which the slave states had a strong interest in the application of their laws, ignores the malicious substantive merits of the laws in question.[80] Accordingly, interest analysis supporters have followed the classical choice of law methodology that seems to be an incorporation of

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[76] Currie, *supra* note 17 at 138–39. For a more recent overview of traditional escape devices, see Brilmayer & Anglin, *supra* note 28 at 1133–35, 1140–41.

[77] Kramer, *supra* note 59 at 335–36 (offering to incorporate the so-called "anachronistic" and "aberrational" laws within the choice of law process of interest analysis).

[78] For the centrality of interest analysis within the Restatement's provisions, see *Second Restatement*, *supra* note 41, § 6.

[79] *Ibid*, § 90.

[80] See Louise Weinberg, "Methodological Interventions and the Slavery Cases; Or, Night-Thoughts of a Legal Realist" (1997) 56:4 Md L Rev 1316 at 1320–21 (arguing that, in choice of law slavery cases, any "formalistic" approach (inter alia the interest approach according to which the slave states had a strong interest in the application of their laws) that ignores the content of the applied laws would be "disastrous". As she states, "[t]oo much was at stake, at least in the slavery cases, to make justice as blind as that" at 1321).

public policy doctrine as a subsidiary, substantively exceptional doctrine to the ordinary choice of law process.[81]

This inherent incorporation of the better law approach as a secondary rule within classical and modern choice of law methodologies underlies its sharp contrast to the unpopular primary version of the better law approach. The following Parts II and III suggest taking one step further with respect to each of the better law versions. In particular, these parts suggest drawing a parallel between what seem to be perfect conceptual matches for the primary and subsidiary versions of better law: the full-blown private law theory of corrective justice and the theory of evil laws.

II. Better Law as a Primary Rule: Marriage with Corrective Justice?

A. A Perfect Match?

In the landscape of contemporary legal theory, corrective justice theory appears to be the leading theoretical account for grasping the normative nature of private law and private relations.[82] Corrective justice gives arguments for both the special structure and normative content, and the possible legal effect of private individuals' interactions. The special structure is that of relationships between the particular plaintiff and particular defendant. This bipolar structure is viewed as a backbone unit of private law, which is immune from external considerations such as economic efficiency, community, political consequences, and so on. Justice, under this structure, reflects vindication of the precise injustice that a particular defendant has suffered at the hands of a particular plaintiff. This perspective maintains an intimate link between right and remedy, in which the remedy has to mirror the plaintiff's infringed right and plays the role of rectification of the injustice done to the particular plaintiff. This notion explains, for example, why corrective justice objects to the idea of punitive

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[81] For further detailed analysis of the leading cases on public policy doctrine as a reflection of the substantive value of equality and a significant disjunction between the terminological label and the actual implementation of the doctrine, see Part III.B., below.

[82] The brief outline of corrective justice theory in the next four paragraphs is based on the following works of (primarily Canadian as well as other) scholars of private law theory: Ernest J Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 2012) [Weinrib, *Idea*]; Jules L Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001); Stephen R Perry, "Responsibility for Outcomes, Risk, and the Law of Torts" in Gerald J Postema, ed, *Philosophy and the Law of Torts* (Cambridge: Cambridge University Press, 2001) 72; Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge: Cambridge University Press, 1999). For an argument regarding the shared theoretical foundation of these works, see Ernest J Weinrib, "Correlativity, Personality, and the Emerging Consensus on Corrective Justice" (2001) 2:1 Theor Inq L 107.

damages in tort law. By breaking apart the bipolar structure between the parties, this kind of remedy overcompensates the plaintiff rather than putting him or her into the position in which he or she would have been if the tort had not been committed.[83]

As for the normative content of corrective justice, this content is grounded in the natural rights thinkers' notion of relational freedom that is embedded in interaction between persons (or corporations).[84] The focus on the persons' actions and the abstraction from their particular needs, motives, and wishes that stand behind these actions results in the establishment of a system of negative duties of non-interference with the rights of others. Law's intervention is required within this system when one person's action is inconsistent with the freedom of another person. This notion of relational freedom as the underlying normative basis for rights-based analysis of private law has provided fertile ground for the classification of the entire spectrum of possible private interactions into the categories of property, torts, contracts, fiduciary duties, and unjust enrichment and has confirmed the normative content of these categories.[85]

Through the years, corrective justice scholars have demonstrated how corrective justice's structure and normative content are already embedded in particular doctrines and concepts of specific structures of private law grounds of liability, such as duty of care and proximate cause in torts,[86] the doctrines of offer, acceptance, and consideration in contracts,[87] and the doctrines of incontrovertible benefit and subjective devaluation in the law of unjust enrichment.[88] When some private law provisions of various jurisdictions are at odds or only partially consistent with the corrective justice vision of private law categories,[89] scholars have emphasized the gen-

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83 See generally Ernest J Weinrib, "Two Conceptions of Remedies" in Charles EF Rickett, ed, *Justifying Private Law Remedies* (Oxford: Hart, 2008) 3.

84 See Sagi Peari, "Improperly Collected Taxes: The Border Between Private and Public Law" (2010) 23:1 Can JL & Jur 125 at 149, n 187 [Peari, "Improperly"].

85 See generally Ernest J Weinrib, "The Juridical Classification of Obligations" in Peter Birks, ed, *The Classification of Obligations* (Oxford: Clarendon Press, 1997) 37; Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012).

86 See generally Weinrib, *Idea*, *supra* note 82 at 145–205. See also Arthur Ripstein, "Civil Recourse and Separation of Wrongs and Remedies" (2011) 39:1 Fla St UL Rev 163.

87 See generally Peter Benson, "The Unity of Contract Law" in Peter Benson, ed, *The Theory of Contract Law: New Essays* (Cambridge: Cambridge University Press, 2001) 118.

88 See generally Ernest J Weinrib, "The Normative Structure of Unjust Enrichment" in Charles Rickett & Ross Grantham, eds, *Structure and Justification in Private Law: Essays for Peter Birks* (Oxford: Hart, 2008) 21 at 34, 40. See also Peari, "Improperly", *supra* note 84.

89 Thus, for example, corrective justice supporters would consider New Zealand's no-fault liability regime (see e.g. Craig Brown, "Deterrence in Tort and No-Fault: The New Zea-

eral tendency of courts to intuitively produce a vast body of decisions that generally follow the path of this theory of private law.[90] From this perspective, corrective justice provides a rationalization of already existing positive private law provisions and judicial precedents.

Presented in these terms, the full-blown theory of private law of corrective justice seems to be a suitable candidate for providing the normative criteria of the better law approach. This theory is a conceptual idea that applies to certain types of interactions between humans and offers its normative basis for a wide spectrum of private law categories, doctrines, and concepts. Throughout the literature on the better law approach, one can find a few references to the question of whether the choice of law process is a "value-free discipline".[91] The usage of this phrase, however, does not differentiate between various choice of law methodologies and their underlying normative basis. Thus, for modern choice of law methodology, the "value" of the discipline (i.e., of choice of law) is that of promoting and effectuating the states' interests embedded in various provisions.[92] In the context of the better law approach, one can suggest, however, focusing not on the word "value", but rather on the word "discipline" in this phrase. What is striking is that in the context of this approach, this word "discipline" does not refer to the normative dimensions of the *choice of law question*, but rather to the normative dimensions of *private law* and private law interactions. In this way, the introduction of corrective justice as a theoretical foundation of private law and private law interactions equips the better law approach with a tool to exercise a comparative normative analysis of various private law provisions as a central element of its jurisprudence.

The reference to private law and private law interactions here enables us to make several immediate comments on the nature of choice of law. By viewing the paradigmatic cases of the choice of law question as reflecting the private bipolar interaction between a particular defendant and plaintiff, corrective justice can contribute much to our understanding of choice of law as a discipline. Consider hypothetical cases of mistaken

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land Experience" (1985) 73:3 Cal L Rev 976) as the antithesis to corrective justice (see e.g. Weinrib, *Idea*, *supra* note 82 at 171–87).

90 See e.g. Weinrib, *Idea*, *supra* note 82 at 146–47 (arguing in favour of a correlation between the core elements of the common law conception of negligence and corrective justice); Benson, *supra* note 87 at 118–19 (arguing in favour of a correlation between the core elements of contractual obligation and corrective justice).

91 See Juenger, *Multistate Justice*, *supra* note 4 (discussing his objection to the claim that the "discipline is value-free" at 185); Symeonides, "Result-Selectivism", *supra* note 4 (mentioning that the discipline is "not value-free" at 29).

92 See *supra* notes 71–75 and accompanying text.

payment made between New Zealand and Quebec corporations, a contract signed between an Ontario resident and a French resident with respect to the delivery of goods in Brazil, or a tortious act committed by a Quebec resident against an Ontario resident. For corrective justice, these cases represent cases of unjust enrichment, torts, and contracts that are all grounded on the bipolar structure of the notion of relational freedom.

