

**Of Theory and Theodicy:
The Problem of Immoral Law***

Law and Justice in a Multistate World:
Essays in Honor of Arthur T. Von Mehren, pp. 473-502
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Louise Weinberg**

I. INTRODUCTION: CRITIQUE AND COUNTER-CRITIQUE

Sooner or later even the most impressive theories of adjudication must grapple with the problem of immoral law.¹ That problem is to legal theory what the theodicy is to religion. Seriously wrong law cannot be “applied” in some neutral, principled way, as if by holding one’s nose and looking in the other direction. Immoral law invites the condemnation of the world. Yet immoral law, like the poor, will always be with us, even in otherwise highly developed and democratic legal systems.

In America we have a rather large legacy of judicial opinions struggling with immoral law—the old cases on slavery. Those cases have intrigued writers² in American legal and constitutional history,³ as they have writers

*Copyright © 2001 by Louise Weinberg. This essay is dedicated to Arthur Taylor von Mehren, whose appreciative student I was at Harvard. It is based in part on a talk I gave at the 1997 annual meeting of the Association of American Law Schools in Washington, D.C., in the Section on Conflict of Laws. An earlier version of this essay, with rather different argumentation and coverage, appears at 56 MD. L. REV. 1316 (1997). I wanted especially to present Professor von Mehren with that paper, as, in the field of the conflict of laws, it is the thing I have written that I liked best. But I found that, even so, I needed to recast the whole argument.

**Holder of the Bates Chair and Professor of Law, The University of Texas.

1. I do not pretend to define what is immoral. A main message of this essay is that the case on extreme facts or extreme law is not importantly different from the workaday case.

2. For current general commentary and background see Alfred L. Brophy, *Harriet Beecher Stowe’s Interpretation of the “Slavery Of Politics” in Dred: A Tale off the Great Dismal Swamp*, 25 Ok.C. U. L. Rev. 63 (2000); and see the essays collected in Symposium, *Bondage, Freedom & the Constitution: The New Slavery Scholarship and Its Impact on Law and Legal Historiography*, 17 CARDOZO L. REV. 1685 (1996).

3. See, e.g., PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* (1996); THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860* (1996); JAMES OAKES, *SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH* (1990); DON E. FEHRENBACHER, *SLAVERY, LAW, AND POLITICS: THE DRED*

on legal theory, particularly choice-of-law theory.⁴ Slavery, in a house divided between slave states and free states, (2002) **Law and Justice 474** presented an unusually rich array of conflicts cases, all arising under peculiarly wrong law, and all on particularly wrenching facts. And all now present a serious if not insurmountable problem for choice-of-law theory.

What forms of legal reasoning could be brought to bear on the slavery cases? The American legal realists showed rather conclusively that formalism in the decision of cases works to obscure rather than justify.⁵ This message was widely received and acknowledged. But ever since, legal theorists have supposed that the formalist demon could be exorcised from the decision of cases by a thoughtful substitution of “approaches” for “rules.” It is now somehow an article of faith that “rules” are “formalisms” in a way that “approaches” are not. Yet what the realists *meant* was that the decision of cases should be free of fixed, abstract systems—of any kind. Until that happens—as the realists saw—the world will best esteem the judge who best manipulates the required method to achieve a prudent result. One may deplore this as unprincipled or applaud it as sophisticated, but it is common experience. In the fairyland of Oz we like to believe in our Wizard. We do not want to look behind the curtain.

SCOTT CASE IN HISTORICAL PERSPECTIVE (1981); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (1977); ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); Louise Weinberg, *Methodological Interventions and the Slavery Cases, or, Night-Thoughts of a Legal Realist*, 56 MD. L. REV. 1316 (1997); Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77 (1985). On the teaching of slavery as part of constitutional law, see Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-KENT L. REV. 1087 (1993).