Accordingly, corrective justice analysis of choice of law would point to the conceptual difficulties involved in developing choice of law theories based on interactions that are at odds with the strictly bipolar structure of corrective justice. By using cases that reflect distributive considerations involving multiple plaintiffs (such as aerial disaster cases[93] or cases of distribution of workers' compensation[94]) or public law considerations (such as cases of enforcement of antitrust law[95] or criminal law cases[96]) as representative examples, choice of law scholars have failed to point to an adequate example for developing a conceptual account of the discipline.

This is especially true for better law scholars, such as Friedrich Juenger, who have conceived choice of law as being ultimately grounded in the normative notion of multistate justice. The case of private law interaction (usually) between two individuals from different territories appears to be a paradigmatic case of such a conception. The above-mentioned cases seem to be of a different order involving distributive or public law considerations that are alien to the nature of the discipline. From this perspective, reliance on such unrepresentative cases might create a bad theory. Furthermore (and more radically), these cases seem to be, for the most part, simply too foreign to the nature of the discipline and it is highly doubtful whether they belong to private international law in the first place. Accordingly, corrective justice would question this publicization of private international law.[97]

The advantage of corrective justice is not just its ability to supply the missing normative dimension of the better law approach, nor even its in-

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93 See Juenger, *Multistate Justice*, *supra* note 4 at 166–67, 208–09.

94 See *ibid* at 177; Juenger, "Critique", *supra* note 74 at 4–5.

95 See Symeon C Symeonides, "Resolving Punitive-Damages Conflicts" (2003) 5 YB Priv Intl L 1 at 11–12 (discussing massive insurance fraud of a national insurance company).

96 See Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws* (Cambridge, Mass: Harvard University Press, 1942) at 9–15.

97 The most radical example for this "publicization" of private international law can be noticed in the works of Knop, Michaels & Riles, *supra* note 70, which offer to apply the traditional choice of law doctrines and concepts to the entire range of public and distributive matters such as regulation of financial markets and the clash between the values of cultural relativism and equality.

sights on the identity of cases that can be classified as conceptually affiliated with the choice of law question, but also that corrective justice seems to be capable of explaining the approximation toward its ideal within its own terms rather than the direct application of this ideal in every case. In other words, corrective justice seems to be capable of addressing the above-mentioned "approximation move"[98] of better law as a primary rule.

One can construct in this respect the following argument. Corrective justice theorists have not said much about the question of the relation of corrective justice to certain visions of international order and the positivity of legal systems. One can, however, argue that based on its explicitly Kantian foundations,[99] corrective justice accepts the necessary multiplicity of political units of contemporary Westphalian international order. Since people hold different views about what justice requires, the very natural law foundations of the system of relational freedom in fact require the establishment of necessarily multiple systems of positive law regardless of their approximation to a certain ideal. This international structure rejects any kind of universal Rome-style empire that would be governed by a single supreme law that would leave no room for the choice of law question.

Within this order, many systems have intuitively adopted, under various forms and formulations, corrective justice's internal morality of private law. Stemming from historical and social contingencies, other systems have not followed or have followed its form and content only partially. Corrective justice, however, accepts the factual divergence between the positive private law provisions of different countries and does not normatively differentiate between the systems according to the degree of proximity to its ideal version. The reason for this acceptance lies in the moral value embedded in the concepts of legal certainty and predictability that serve as a normative justification for the multiplicity of systems of positive law and the priority of positive law over the internal morality of private law. This explains why, in the cases of purely domestic interaction,

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98 See *supra* notes 27–29 and accompanying text.

99 For Kantian foundations of corrective justice, see Weinrib, *Idea*, *supra* note 82 at 84–114. This and the following paragraphs are based on the following sources grounded in the Kantian vision of legal positivism and international order: Immanuel Kant, *The Metaphysics of Morals*, translated by Mary Gregor (Cambridge: Cambridge University Press, 1996) at 6:343 to 6:355 [Kant, *Morals*]; Immanuel Kant, "Perpetual Peace: A Philosophical Sketch" in Hans Reiss, ed, *Kant: Political Writings*, 2nd ed, translated by HB Nisbet (Cambridge: Cambridge University Press, 1991) 93 [Kant, "Perpetual Peace"]; Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999); Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass: Harvard University Press, 2009) [Ripstein, *Force*].

the specific positive private law provision always prevails and applies despite its approximation to the ideal version of corrective justice.

One can argue that the case of private international interaction presents a unique opportunity for corrective justice to exercise its systematic and constant influence on the adjudication process. This private international law understanding of corrective justice will mean a two-stage analysis in which the special form and structure of corrective justice are integrated with notions such as predictability and stability of judicial systems within one conceptual whole.[100] The first stage of this analysis would eliminate from the choice of law process the law of those states that do not have a minimal connection to the event and to the parties. This stage would represent the influences of the values of legal certainty and predictability under which the pool of involved laws is identified under the requirement of sufficient connection.[101] At the second stage of this analysis, corrective justice adopts the approximation move of better law. By applying the law that most closely approximates corrective justice, the courts strive for the ideal version that reflects both its special structure and the normative content of corrective justice theory in each private international law case. In this way, the Kantian foundations of corrective justice and Kantian normative foundations of the international order structure and the positivity of legal systems seem to explain why better law as a primary doctrine is willing to compromise in the first place and to approximate toward a certain ideal.

The very reference, however, to Kantian foundations is what makes the above-presented claim flawed. There are two ways to tackle the apparent consistency of Kantian legal philosophy (and corrective justice, respectively) with the approximation move. One way would be to develop a positive argument about a neo-Kantian conception of choice of law that has nothing to do with approximation toward the ideal of corrective justice. I have explored this positive argument elsewhere.[102] Another way to approach this task would be through a negative argument that favours the exclusion of better law from the choice of law process entirely. The following section focuses on this negative argument and explains that, be-

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[100] For an argument regarding the possibility of this integration within the Kantian vision of the adjudication process, see Ernest J Weinrib, "Private Law and Public Right" (2011) 61:2 UTLJ 191.

[101] See *supra* notes 26–29.

[102] See Peari, "Choice-Based", *supra* note 19 at 482, n 23; Peari, "Savigny", *supra* note 47. In a nutshell, the neo-Kantian vision of choice of law insists on a general conceptual requirement of parties' choice with respect to the identity of the framework to adjudicate their dispute and, conceptually, it applies equally to both purely domestic and private international law cases.

cause of its adoption of the so-called "state equality" principle, Kantian legal philosophy is fundamentally at odds with the inherent nature of the better law approach.

B. Marriage Wrecker: The State Equality Principle

Briefly stated, the state equality principle points to the normative equality between various states and respectively accepts the normative equality between their public legal institutions. For an exposition of this principle, one can suggest drawing attention to Douglas Laycock's influential work, which discusses the American constitutional limitations of the choice of law question.[103] More than twenty years ago, he argued that the better law approach in its essence violates the United States Constitution.[104] As Laycock explained, the Constitution imposes certain restrictions on the choice of law process based on the Due Process Clause of the Fourteenth Amendment[105] and on the Full Faith and Credit Clause of Article IV.[106] Since, according to the Full Faith and Credit Clause, each state has equal authority to the other forty-nine states, the laws of all American states are of equal status.[107] From here follows the argument that no court of a given state can decide that its law is better or worse than that of another state.[108] Thus, if we follow Laycock's example, a Texas court cannot insist that its law is better than California's.[109] In other words, the very nature of the better law approach is unconstitutional.

Although Laycock's argument explicitly addressed choice of law cases within the United States,[110] I shall suggest extending it to the global arena and to what has been termed the "state equality" principle (or as it is

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[103] See generally Douglas Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law" (1992) 92:2 Colum L Rev 249.

[104] Somewhat similar commentary can be found in Terry S Kogan, "Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity" (1987) 62:4 NYUL Rev 651 ("the Constitution cannot allow a choice between the two laws based on a determination that one law is inherently better than the other" at 698).

[105] US Const amend XIV, §1.

[106] US Const art IV, §1.

[107] See Laycock, *supra* note 103 at 310.

[108] See *ibid* at 312.

[109] See *ibid* at 312–13.

[110] See *ibid* ("[i]t is a serious mistake to discuss domestic and international choice-of-law cases interchangeably, even though that practice is nearly universal in the conflicts literature" at 259).

also sometimes called, the "sovereign equality" principle[111]). The significance of this principle must not be underestimated. Nowadays, this principle is considered to be no less than "canonical",[112] and a "foundational principle of the international legal order."[113] The United Nations Charter has explicitly identified "the principle of the sovereign equality of all of its Members"[114] and the United Nations re-emphasized it in its General Assembly Resolution as a core principle of contemporary international order.[115]

The intellectual roots of the state equality principle lie in the eighteenth century work of Emmerich de Vattel. As Vattel states:

> Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. Strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.[116]

As Vattel explains, the principle of state equality is not about inequality in terms of territorial size, natural resources power, or other distributive considerations. Rather, in similarity to private individuals, this inequality ultimately relates to the legal status of the states themselves. The similarity between the above-mentioned constitutional principle of the Full Faith and Credit Clause is clear, but not surprising. As has been shown, Vattel's works had a significant influence on the American Founders.[117] Furthermore, this conception of equal legal status of states lay at the ba-

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[111] For a discussion of the substantive similarity between these terminologically different terms, see RP Anand, "Sovereign Equality of States in International Law" (1986) 197 Rec des Cours 9 at 103–05.

[112] Thomas H Lee, "International Law, International Relations Theory, and Premptive War: The Vitality of Sovereign Equality Today" (2004) 67:4 Law & Contemp Probs 147 at 147.

[113] Brad R Roth, *Sovereign Equality and Moral Disagreement* (Oxford: Oxford University Press, 2011) at 54.

[114] *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 2(1).

[115] *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UNGAOR, 25th Sess, Supp No 25, UN Doc A/8082 (1970) 121.

[116] E de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, translated by Charles G Fenwick (Washington: Carnegie Institute of Washington, 1916) vol 3 at 7.

[117] See Lee, *supra* note 112 ("Vattel was particularly attractive to the American founding generation who eagerly embraced his vision of sovereign equality" at 151).

sis of the contemporary international order that was established in the Westphalian Peace Treaties of 1648. This order recognizes a multitude of states as independent and legally equal political entities.[118]

The normative argument regarding the conceptual analogy between private individuals and states was taken up and extended by Kant in his *Doctrine of Right* and *Perpetual Peace*.[119] Kant insists that only through abstraction from such considerations as wealth, gender, or the desires that lie at the root of actions, is it possible to conceive interactions between individuals in a purely juridical manner. Since this argument is extended to the international arena, it explains why Vattel's "dwarf" and "giant" states are equal. Through abstraction from particular features of given states such as territorial size or even internal structure, Kant juridically equalizes the states. As with private individuals, states, under this conception, are situated in juridical equal relation to each other.

This argument has further implications. Since states are juridically equally situated, the three constituents of the state (i.e., the legislative, judicial, and executive branches) follow this equality too. The classic example of this institutional equality can be seen with respect to the "recognition question" in private international law. Since the courts of different states are equally related to each other, the operative product of the adjudicative process—the judgment—bears the same normative content. This is indeed traditional and contemporary courts' position with respect to foreign judgments. According to this position, provided that the judgment of the foreign court has met a certain reasonable (and fairly liberal) test of jurisdiction acquisition—the so-called "jurisdictional competence" test—it is as good as a judgment of the domestic court and has to be recognized as a general rule of thumb.[120] The general position of the courts in this respect is to avoid any merit-based review of foreign judgments. According-

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[118] See e.g. Roth, *supra* note 113 at 54.

[119] See Kant, "Perpetual Peace", *supra* note 99; Kant, *Morals*, *supra* note 99. As Kant states, "[h]ere a state, as a moral person, is considered as living in relation to another state" (*ibid* at 6:343). See also Brian Orend, "Kant on International Law and Armed Conflict" (1998) 11:2 Can JL & Jur 329 at 338; Sharon Byrd, "The State as a 'Moral Person'" in Hoke Robinson, ed, *Proceedings of the Eighth International Kant Congress*, vol 1 (Milwaukee: Marquette University Press, 1995) 171 at 177.

[120] For discussion of the concept of "jurisdictional competence" within Anglo-American-Canadian systems, see e.g. Pitel & Rafferty, *supra* note 5 at 161–72; Rafferty et al, *supra* note 9 at 404–25; Alan Reed, "A New Model of Jurisdictional Propriety for Anglo-American Foreign Judgement Recognition and Enforcement: Something Old, Something Borrowed, Something New?" (2003) 25:2 Loy LA Intl & Comp L Rev 243; Lord Collins of Mapesbury et al, eds, *Dicey, Morris and Collins on the Conflict of Laws*, 15th ed (London: Sweet & Maxwell, 2012) at 673–712; SI Strong, "Recognition and Enforcement of Foreign Judgments in US Courts: Problems and Possibilities" (2014) 33:1 Rev Lit 45 at 59–83.

ly, the fact that one of the parties was under-compensated, over-compensated, or even had been granted a remedy that is not known in the domestic law does not serve as a basis for challenging the foreign decision.[121]

The same point applies with respect to the choice of law question. Since states are situated in equal juridical relation to each other, this equality applies to their legislative provisions or judicial precedents of the foreign systems. Because of state equality, the very essence of better law is at odds with the fundamental principle of international order—state equality.[122] Consider Cheshire, North, and Fawcett's striking rejection of better law. As they put it:

> [I]t [the better law approach] is a dangerous factor to use in the choice of law process because it confuses the issue of the reform of the substantive law of one country which is that of choosing the most appropriate law to govern a dispute with links with two or more countries. It is certainly not the task of a judge in one country to try to reform the law in another.[123]

This fundamental objection to better law does not address the judge's capability to execute comparative analysis of concerned provisions, but rather his or her legitimacy to engage in this analysis in the first place. This objection challenges the very capacity of the judicial public authority to engage in this kind of analysis without challenging the fundamentally equal structure of international order.

This objection is relevant only with respect to the better law approach. No other choice of law methodology has put itself in the position of conceptually challenging the equal structure of international order.[124] Neither as a technical bureaucrat who enforces the normative principle of state sovereignty over his or her territory (as with the sovereignty justification

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[121] See e.g. Strong, *supra* note 120 at 105–06. See also *Beals*, *supra* note 5 at paras 39–42 (following the traditional English approach to recognition which has limited the exceptions to recognition to limited versions of the "fraud", "public policy", and "natural justice" defences which should be construed in a very narrow way).

[122] There are some comments in choice of law literature in this direction. See e.g. Kegel, "Dream Home", *supra* note 60 (describing the better law methodology as "awkward because it awards grades" at 632); Kramer, "Rethinking", *supra* note 59 ("[e]ach state is free to define its own version of the 'just' result, and it is axiomatic that there is no perspective from which to judge one version 'better' or more just" at 339); Symeonides, "Dawn", *supra* note 31 ("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" at 62).

[123] JJ Fawcett, JM Carruthers & Sir Peter North, eds, *Cheshire, North & Fawcett: Private International Law*, 14th ed (Oxford: Oxford University Press, 2008) at 34–35 [references omitted].

[124] See *supra* notes 45–47, 73–75 and accompanying text.

of classical choice of law methodology), nor as a follower of the parties' united choice of the framework to adjudicate their case (as with the choice-based justification of the classical approach), nor as an enforcer of states' extraterritorial policies (as under the modern methodology), does the judicial authority question the normative equality of international order. The better law approach presents, however, a different case. By executing a comparative evaluation of private law provisions, the better law judge challenges the very nature of judicial authority as an inherent part and representative of international order.

This indeed seems to be a position of corrective justice with respect to better law. Having developed a detailed conception with respect to the universal structure and content of the private law categories of contract, property, and so on,[125] corrective justice is situated in a strong position to provide normative objective criteria for the substantive evaluation of the different private law provisions of various states. Yet, its underlying Kantian foundations reject a full-blown appeal to the better law approach. The real reason, however, for the incompatibility of corrective justice with better law is based on the notion of state equality that follows from the Kantian conception of the international order as comprising normatively equal states. The rejection of the better law approach is not because of the judges' inability to comparatively evaluate the merits of the involved laws (something which they are quite capable of doing), but rather because of the infringement of the state equality principle that conceives all laws (whether domestic or foreign) in normative equal relation to each other. No matter how "bad" the domestic or foreign private law provision may be, corrective justice does not purport to replace it with its ideal form and content. These should be left for legislative reform and judicial changes to existing precedent. Corrective justice simply is not willing to trump positive law.

III. Better Law as a Subsidiary Doctrine: Marriage with Evil Laws?

A. The Notion of Evil Laws in Legal Theory

The notion of so-called "evil laws" has always occupied a central place in Western legal theory. In a nutshell, its point is that there are legislative provisions that are so odious or barbaric that judges refuse to give effect to them. Throughout the literature on evil laws, one can trace three primary examples of such provisions. First and foremost, the various monstrous statutes during the regime of Nazi Germany are taken as a

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[125] For universal aspirations of corrective justice, see Ernest J Weinrib, "Adjudication and Public Values: Fiss's Critique of Corrective Justice" (1989) 39:1 UTLJ 1 at 3.

clear reflection of evil laws.[126] Second, the various discriminatory provisions against blacks in apartheid South Africa[127] are another example. Finally, the early *Fugitive Slave Act* of the United States that enforced slavery law in the Northern states[128] is a third example that has often been used to illustrate the evil nature of certain provisions to the extent that they cannot be applied by judges.