4. See, e.g., PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* (1981); Cover, *JUSTICE ACCUSED*, *supra* note 4; Weinberg, *Night-Thoughts of a Legal Realist*, *supra* note 4; Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992); A. E. Keir Nash, *In re Radical Interpretations of American Law: The Relation of Law and History*, 82 MICH. L. REV. 274 (1983); John Phillip Reid, *Lessons of Lumpkin: A Review of Recent Literature on Law, Comity, and the Impending Crisis*, 23 WM. & MARY L. REV. 571 (1982); Note, *American Slavery and the Conflict of Laws*, 71 COLUM. L. REV. 74, 75 (1971); Harold W. Horowitz, *Choice-of-Law Decisions Involving Slavery: “Interest Analysis” in the Early Nineteenth Century*, 17 U.C.L.A. L. REV. 587 (1970). Use of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), to teach conflicts is discussed in Jane E. Larson, *“A House Divided”: Using Dred Scott to Teach Conflict of Laws*, 27 U. TOL. L. REV. 577 (1996).

5. The finest work is probably Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 487 (1924); cf. Christopher Shannon, *The Dance of History*, 8 YALE J.L. & HUMAN. 495, 501 (1996) (book review) (referring to Cook as “the greatest of the realists”).

The legal-realist critique of formalism in choice of law is sometimes disparaged as having destroyed the old system without having constructed a new system to put in its place.⁶ That objection misses the point. Understanding the legal-realist critique, one would not want to construct a new system. Yet in our common-law tradition judges must write opinions. They must have something to say. How would an opinion read without recourse to some overlord of law to which a judge could make due obeisance? Formalisms, of course, must be part of the answer. But the universe of legal argument is much vaster than a formalist supposes.⁷ It is capacious enough for all kinds of reasoning, including formalist reasoning. Some writers of the legal realist-school tended to favor arguments from the social sciences. Those sorts of extra-legal arguments can, at least, furnish helpful background. Louis Brandeis's briefs were famous for them. But there remain also, as the best of the realists saw, arguments that are the very stuff of a lawyer's craft:⁸ the ordinary methods of construction and interpretation. There remains, especially, the powerful beauty of purposive reasoning. There are, besides, the immeasurable helps of the solutions (and the reasoning) of the judges who have gone before. Beyond these resources, in the universe of argument there is also the realm of consequentialist or policy or economic arguments. And increasingly, worldwide, writers and (2002) **Law and Justice 475** judges and political leaders are reminding us of a great heritage of arguments that inexplicably have lain in some disuse: arguments from justice and morality.

Unmindful of these other riches of the common law that lie about them, there are many who can see only nihilism in the realist critique of formalism. For some, nothing can replace the evenhandedness and disinterestedness of formalisms. Stepping into the breach, brilliant theorists take turns offering some new multi-factored "approach" as a cure for the mistakes of the past. Some of these have a persuasive ring, and

6. See, e.g., David F. Cavers, *The Logical and Legal Bases of the Conflict of Laws*, 56 HARV. L. REV. 1170, 1172-73 (1943) (book review).

7. For a useful typology of some of the forms of legal argument, see PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12-13 (1991). See also, e.g., Vincent A. Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45, 46 (1985); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 285 (1973); M. P. Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35, 40 (1963).

8. *Prohibitions del Roy*, 12 Coke's Rep. 63, 65 (K.B. 1608) (Coke, C. J.) (speaking of "the artificial reason . . . of law" in which lawyers are learned but even the King is not).

characteristically provide “escape hatches” in any event for unforeseen difficulties. But if even the finest choice-of-law mechanism cannot survive unforeseen difficulties without an escape hatch, it is the escape hatch that does the heavy work, not the mechanism. Within its own terms even the finest theory may be unable to survive the test presented when a court is asked to apply, and apparently is required to apply, seriously wrong law.

II. A CURIOUS DETERIORATION IN OUR TIME

Oddly, the problem the slavery cases present for choice-of-law theory is *more* serious today than it was when those cases were decided. Our “modern methods,” developed in the last century, are characteristically much more elaborated than nineteenth century methods were. And ours are mandatory. The judges in the two-state slavery cases, in contrast, often did not even treat those cases as conflicts cases. Despite the respectable body of literature examining the two-state slavery cases as exercises in choice of law,⁹ those cases did not turn very much on reasoning we would identify today as conflicts reasoning, or as analogous to conflicts reasoning.¹⁰

What one finds is that the judges quite often refer to what we might call *conflicts policy*. They were aware of an ideal of “comity.” Thus, they might mention the desirability of intercourse between the states, free of penalty to slaveholders or the threat of retaliation by an offended sister state. They might take the view, as we would, that property rights should not vary as one crosses state lines. Sometimes they do advert to a rule of the conflict of laws, most often the old technical rule that ordinarily the domicile should determine the status of persons. But the cases do not *hinge* on such things. Judges in those days did not have it authoritatively laid down that some particular mode of choice of law would have to be used at the outset in all two-state cases in their courts.¹¹ Perhaps too much was at stake in the slavery cases to make justice as blind as that. Most of those cases, whether or not taking the ideal of “comity” into account, were

9. Harold W. Horowitz, *Choice-of-Law Decisions Involving Slavery: “Interest Analysis” in the Early Nineteenth Century*, 17 U.C.L.A.L. REV. 587 (1970).

10. Some writers employ traditional conflicts terminology, e.g., “*lex loci*” to describe the results in some of the slave cases. See, e.g., throughout, FINKELMAN, AN IMPERFECT UNION, *supra* note 4. But I have found little actual use of choice-of-law language of that kind in the slave cases I have read.

11. On the problem of prescribed legal methods, see Louise Weinberg, *Choosing Law, Giving Justice*, 60 LA. L. REV. 1361 (2001); Louise Weinberg, *Night-Thoughts of a Legal Realist*, *supra* note 3.

decided as close to their merits as the judges could get. There was an easy access to discretion which our courts today do not enjoy and well might envy.

III. THE MORAL ARGUMENT AND THE JUDGMENT OF HISTORY

Not one of our modern methods of choosing law is intelligible as applied to the slavery cases. That much is readily apparent. Our 20th century “modern methods” of choosing law, like the so-called “traditional” rules they are supposed to have replaced, are intended to be followed both *dutifully* and *dispassionately*. But how useful is any (2002) **Law and Justice 476** dispassionate approach to choosing between two alternatives—liberty and enslavement—one of which, in the judgment of history, is intolerable?

It is quite in order to apply our own standards of morality to those old cases. Historians and legal theorists *should* take into account the judgment of history. Whatever is to be gained by suspension of the critical faculties is likely to be outweighed by all that is lost. But whether or not the judgment of history generally is an appropriate perspective on the past, in the matter of slavery it is not as anachronistic a perspective as might be feared. To hold the past to our own moral standards in this matter would not be simply to impose our world on people who lived in a different one. Rather, the shared position today—that law supporting racial slavery was immoral—was also, to a surprising extent, the moral position of the antebellum courts, south as well as north. Judges then may have seen no way out of the cage, but for a good part of antebellum history they did see it for what it was.

It is a mistake to suppose that moral argument rarely figures in the decision of cases. Few judicial pronouncements have had the resonance of Lord Mansfield’s declaration in *Somerset’s Case*,¹² that slavery is “so odious, that nothing can be suffered to support it, but positive law.”¹³ Lord Mansfield could say this even while acknowledging that slavery did not, in

12. *Somerset against Stewart*, 98 Eng. Rep. 499 (K.B. 1772); the case is also reported as *Sommersett v. Steuart*, 20 Howells State Trials 2 (1772), set out in *Anderson v Poindexter*, 6 Oh. St. 622, 657 (op. of Swan, J.).