The fairly limited number of representative examples has not, however, undermined the significance of evil laws for legal theory. As we will see below, this is the notion at the core of the heated debate between what are, perhaps, two of the most central stances of traditional and contemporary legal theory: the natural and positivistic conceptions of law.

1. Natural Law and Evil Laws

The traditional natural law position conceives law as an inherently moral phenomenon[129] and, as such, it links the question of existence of law to certain universal moral values that exist beyond positivistic legislative provisions of a particular system. Similar to the natural sciences, the moral underpinnings of law can be discovered by the mere exercise of human reason regardless of the specific location in time and space. As a matter of fact, however, such full-blown accounts of natural law have rarely been defended even by the most prominent defenders of the natural law tradition. Instead, its argument has usually been confined to the following two focal points: normative justification of the existing systems of positive law and the notion of evil laws.

The first point tackles the normative justifications of legal positivism and the normative priority of legal positivism over moral law based in "human reason".[130] Instead of defending an anarchistic position according

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[126] See HLA Hart, *The Concept of Law*, 2nd ed (Oxford: Oxford University Press, 1961) at 200 [Hart, *The Concept*].

[127] See David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality*, 2nd ed (Oxford: Oxford University Press, 2010) [Dyzenhaus, *Wicked Systems*]; Frederick Schauer, "The Legality of Evil or the Evil of Legality?", Book Review of *Hard Cases in Wicked Legal Systems: Pathologies of Legality* by David Dyzenhaus, (2011) 47:1 Tul L Rev 121 at 121.

[128] See TRS Allan, "Law, Justice and Integrity: The Paradox of Wicked Laws" (2009) 29:4 Oxford J Leg Stud 705 at 725.

[129] See Lon L Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71:4 Harv L Rev 630 [Fuller, "A Reply"] (mentioning "the internal morality of law" at 645).

[130] A representative example of such an approach would be Jeremy Waldron's interpretation of Kantian positivism (see Jeremy Waldron, "Kant's Legal Positivism" (1996) 109:7 Harv L Rev 1535). For a related reading of Hegel, see Thom Brooks, "Between Natural

to which some law exists beyond the existing systems of positive law, natural law provides the justification for these systems based on the reasoning that these systems, in fact, protect freedom and secure the rights of private individuals against the negative phenomenon of legal unpredictability and uncertainty.[131] The private law theory of corrective justice discussed in Part II of this article is a representative example of such a position. Despite its natural law foundations and the capacity to evaluate various private law provisions, this theory steps aside and does not enforce the ideal versions of its form and content on the adjudication process. Presented in these terms, corrective justice is viewed as a pure theory of what law *ought* to be rather than what law *is*. In this way, it reflects the priority of the value of predictability within the terms of the natural law tradition.

The other focal point of natural law focuses on the cases of great injustice or evil laws as constraints on laws' positivity.[132] In fact, evil laws became the "bread and butter" of the natural law tradition. Instead of justifying the unpredictable full-blown version of universal moral law, natural lawyers have found more appeal in the position under which natural law serves as a safety valve for cases involving radically unjust laws. Any positive law provision must undergo certain universal substantive tests of morality and there is always a point at which a statute becomes sufficiently evil to a degree that it ceases to be a law at all.[133] Since evil law lacks the quality of law, it reflects nothing more than a private arbitrary power that only pretends to be called law and should not be enforced by judges.

At this point, we can delineate two understandings of evil laws from the natural law perspective. One understanding would apply the abovementioned moral test of legality to various positive law provisions on an ad hoc basis. According to this position, the morality of natural law serves as a shield against extremely oppressive positive laws that do not pass the substantive test of legality. When "moral confusion reaches its height,"[134]

Law and Legal Positivism: Dworkin and Hegel on Legal Theory" (2007) 23:3 Ga St U L Rev 513.

[131] See e.g. Julius Ebbinghaus, "The Law of Humanity and the Limits of State Power" (1953) 3:10 Phil Q 14 at 15–19; Ripstein, *Force*, *supra* note 99 at 145–81 (outlining the inherent necessity for establishment of a system of positive law from the theoretical perspective of Kantian legal philosophy).

[132] See Perry Dane, "The Natural Law Challenge to Choice of Law" in Donald Earl Childress III, ed, *The Role of Ethics in International Law* (Cambridge: Cambridge University Press, 2012) 142 at 170–75.

[133] See Fuller, "A Reply", *supra* note 129 at 655.

[134] *Ibid*.

the positive law provision of a given system does not pass the minimum threshold of natural law. It becomes a mere parody of law, something called "amoral datum", and it ceases to be law.[135] The various provisions of the Nazi regime that discriminated against Jews on the basis of race are representative examples of these evil laws.

Another understanding of the natural law position would be to outlaw the entire system. Instead of striking down a particular law, this position claims that barbaric and outrageous systems cannot be considered as valid systems because of their failure to meet certain minimum moral features that natural law attributes to any regime.[136] The disqualification of the entire system subsequently leads to the disqualification of a system's public legal institutions and its products: the judgments, executive decisions, and laws that cannot be enforced or applied in domestic courts.[137] The Nazi traffic light rules, according to this account, should not be considered as laws not because of their substantive failure but simply for the reason that they were produced by an evil system.[138] Put in different terms, the evil nature of Hitler's regime disqualified its legislative body from having any capacity to produce something that meets the standard of law and any legislative act of his regime, although legislated in the appropriate way, was not binding on citizens.

The leading modern text[139] on representation of the natural law position with respect to evil laws appears to be that of Gustav Radbruch.[140] Following the Nazi horrors of World War II, Radbruch's latest writings reflect a move from a strictly positivistic camp to a natural law understand-

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[135] *Ibid* at 656.

[136] See Lon L Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964) at 39 [Fuller, *Morality*].

[137] See Fuller, "A Reply", *supra* note 129 at 661. See also Ripstein, *Force*, *supra* note 99 at 339–52 (discussing a related idea of "barbarism" that disqualifies the entire system from meeting the minimum requirement of legality).

[138] See David Dyzenhaus, "The Grudge Informer Case Revisited" (2008) 83 NYUL Rev 1000 at 1019–21 [Dyzenhaus, "Grudge Informer Case"].

[139] To be sure, the notion according to which an extremely unjust law is not law at all has a rich tradition (see e.g. Thomas Aquinas, *The Summa Theologica*, translated by Fathers of the English Dominican Province (Chicago: Encyclopedia Britannica, 1952) 4 at 233). For additional sources in this direction, see Scott J Shapiro, *Legality* (Cambridge, Mass: Harvard University Press, 2011) at 407–08, n 23.

[140] See Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law", translated by Bonnie Litschewski Paulson & Stanley L Paulson, (2006) 26:1 Oxford J Leg Stud 1 [Radbruch, "Lawlessness"]; Gustav Radbruch, "Five Minutes of Legal Philosophy", translated by Bonnie Litschewski Paulson & Stanley L Paulson, (2006) 26:1 Oxford J Leg Stud 13 [Radbruch, "Five Minutes"].

ing of evil laws.[141] Radbruch challenged the traditional positivistic view according to which the validity of positive law statutes can be evaluated without any reference to their substantive merits. For him, the core of natural law has to be understood as securing of a minimal threshold of human rights.[142] By mentioning that "whole *portions* of National Socialist law never attained the dignity of valid law,"[143] Radbruch did not think that Hitler's entire regime was illegitimate where any execution of authority became arbitrary private power. Accordingly, Radbruch supported an ad hoc reference to the merits of particular laws rather than a wholesale outlawing of evil systems.

In line with the natural law tradition, Radbruch's account tried to ground the positivity of legal systems on moral foundations. His rejection of a full-blown version of natural law follows from his vision of positive law legislation as representing a dominant part of legality. Formulating it under the term "certainty", positivistic legislation does not compete with morality, but in fact reflects it. This moral foundation of positivism, Radbruch argued, enables an explanation of why the value of "certainty" prevails in the almost absolute majority of cases over the value of "justice".[144] As he put it:

> The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as "flawed law", must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: *Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law", it lacks completely the very nature of law*.[145]

For Radbruch, as for classical natural law thought, the "bad" or "flawed" laws are still laws because they are still "just" in the way that

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[141] For an overview on the change in Radbruch's position, see Dietmar von der Pfordten, "Radbruch as an Affirmative Holist: On the Question of What Ought to be Preserved in His Philosophy" (2008) 21:3 Ratio Juris 387.

[142] See Radbruch, "Five Minutes", *supra* note 140 at 14–15.

[143] Radbruch, "Lawlessness", *supra* note 140 at 7 [emphasis added].

[144] *Ibid* at 6–7. As Radbruch explains, this priority of natural law over positivism should be as minimal as possible. Thus, he leaves the jurisdiction to invalid evil statutes only in the hands of "higher court[s]" and in a way that is the "smallest possible sacrifice of legal certainty" (*ibid* at 8).