13. *Somerset*, 98 Eng. Rep., at 510 (Mansfield, C. J.). For a review of a controversy over what Lord Mansfield said, see William M. Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86 (1974). The controversy is interesting but irrelevant; the language has had a life of its own.

his day, violate international law.¹⁴ American judges both north¹⁵ and south¹⁶ adverted to Lord Mansfield's language, as did members of the Supreme Court.¹⁷ Under the impetus of that language, judges both north and south, for much of that period, could be found administering law if feasible in such a way as to free a slave. This was so even though the moral argument for liberating slaves sojourning in free states must have been severely compromised by the Constitution's provision for the rendition of "fugitive" slaves.¹⁸

(2002) Law and Justice 477 It is true that there were sincere antebellum beliefs, entertained even in abolitionist courts, that the ideal of "comity" should be respected. There was an ingrained respect for alleged rights of property. Most importantly, there was a deep belief that the *greater good* sometimes *required* enforcement of slave law.¹⁹ But today we would not remit an American to racial bondage on any speculation as to "the greater good,"²⁰ and there were judges then who would not do so either.

14. To the same effect, see *The Antelope*, 23 U.S. (10 Wheat.) 66, 74 (1825) (Marshall, C. J.).

15. See, e.g., *Ex parte Bushnell*, 9 Oh. St. 77, 115 (1859) (referring to Lord Mansfield's characterization of slavery as "odious" in *Somerset's Case*, and stating that "every court of every state, slave and free, has echoed and re-echoed these immortal words"); *Anderson v. Poindexter*, 6 Ohio St. 622, 657 (1856) (Swan, J., concurring) (reprinting the opinion of Lord Mansfield); *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 212 (1836) (Shaw, C. J.) (quoting Lord Mansfield on the odiousness of slavery).

16. See, e.g., *Rankin v. Lydia*, 9 Ky. (2 A. K. Marsh.) 467, 470 (1820) (Mills, J) ("Slavery is sanctioned by the laws of this state, and the right to hold [slaves] under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature, or the unwritten and common law."). See *Osborn v. Nicholson*, 18 F. Cas. 846, 846-48, 850, 854-55 (C.C.E.D. Ark. 1870) (No. 10,595) (adverting to Lord Mansfield's language in *Somerset's Case*, as well as to the Thirteenth Amendment, in an 1870 opinion refusing to provide relief in an action for the contract price of slaves), *rev'd*, 80 U.S. (13 Wall.) 654 (1871).

17. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 498 (1856) (Campbell, J., concurring); *cf. id.* at 624 (Curtis, J., dissenting) ("[S]lavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws" [quoting *Prigg v. Pennsylvania*, 41 U.S. (1 Pet.) 345, 543 (1842) (Story, J.)]); *Dred Scott*, 60 U.S. (19 How.) at 534 (McLean, J., dissenting) ("[S]lavery can exist only within the territory where it is established.").

18. This was a point made by Benjamin Curtis, arguing for the slaveowner in *Aves' Case*, 35 Mass. (18 Pick.) at 197.

19. See *infra* notes 129-32 and accompanying text.

20. For further analysis of the problem of "the greater good" as a desideratum in

IV. CHOOSING SLAVERY LAW WITHOUT WANTING TO

There will always be legal theorists whose very decency and optimism can exalt them to a plane far above the gritty realities, where they can bring a balanced, evenhanded, even reconciling view to the decision of cases. Unfortunately, when really bad law is in the balance, the more evenhanded and neutral the choice-of-law theory, the more likely a choice of bad law. Paradoxically, what makes the slavery cases hard for choice-of-law theory is that they are *easy cases*. Even if we do not always recognize seriously wrong law when we see it, about the slavery cases, viewed objectively, today, we can have very few doubts. The Civil War Amendments will have resolved even those.

About forty years ago, when “comparative impairment” proposals were first becoming important to conflicts theory,²¹ one author made the interesting argument that accommodation-seeking methods could be used to find the law applicable even in a north-south conflict of laws over slavery.²² The slavery cases, to him, even provided “a useful background on which courts [could] draw today” in trying to resolve true conflicts.²³ He could cite with approval, as a reasonable accommodation to the needs of the slave states, the decision of an Illinois high court that a resident could be prosecuted for helping a slave to escape.²⁴ He found a similarly praiseworthy accommodation in a decision by the Supreme Court of Connecticut, in which that court refused to hold free a person who, though brought to Connecticut, a free state, by the voluntary act of the alleged master, was sojourning there only temporarily.²⁵

Such thinking makes a certain sense. But it may seem more questionable to today’s readers than when that essay was published. Some

choosing law, see Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L. J. 475, 492-97 (2000).

21. This is a technique for resolution of “true conflicts” first proposed in William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 18 (1963). The analyst considers whether all, or only a part, of a state’s policy would be impaired by a choice of the other state’s law. The approach can be very helpful.

22. See Horowitz, *Choice-of-Law Decisions*, *supra* note 9.

23. *Id.* at 593, 601. Professor Horowitz correctly reasoned that if a slave sued for freedom in a northern court, where she resided, both the northern forum and the southern domicile could be characterized as “interested” states, and in such a case there would be a “true conflict.”

24. See Horowitz, *Choice-of-Law Decisions*, *supra* note 9, at 592-93.

25. *Id.*

of us might feel more comfortable with less “accommodating” choices, ones that excuse the rescuer and free the slave. The results the essay applauds put a man in prison and a woman in chains to “accommodate” the laws of a court that itself might not have applied them. In the case of the slave, the result depends on an assumption about the property value of human chattels that we do not share, and that the Constitution deletes. In the case of the rescuer, the result elevates fidelity to immoral positive law above the duty to rescue the victims of immoral positive law, a duty that, at least since the defeat of the Germans in World War II, seems assigned to each of us by history. But these results are (2002) **Law and Justice 478** no particular fault of “comparative impairment,” a justly valued problem-solving method. Any theory of adjudication, even one as sophisticated as this, sooner or later would yield similarly unfortunate results. Approaches and principles, rules and canons, are formulated to assist judges in choosing between answers. But there are some questions to which we might as well acknowledge there can be only one decent answer.²⁶ This being so, any abstract decision-making process can create an artificial moral equivalence between “right” and “wrong”—or at least what we can’t help seeing as “right” or “wrong.” Any conflicts “approach,” if consistently applied, will do this.

The pure form of “interest analysis,” on which many of us, myself included, depend for clear thinking in conflicts cases, is a prime example of this difficulty. Surely that approach can be ranked among the most distinguished achievements of 20th century conflicts theory. But in the slavery cases, interest analysis can be devastating. Interest analysis, of course, will not resolve true conflicts, in the absence of some additional theory to top it off, along the lines of “comparative impairment.” But interest analysis will certainly resolve false conflicts. It is really good at that. In a case in which the joint domicile of the parties is a slave state, and the issue is the nature of the master-slave relationship, an interest analyst would easily identify the conflict as “false” and apply the law of “the only interested state”—the slave state.

26. I might qualify this remark in view of cases like *Selectmen v. Jacob*, 2 Tyl. 192 (Vt. 1802) (per curiam), in which the Vermont court’s abhorrence of slavery was such that it refused to enforce the slavemaster’s duty of care of a sick, blind, old slave woman whom he had abandoned. *Id.* at 196-98. But I assume that this judgment in effect allotted her upkeep to the village of Windsor, Vermont. Another case that gives me some difficulty, apparently not felt by others, is the famous case of *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (1836) (Shaw, C. J.). See *infra* note 61 and accompanying text.