[145] *Ibid* at 7 [emphasis added].

they secure the subjects of the law against uncertainty.[146] The requirement of legal certainty thus does not stand in contradiction with morality (or as Radbruch put it, "justice"[147]), but in fact serves it and explains why the idea of positivism is compatible with morality. Accordingly, in the conflict between the morality of a particular case and positive law reflecting legal certainty, the positive law prevails. The triumph of legal certainty over justice is not, however, absolute. As Radbruch's above-stated formula indicates, in extreme cases, the infringement of morality is so severe (with articulated criteria of "betrayal"[148] of the "core of justice",[149] and the value of equality, to which we will return in some detail later in this Part[150]), that the positive law provision lacks the validity of law and is not law at all.

2. Legal Positivism and Evil Laws

Classical positivistic thought is rooted in the idea of imposition of authority originating within public legal institutions: the executive, judicial, and legislative branches which impose their decisions or provisions on individuals. The existence of law, according to this thought, does not depend on universal moral foundations but rather on certain social criteria. This explains why the question of the legality of a given statute depends entirely on the question of whether this statute had been duly enacted according to the procedural requirements of a given system. Thus, for example, if the English Parliament passes a certain act according to its procedures, this fact ends the positivistic inquiry into the legal status of this provision. In other words, "[a] law is a law" and "[a]n order is an order,"[151] regardless of the substantive content of a given law and how morally outrageous this content might be. This purely social practice foundation of legality is what fundamentally differentiates legal positivism from the universal aspirations of natural law morality.

This is not, however, to say that morality is irrelevant for law. The positivists' point is not that legality cannot overlap with morality or avoid being heavily influenced by it,[152] but rather that such overlap between law and morality is not necessary. The positivistic charge against natural law

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[146] Radbruch, "Five Minutes", *supra* note 140 at 14. See also Ebbinghaus, *supra* note 131 at 19–22 (distinguishing between acts of "injustice" and acts that violate "humanity").

[147] Radbruch, "Lawlessness", *supra* note 140 at 7.

[148] *Ibid.*

[149] *Ibid.*

[150] See *infra* notes 208–13 and accompanying text.

[151] Radbruch, "Five Minutes", *supra* note 140 at 13.

[152] See Hart, *The Concept*, *supra* note 126 at 185–86.

is that the latter has confused the fundamental questions of what the law is and what the law should be.[153] Law and morality are, however, two separate worlds that do not necessarily need to coexist and be inherently linked. While the question of what the law should be is indeed grounded on moral considerations, these considerations should be reserved to the point of possible improvement of law through reform. The question of legality is simply a question of a different order which is tied solely to the test of the procedural appropriateness of given legislation.

Articulated in these terms, the notion of evil laws presents a serious headache for classical positivistic thought. In contrast to the natural law platform, any minimal moral test or any inherent reference to the substantive merits of the applied laws would be at odds with the very nature of this thought. If a given law passes certain procedural requirements of a given system, legal positivism has difficulties arguing that this provision cannot be regarded as "law". This indeed explains the somewhat vague treatment of evil laws within legal positivism.

Consider, for instance, perhaps the most significant piece on the nature of law in Anglo-American legal theoretical literature of the last century—the 1958 *Harvard Law Review* debate between Lon L. Fuller and the intellectual father of modern legal positivism, H.L.A. Hart.[154] The notion of evil laws and Gustav Radbruch's natural law position lay at the heart of this debate.[155] Fuller, supporting Radbruch, represented the classical natural law position according to which the outrageous Nazi statutes cannot be considered law for the reason that they do not meet certain internal moral criteria of legality.[156]

Hart, on his side, has serious difficulties accommodating the phenomenon of evil laws within the positivistic camp. By mocking Rabruch's latest views as no less than "hysteria"[157] of post-War Germany, he defended the legal validity of Nazi legislation. For him, the best way to address evil laws is through new legislation that invalidates the Nazi statutes retroactively. Three years later, however, in his seminal work *The Concept of*

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[153] See HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71:4 Harv L Rev 593 at 594–600, 606 [Hart, "Positivism"].

[154] *Ibid*; Fuller, "A Reply", *supra* note 129.

[155] See Hart, "Positivism", *supra* note 153 at 615–21; Fuller, "A Reply", *supra* note 129 at 632, 650–57. A careful evaluation of this debate on the point of evil laws with further complex implications is a subject of several of David Dyzenhaus' works (see Dyzenhaus, "Grudge Informer Case", *supra* note 138; Dyzenhaus, *Wicked Systems*, *supra* note 127).

[156] Fuller, "A Reply", *supra* note 129 at 659–60.

[157] Hart, "Positivism", *supra* note 153 at 619.

Law, Hart changed his position.[158] Following his 1958 essay, he mocked the natural law temptation to declare evil laws invalid.[159] This time, however, instead of the panacea of retroactive legislation, Hart suggested making a distinction between the questions of validity of law and obedience to law. While evil laws remain legally valid laws, they are so morally unjust that they lead to a moral civil disobedience of these laws by judges.[160] In Hart's words, "[t]his is law; but it is too iniquitous to be applied or obeyed."[161] In this way, through extending the moral obligation of the citizens to refuse to obey extremely unjust laws to judges, legal positivism disqualified evil laws not because they are not law (a position that would fundamentally undermine its very nature) but because of judges' moral disobedience to apply evil law.

The argument according to which the obedience of law is not part of legal philosophy but rather part of moral philosophy is, of course, doubtful. One might ask whether the questions of validity and disobedience are of a different nature and are grounded on different bases.[162] In fact, it is hard to recognize any substantive limitations on the validity of law from a positivistic perspective. Furthermore, the equalization between judges and citizens according to which the same moral standard of obedience applies to both citizens and judges seems to be questionable to no lesser a degree.[163] The possibility that judges may be morally entitled to refuse the application of a certain law is doubtful because of the role of judicial authority as an official representative of the system.[164]

Without delving further into the inherent difficulty of legal positivism to accommodate the notion of evil laws, the crucial point for the purposes of this article is this: both natural law and legal positivism eventually agreed on the practical result of the evil laws—they cannot be implement-

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158 *Supra* note 126 at 208.

159 *Ibid*. See also Dyzenhaus, "Grudge Informer Case", *supra* note 138 at 1003–08, 1013–16, 1021–28.

160 See Hart, *The Concept*, *supra* note 126 at 208–11.

161 See *ibid* at 208.

162 See Fuller, "A Reply", *supra* note 129 at 655 (mentioning the positivistic thought dilemma between the moral duty to obey law and the moral duty to disobey evil law). See also Dyzenhaus, *Wicked Systems*, *supra* note 127 at 165–74; Dyzenhaus, "Grudge Informer Case", *supra* note 138 at 1013–17, 1021–28.

163 See Hart, *The Concept*, *supra* note 126 at 207–08.

164 See Dyzenhaus, "Grudge Informer Case", *supra* note 138 at 1022–23. On a related note, it is difficult to accommodate a positivistic conception of evil laws within the principle of state equality as is discussed in Part II. Since this principle conceives of judicial authority as a representative of international order, it is hard to see how a court can refuse to apply valid law without infringing the equal structure of the international order.

ed by judges. While natural lawyers came to this conclusion directly on the basis of their conception of legality as a reflection of morality, the positivists based this result on a conceptual distinction between the question of legality and the moral conscience of judges. This explains Ronald Dworkin's recent striking comments in his last book on the practical significance of evil laws:

> Legal philosophers argue, for instance, about an ancient jurisprudential puzzle of almost no practical importance that has nevertheless had a prominent place in seminars on legal theory: the puzzle of evil law. ... The ancient jurisprudential problem of evil law is sadly close to a verbal dispute.[165]

Indeed, it would appear, with respect to evil laws, that the two major stances of Western legal philosophy have teamed up and reached a remarkable consensus.

B. The Subsidiary Version of Better Law as an Evil Law

The consensus between natural law and legal positivism in their treatment of evil laws is important for understanding the nature of the better law approach as a subsidiary doctrine. In fact, it is striking that no serious parallel has yet been drawn between the theory of evil laws and the wide spectrum of exceptional substantive doctrines of private international law.[166] Taking the popular doctrine of public policy as an illustrative example,[167] the next section shows the remarkable similarity between the rhetoric and actual implementation of this doctrine in courts and in the evil laws theory.

1. Public Policy as an Evil Law in Courts

Let me start with a comment on the terminological fallacy of private international law doctrines that reverberates in the opening citation to

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[165] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass: Harvard University Press, 2011) at 410, 412. Note that the notion of evil laws presented a serious challenge for Dworkin's own non-positivistic account of law as "interpretative practice" (see generally Ronald Dworkin, *Law's Empire* (Cambridge, Mass: Harvard University Press, 1986) [Dworkin, *Law's Empire*]). Apparently, according to this account, the judges of a fully evil system are required to promote its evil values as the "soundest interpretation". For discussion of this point, see Dyzenhaus, *Wicked Systems*, *supra* note 127 at 177–86.

[166] The usage here of the phrase "private international law" rather than "choice of law" is purposive in light of the presence of the subsidiary version of better law within another area of private international law—that of recognition of foreign judgments (see *supra* notes 37, 119–21; *infra* note 202).

[167] For a list of what appear to be effectively substantive exceptional doctrines of private international law, see *supra* notes 33–38 and accompanying text.

this article. Although throughout this article we have witnessed such fallacy several times,[168] one could argue that the doctrine of public policy is a predominant example. Indeed, the terminological title of "public policy" suggests a reference to the notion of execution of state sovereignty and a reference to socio-economic policies of a particular state rather than to universal moral values, which has been recognized by both natural law and legal positivism traditions as standing at the core of evil laws. The labels, however, are not always completely determinative. The fact that public policy is called "public policy" does not mean that conceptually, effectively, and in the everyday operation of the courts, the doctrine actually implements policy considerations of a particular forum. In order to illustrate this point, the paragraphs below suggest drawing attention to a set of three core public policy decisions that are frequently cited in Anglo-American literature:[169] the English cases *Oppenheimer v. Cattermole*[170] and *Kuwait Airways v. Iraqi Airways*[171] and the American case *Loucks v. Standard Oil*.[172]

a. Loucks v. Standard Oil

The first decision in this set is an early decision from 1918 delivered by Justice Cardozo of the New York Court of Appeal. The case addressed the situation where a New York resident was killed while travelling in Massachusetts as a result of the negligent act of the defendant's employees. Following the classical methodology of connecting factors, the New York court was supposed to follow the connecting factor of the place of in-

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[168] For terminological miscategorizations of various doctrines and concepts discussed in this article, see *supra* notes 22–26 (with respect to the affiliation of party autonomy and validation principles with better law), 30–38 (with respect to labelling various exceptional doctrines of choice of law irrespective of their organizational basis in better law), 39 (with respect to affiliation of better law with "mandatory rules" and inherently asymmetrical relationships), 74 (with respect to the usage of the word "substance" in the context of interest analysis).

[169] For the centrality of these three decisions within the Anglo-American literature, see Briggs, *Conflict*, *supra* note 42 at 208–12; Larry Kramer, "Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception" (1997) 106:7 Yale LJ 1965 at 1972 (identifying the *Loucks* decision as capturing "the basic idea" of public policy doctrine); David Fraser, "'This Is Not Like Any Other Legal Question': A Brief History of Nazi Law Before UK and US Courts" (2003) 19:1 Conn J Intl L 59 [Fraser, "A Brief History"] (identifying *Oppenheimer* as "the best known instance wherein British courts have had to deal with the Radbruchian dilemma" at 68); Pitel & Rafferty, *supra* note 5 at 30–33, 183–84; Rafferty et al, *supra* note 9 at 70–93.

[170] *Supra* note 51.

[171] *Supra* note 51.

[172] *Supra* note 51.

jury and to apply Massachusetts negligence law.[173] The relevant wrongful death statute of the state of Massachusetts specified the amounts of damages awarded based on the degree of culpability of the defendant.[174] This statute differed from the equivalent New York law because it established both a minimum and maximum for awards that plaintiffs could potentially recover and it seemed that the plaintiff's estate received more under the Massachusetts law than it would have received under the New York law.[175]

Addressing the question of whether the New York court should strike down the application of the Massachusetts statute based on the doctrine of public policy, Justice Cardozo formulated what would become a decisive understanding of this doctrine within Anglo-American literature. According to this understanding, the doctrine of public policy can be invoked only when the foreign provision violates "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[176]

Formulated in these exceptional terms, Cardozo's test is radical. Indeed, had New York negligence law applied, the result would have been different. However, Justice Cardozo refused to invoke the public policy doctrine based on the mere difference between the negligence laws of New York and Massachusetts or the "individual notion of expediency or fairness."[177] There is nothing wrong with the fact that Loucks' estate received more than it would have received under the parallel New York provision. As Justice Cardozo put it, "[w]e are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."[178] In this way, Justice Cardozo established the highest possible

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[173] *Ibid* at 200.

[174] *Ibid* at 198.

[175] *Ibid* at 202.

[176] *Ibid*.

[177] *Ibid*.

[178] *Ibid* at 201. In a similar vein, the Supreme Court of Canada reached a similar conclusion in the context of the recognition of foreign judgments question in *Beals*, *supra* note 5. The Court there rejected a proposal to adopt a broader understanding of public policy doctrine that would disqualify a foreign judgment based on the notion that the award is excessive and has restated the doctrine as limited to the cases of "repugnant laws" (*ibid* at paras 71–77). As the Court put it, "[t]he defence of public policy should continue to have a narrow application" (*ibid* at para 75). Note that this very "narrow" conception of public policy goes beyond private international law and captures the traditional unwillingness of common law courts to assign a central role to this doctrine in their reasoning. By pointing to its inherently unpredictable and often self-contradictory nature, the courts have mocked it as no less than an "unruly horse" (*Richardson v Mellish*, [1824] 130 ER 294 at 303, 2 Bing 229). From this perspective, this article offers a panacea to

threshold for the application of public policy doctrine in private international law and its application has been reserved for much more serious cases.

b. Oppenheimer v. Cattermole

A good example of one such serious case can be traced in the decision of the House of Lords in *Oppenheimer v. Cattermole*.[179] This case addressed a possible tax advantage for English residents who had dual nationality. The plaintiff argued that he should benefit from this tax provision because his German nationality had been taken from him by the Nazi Decree of 1941. According to this provision, any Jews who resided abroad lost their German nationality based on the mere fact of being Jewish.[180]

The opinions of the House of Lords focused on the substantive evaluation of the Nazi Decree and questioned the validity of this decree in light of the doctrine of public policy. Their Lordships stressed the "unjust and discriminatory"[181] nature of this decree and commented that the English courts should not "shut their eyes to the shocking nature of such legislation."[182] The leading opinion, delivered by Lord Cross of Chelsea, explicitly adopted Radbruch's natural law position with respect to Nazi legislation. While this opinion did not challenge the validity of the entire National Socialist regime as some versions of natural law do,[183] it stressed the fact that the 1941 decree did not deprive all immigrants of their status as German nationals, but in particular, Jewish immigrants.[184] Accordingly, Lord Cross of Chelsea characterized the Nazi decree as follows: "To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country *ought to refuse to recognise it as a*

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the inherent unpredictability of the doctrine. By naming the value of "equality" (see *infra* notes 208–13 and accompanying text) as a possible candidate for grasping the nature of the subsidiary version of better law (and accordingly for grasping the nature of public policy doctrine), it offers a means to tame public policy's "wild horse", at least in the area of private international law.

179 *Supra* note 51.

180 For an outline of the factual basis of this case, see *ibid* at 452, 456–57.

181 *Ibid* at 454.

182 *Ibid* at 456. (Lord Cross of Chelsea mentions the "shocking nature of ... the 1941 decree.")

183 See *supra* notes 134–39 and accompanying text.

184 *Oppenheimer*, *supra* note 51 at 446, 470.

law at all."[185] The rest of their Lordships agreed with him on this striking natural law definition of public policy doctrine.[186]

c. *Kuwait Airways v. Iraqi Airways*

The focus on the substance of the foreign provision lies also at the heart of the House of Lords decision in *Kuwait Airways v. Iraqi Airways*.[187] The surrounding circumstances of this decision relate to the Iraqi occupation of Kuwait in the summer of 1990. Upon the occupation, the Iraqi government issued the so-called "Resolution 369" which ordered a confiscation and transfer of ten commercial aircrafts of Kuwait to Iraq.[188]

Following *Loucks* and *Oppenheimer*, their Lordships formulated the scope of public policy doctrine in the most limited terms. Thus, it was recognized that the doctrine cannot be applied based on mere substantive differences between various provisions but rather is to be reserved for the cases that are "alien to fundamental requirements of justice,"[189] to be invoked only "exceptionally and with the greatest circumspection"[190] or when "the foreign legislation constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise the legislation as a law at all."[191]

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185 *Ibid* at 470 [emphasis added].

186 *Ibid* at 452, 456. In order to situate the *Oppenheimer* decision in a historical context, we should note that the treatment of Nazi anti-Jew legislation by the House of Lords in *Oppenheimer* was fairly different from the traditional position of pre-War, pre-Holocaust Anglo-American courts, and scholars who had tended to shut their eyes to the discriminatory nature of Nazi legislation (see Fraser, "A Brief History", *supra* note 169 at 75–124). With some exceptions, Anglo-American courts and scholars generally have validated and legitimated Nazi legislation through the application of traditional technical content-free private international law rules without any reference to the substantive content of Nazi law (*ibid* at 98–100). It is not only the courts that have not generally differentiated between "German" and "Nazi" laws as Anglo-American scholars have levelled very little criticism of Nazi anti-discriminatory legislation (see David Fraser, "'The Outsider Does Not See All the Game...': Perceptions of German Law in Anglo-American Legal Scholarship, 1933–1940" in Christian Joerges & Navraj Singh Ghaleigh, eds, *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism Over Europe and Its Legal Traditions* (Oxford: Hart, 2003) 87 at 110). From this perspective, *Oppenheimer*'s better law reading departs from the traditional position of the courts with respect to Nazi law.

187 *Supra* note 51.

188 For the presentation of the factual basis of this case, see *ibid* at 667, 706–07.

189 *Ibid* at 681.

190 *Ibid*. See also *ibid* at 719.

191 *Ibid* at 718.

Based on this understanding of public policy, Iraqi Resolution 369 has been depicted in mostly negative colours and presented no less as "a paradigm of the public policy exception."[192] It was coined as "a flagrant breach of international law,"[193] a violation of established principles of international law, and as an act that reflects the denial of the territorial integrity of another state.[194] The essence of this Resolution does not represent a simple governmental expropriation of property within its territory but a part of a larger attempt by the Iraqi Government "to extinguish every vestige of Kuwait's existence as a separate state,"[195] and to deny Kuwait's status as a state. Based on this vision of the Resolution, Lord Nicholls drew an explicit analogy between it and the related decrees made by the Nazi government during World War II.[196]

The analysis set out above suggests a significant disjunction between the terminological label and the actual implementation of public policy. The remarkable similarity between the notion of evil laws and the exceptional doctrine of public policy is hard to miss. All three decisions view this doctrine as intimately related to universal moral values[197] rather

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[192] *Ibid* at 711. See also *ibid* at 713.

[193] *Ibid* at 709.

[194] *Ibid* at 682–83.

[195] *Ibid* at 684–85.

[196] See *ibid* at 685. A parallel can be drawn between the confiscation of Kuwait aircrafts under Resolution 369 of the Iraqi government and the decree of the Estonian Soviet Socialistic Republic discussed by the Supreme Court of Canada in *Laane v Estonian Cargo & Passenger Steamship Line*, [1949] SCR 530, 2 DLR 641. Similarly to Resolution 369 of the Iraqi government in *Kuwait Airways*, upon its occupation of Estonia in 1940, the Soviet authorities issued a decree, which nationalized the ships staying in the Estonian port. By classifying the Soviet decree as a "penal law", the Court refused to recognize this decree. By this, the Court in *Laane* based its decision on the traditional impossibility of recognizing foreign "penal law" under private international law rules, rather than on its substantive evaluation, as had been done in *Kuwait Airways*. For the traditional refusal of the courts to recognize penal law, see Pitel & Rafferty, *supra* note 5 at 33–37.

[197] This understanding of public policy doctrine as referring to universal moral values (as opposed to the socio-economic policies of a particular forum) enables challenges to the two claims made in choice of law literature with respect to the nature of this doctrine: (1) the proximity thesis and (2) the relation to European mandatory rules. First, this understanding is at odds with the position that attributes normative significance to the degree of connection with the particular forum that adjudicates the case. According to this position, the proximity and connectedness between the forum and the events constituting a given ground of liability or the residence of the parties should affect and justify the application of the doctrine. Thus, for example, a loose connection between an English court and a tort that occurred in Spain between French residents should lead to a reluctance by the court to invoke the doctrine. Although this position has gained some support in *Kuwait Airways*, *supra* note 51 at 728–31, 738–39 and has been endorsed by several scholars (see Alex Mills, "The Dimensions of Public Policy in Private Interna-

than to particular socio-economic policies of particular states. This "moral" understanding of public policy doctrine can be clearly traced in the courts' substantive evaluation of the Massachusetts negligence provision, the Nazi decree of 1941, and Resolution 395 of the Iraqi Government and joins the exceptionally radical formulation of this doctrine in traditional and contemporary choice of law thought.

2. Mutual Benefits: What Can Evil Laws and Better Law Teach Each Other?

While it is important to say that a subsidiary version of better law *is evil laws*, what also matters is how much each of the notions can learn from each other. In fact, the intellectual history and lessons of experience of the two show how much each can greatly benefit from the other. Addressing private interactions between various systems of private international law gives the evil laws theory a significant number of actual examples of treatment of these laws in courts. These examples explain why the notion of evil laws cannot be simply dismissed from the theoretical discourse of theory on grounds of scarcity.[198] In contrast to the vision of evil laws as an exceptional phenomenon that had historically been limited mostly to the hysteria of the post-War German courts,[199] the private international law judge encounters these laws far more frequently. Albeit stated under different labels and titles, the exceptional substantive doctrines of private international law (with the doctrine of public policy at its heart) provide fruitful ground for legal theory's further analysis of evil laws.

A truly decisive contribution appears, however, to be that of the theory of evil laws to private international law. Beyond the possible normative justification of various private international law doctrines and concepts, legal theory (and in particular that of natural law) equips the subsidiary

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tional Law" (2008) 4:2 Priv Intl L 201 at 210–11, 231; Briggs, *Conflict*, *supra* note 42 at 210–11), it has nothing to do with the proposed universal conception of the doctrine. Secondly, the same point applies with respect to the attempt to present this doctrine as a flip side of the "mandatory" rules of a particular forum mentioned in Part I (see e.g. Mills, *supra* note 197 at 202, n 9). While the nature and historical background of mandatory rules indeed reflect the socio-economic policies of a particular forum, these policies have nothing to do with the proposed understanding of public policy as referring to universal moral values. For a somewhat related distinction between the two, see Basedow, *supra* note 8 at 428–29.

198 Ronald Dworkin questioned whether this notion can be taken as a "crucial test" for his conceptual account of law (see Ronald Dworkin, "A Reply by Ronald Dworkin" in Marshall Cohen, ed, *Ronald Dworkin and Contemporary Jurisprudence* (Totowa, NJ: Rowman & Allanheld, 1983) 247 at 260).

199 See *supra* note 157 and accompanying text.

version of better law with convenient tools for addressing the two significant challenges that have been raised against the primary version of better law, as discussed throughout this article: the "subjectivity" challenge (presented in Part I) and the "state equality" challenge (presented in Part II).

a. The Subjectivity Challenge

As we have seen in Part I, a considerable charge against the primary version of better law has pointed to the inherent subjectivity of this approach and its fatal failure to articulate an objective criteria for the better law. The radical conception of better law as a subsidiary doctrine eliminates much of this challenge. Recall Radbruch's "utmost clarity" reference to the "core of justice",[200] the value of equality as reflecting the fundamental nature of evil laws. As he put it in the context of discriminatory Nazi provisions,

> National Socialist "law" would extricate itself from the essential requirement of justice, namely, the equal treatment of equals. It thereby lacks completely the very nature of law; it is not merely flawed law, but rather no law at all.[201]

The centrality of the equality before law can be also traced within other conceptual accounts on evil laws. Consider Fuller's "internal morality of law" which is based on his eight formal principles, such as publicity and non-retroactivity, that every legal order should contain in order to meet the minimum requirements of legality.[202] One may, however, understand Fuller's position as presupposing a certain conception of the reciprocal relationships between the public institutions and a certain status of the laws' subjects, under which the public institutions cannot deny the equal status of private individuals before law.[203]

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[200] See *supra* note 149 and accompanying text.

[201] Radbruch, "Lawlessness", *supra* note 140 at 8.

[202] Fuller, *Morality*, *supra* note 136 at 39.

[203] In his book on the internal morality of law, Fuller says "[e]very departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent" (*ibid* at 162). Kristen Rundle builds upon this comment in saying that Fuller's morality conveys not just the formal requirement from law, but also a certain conception of human dignity that has to be respected in any legal order. Since the formal features of law convey a "built-in" respect for a legal subject, Fuller's morality cannot abuse the legal subject as an agent. From this perspective, the criticism raised against Fuller with respect to the somewhat instrumental nature of his eight principles as referring to the efficient operation of the legal system is flawed. Fuller's eight formal principles represent minimal requirements from any legal order that in deontological terms support the realization of human agency. See Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford: Hart, 2012) at 86–118.

In a similar vein, T.R.S. Allan[204] pointed to the difficulties of Dworkin's theory of "best interpretation" to accommodate the notion of evil laws.[205] Allan argued, however, that certain minimum standards of justice can be integrated within Dworkin's account.[206] This minimum standard should serve as a safeguard of fundamental rights,[207] and positive law provisions that infringe the equal status of individuals before law cannot be acknowledged as law. The American pre-Civil War *Fugitive Slave Act* contradicts, under this position, fundamental principles of justice and cannot in principle be considered as valid law.[208]

Presented in these terms, equality before law can be viewed as an unarticulated principle of the subsidiary version of better law. This principle explains the radical formulation of this version of better law in traditional and contemporary choice of law literature and decisions as referring to serious cases of gross injustice and last resort.[209] The infringement of this principle can be clearly traced in the set of decisions on public policy presented above. The negligence provision of the Massachusetts statute in *Loucks* maybe was unjust in the sense that it over-compensated the plaintiff under certain objective standards, but it had not denied the defendant equal standing before the law. The situation was radically different with parallel provisions in *Oppenheimer* and *Kuwait Airways*. The National Socialist decree of November 1941 discriminated against the plaintiff based on the mere fact he was a Jew. The Iraqi Resolution 369 of the summer of 1990 was a part of the dissolution of Kuwait's statehood and prompted analogy with Nazi provisions mentioned by Radbruch that expelled property from Jews.[210] By depriving Kuwait of its status as an

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[204] Allan, *supra* note 128 at 708.

[205] Dworkin, *Law's Empire*, *supra* note 165 at 61, 77, 139.

[206] Allan, *supra* note 128 at 711–15.

[207] *Ibid*.

[208] *Ibid* at 714–15.

[209] See *supra* notes 48–53 and accompanying text. To be sure, the centrality of the equality before law principle is not limited to the nature of public policy doctrine but can also be extended to other instances of the subsidiary version of better law or other areas of private international law. Thus, the various systems impose substantive restriction on parties' potential choice within the party autonomy principle, if such choice discriminates against one of the parties on the basis of gender (see e.g. Briggs, *Conflict*, *supra* note 42 at 210). The case of recognition of foreign judgments is another example. Despite the general rule of recognition (see *supra* notes 119–21 and accompanying text), foreign judgments that are based on provisions that deny the equal status of the litigating parties, such as the discriminatory provisions against Jews in Nazi Germany or the discriminatory provisions against blacks in apartheid South Africa, are not recognized as valid judgments (see Strong, *supra* note 120 at 108–09).

[210] Radbruch, "Lawlessness", *supra* note 140 at 1–2.

equal state, their Lordships challenged the very validity of this Resolution[211] and its capacity to be recognized "for any purpose".[212]

The underlying equality before law principle explains why both private international law and evil law theory have focused on more or less an identical set of examples in illustrating evil laws: the predominant cases of Nazi Germany, discriminatory provisions of apartheid South Africa, and the slavery cases of the early United States.[213] Representing an identical underlying idea, both private international law and evil laws theory have focused on provisions that discriminated before law and denied equal status to one of the litigating parties.

b. The State Equality Challenge

As we have seen in Part II, some have argued against the primary version of better law that even if better law is able to overcome the subjectivity challenge, it is still illegitimate and to be rejected because of the argument that any substantive evaluation of laws' merits will lead to a violation of the normative equality of the states. Allow us to return to Laycock's[214] argument mentioned in Part II on the apparent incompatibility between the better law approach and the state equality principle. Laycock thought that the doctrine of public policy should be eliminated from choice of law process. Referring to the substantive evaluation of the laws concerned, this doctrine is at odds with state equality and as such must be rejected along with other versions of the better law approach either as a primary rule or as a subsidiary rule.[215]

One must, however, be careful with the exposition of Laycock's position. Despite his deep antagonism toward any analysis of the substantive merits of laws, he recognized that a very limited version of the better law approach seems to be too important to be eliminated completely. Indeed, a close examination of his position reveals that the proposed elimination of the limited version of the better law approach was restricted to the inter-American domain. By mentioning the slavery cases as a notable exception,[216] Laycock argued that American states' legal systems do not differ dramatically. On the international level, however, the picture is different.

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[211] *Kuwait Airways*, *supra* note 51 at 711, 713.

[212] *Ibid* at 726.

[213] See *supra* notes 126–28 and accompanying text.

[214] See *supra* notes 103–09 and accompanying text.

[215] See Laycock, *supra* note 103 at 313.

[216] See *ibid* ("[s]lavery was the great uncompromisable exception, but slavery has been uniformly abolished. ... It would be a serious error to design choice-of-law rules around slavery" at 260).

At this level, Laycock suggested adopting a more flexible approach that will be responsive to cases of totalitarian states.[217] From this perspective Laycock seems to be very careful in marking the limits of the scope of his argument for the full-blown exclusion of better law.

Laycock's comments on the exceptional nature of slavery and totalitarian regime cases are clearly reminiscent of the theory of evil laws. As we have seen, the slavery cases were one of the representative examples of such laws. The case of totalitarian regimes makes a reference to a parallel point made within the natural law position about the inherent barbarity and outrageous nature of certain regimes to a degree that outlaws the entire system.[218] Furthermore, legal theory of evil laws (or at least the natural law justification of these laws) can explain fairly easily why the notion of evil laws can be integrated within the state equality principle. Since such laws were "null and void the moment they were enacted," they simply do not constitute a valid object of substantive evaluation for better law.[219]

Conclusion

This article has presented the story of better law as a story of missed points and misconceptions. The better law approach differentiates itself from other choice of law methodologies in its evaluation of the merits of the involved laws' substantive content. While the normative basis of other methodologies is indifferent to the substantive merits of the applied laws, for better law, the reference to this content is all that matters. This does not mean, however, that other choice of law methodologies do not incorporate the better law as their subsidiary rule. While the inherent reference to substantive merits evaluation serves as a primary path for the better law approach as a primary rule, this reference is also made pursuant to other methodologies as a subsidiary or complementary doctrine to their ordinary choice of law adjudication process.

The distinction between better law as primary and subsidiary rules is important for several reasons. Choice of law thought and judicial decisions have treated the two forms of better law in fundamentally different ways. One of them, better law as a primary rule, seems to be vulnerable to a set of serious objections, has not been internally incorporated in choice of law doctrines and concepts, seems to lack internal coherence

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[217] See *ibid* at 259–60. See also *Tolofson*, *supra* note 5 at 1058–59 (according to which there seems to be no room for public policy doctrine in inter-provincial cases, as opposed to international cases).

[218] See *supra* notes 136–40 and accompanying text.

[219] Radbruch, "Lawlessness", *supra* note 140 at 2.

within its own argument, and has very limited support in scholarly writings and in the courts. It is hard to see the light at the end of the tunnel with this version of better law. The situation is radically different with respect to the subsidiary version of better law. Its incorporation within a very wide spectrum of traditional and contemporary choice of law doctrines and concepts underlies its practical significance for choice of law process. Strikingly, but at odds with the theoretical basis of both the classical and modern choice of law methodologies, this version of better law has nonetheless found a way to inherently integrate itself within them.[220]

Furthermore, drawing the distinction between two versions of better law has enabled us to go a step further through the following two suggestions: the possibility of matching the primary version of better law with the corrective justice theory of private law and the possibility of matching the subsidiary version of better law with the theory of evil laws.

Although it appears promising at first glance, the first match is ultimately found to be unsuccessful. Indeed, the introduction of corrective justice as a theoretical foundation of private law and private law interactions apparently equips the better law approach with a means to exercise a comparative normative analysis of various private law provisions as a central element of its jurisprudence. However, it has been argued that corrective justice still rejects better law as a primary rule and therefore is compatible with its general rejection by choice of law thought. Its fundamental objection to better law does not address the judges' capability to execute comparative analyses of the provisions concerned, but rather their legitimacy to engage in such analyses in the first place. This objection questions the very capacity of the public judicial authority to engage in better law analysis without challenging the fundamentally equal structure of international order.

In contrast to the first match, the marriage between the evil laws theory and the subsidiary version of better law is found to be more successful.

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[220] This popularity of a subsidiary version of better law suggests that the normative structure of the choice of law question cannot be presented exclusively through a unitary concept of better law, but rather as a complex conglomerate which is grounded on the interplay between the following theoretically related notions: the party autonomy principle, according to which the parties can agree on the identity of the framework to adjudicate their case; the flip side of the party autonomy principle—the most significant relationship principle according to which the court applies the law that is "most" connected to the parties and to the events; and the subsidiary version of the better law approach. For a defence and exposition of this tripartite normative structure of the choice of law question, see Peari, "Savigny", *supra* note 47; Peari, "Choice-Based", *supr*a note 19; Sagi Peari, "Choice-of-Law in Family Law: Kant, Savigny and the Parties' Autonomy Principle" (2012) 4 Nederlands Internationaal Privaatrecht 597.

By taking the vastly popular public policy doctrine as a representative example of this version of better law, this article has demonstrated the remarkable conceptual similarity in rhetoric and implementation between it and evil laws theory. As we have seen, the theory of evil laws provides the subsidiary version of a better law with an invaluable service. It does not just purport to provide a normative justification for its operation, but also immunizes it from the fatal objections that have been mounted against the primary version of better law: the subjectivity and state equality challenges. This explains the vast popularity of the various doctrines and concepts of a limited version of better law within classical and modern choice of law methodologies: in contrast to the primary better law approach, the subsidiary version of better law is normatively justifiable.

In this way, this article has sought to demonstrate why, of the two proposed matches, only the second match works, or why the answer to the question in the title of this article—"can better law be married with corrective justice or evil laws?"—is "no" to the former and "yes" to the latter.