Today, of course, after the Civil War Amendments, any “interest” of a southern state in enforcing slave law would not be a legitimate one.²⁷ And any “interest” of a northern state in freeing a particular slave would exist only in the northern state’s courts; it would not survive the slave’s return to the south. Nevertheless we cannot say that any of these cases did not involve a true conflict. These conflicts were real enough to bring about the Civil War. We could not account at all for the persistence in one place of law widely condemned elsewhere, like the law of slavery, if we did not suppose either that it occurs among deeply indoctrinated people, as Nazi law increasingly did, or that it is so entrenched in the political and economic life of a polity that people see it as a necessary or even irreversible evil. This seems to have been the case with slavery in the south, at least in the earlier part of the antebellum period. The slave states had very strong interests-in-fact. Increasingly, as slavery came to seem more than a necessary evil—a positive good—it would have taken courage for southern judges to set aside slave law, even under cover of impeccably neutral principles. Nor could we account fully for the struggle apparent in some of the northern decisions, without attributing to those judges an equally ideological position favoring liberty, from which, increasingly it would have taken courage to depart. This is so, notwithstanding the fragility of the Union, and notwithstanding the Fugitive Slave Acts—not to mention the north’s own racism,²⁸ and the dependency of northern commerce on southern debt and southern crops.²⁹ The northern states had strong interests-in-fact as well.

(2002) Law and Justice 479 Suppose, then, that we overlook technical niceties, as well as the obvious policy conflicts within the states, and take the view that the two-state slavery cases presented true conflicts in all courts. How, then, should a court resolve them? We have already considered an appeasing “comparative impairment” approach in northern courts and were not very comfortable with it.³⁰ How else solve our true

27. See U.S. CONST. amend. XIII (1865); U.S. CONST. amend. XIV.(1868).

28. The origins of the anti-slavery position are said by some historians to lie in hatred of the presence of black people. See, recently, the numerous authorities cited in Daniel Feller, *A Brother in Arms: Benhamin Tappan and the Antislavery Democracy*, 88 J. AM. Hist. 48, 50 n. 5 (2001).

29. See generally Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and Prigg v. Pennsylvania*, 78 CORNELL L. REV. 1086 (1993).

30. See *supra* notes 21-26 and accompanying text. See, e.g., Horowitz, *Choice-of-Law Decisions*, *supra* note 9, at 588 (acknowledging that “[s]ome will think it tasteless” to deal with slavery as a problem in accommodation of conflicting laws)).

conflicts? By preferring forum law? That is the approach I generally have recommended in my own conflicts writing.³¹ But that approach would hardly do in the slavery cases. A goodly number of those cases would be tried in the courts of some slave state. I cannot keep up my enthusiasm for forum law when its straightforward application in southern courts might mean somebody's re-enslavement.

What of the law of the place of "most significant contact?" That is the rule now under adoption in most American courts. The "most significant contact" rule, unlike the *lex fori*, would work badly in both southern and northern courts. In northern as well as southern courts the place of most significant contact would most likely be the joint domicile of the parties—a slave state. The joint domicile is the place of most significant contact on the vital issue of the master/slave relationship.

Any faithful, unmanipulated (unnuanced, unsophisticated) resort in any court, even to the best imaginable choice rule, would invite injustice.

V. CAN THE EXCEPTION ILLUSTRATE THE RULE?

It is true that the slavery cases are extraordinary cases, at the very limits of the moral sense. One might choose to think of them as exotics, from which little of general application can be learned.³² Yet as long as there are still laws in our country discriminating, for example, against homosexuals on the basis only of animus to them,³³ we cannot say that seriously wrong law is a thing of the past.³⁴ And it would be very hard to draw a meaningful

31. See Louise Weinberg, *Against Comity*, 80 GEO. L. J. 53 (1991); Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595 (1984).

32. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 260-61 (1992) (arguing that it "would be a serious error to design choice-of-law rules around slavery and abortion, instead of around the thousands of routine conflicts between ordinary laws," because ordinary cases require no "escape hatches").

33. For this pathology in the United States Supreme Court, compare *Bowers v. Hardwick*, 478 U.S. 186 (1986) (sustaining, under the Due Process Clause of the Fourteenth Amendment, a prosecution under an anti-sodomy statute as applied to consensual private adult homosexual intercourse), with *Romer v. Evans*, 517 U.S. 620 (1996) (striking down, under the Equal Protection Clause of the Fourteenth Amendment, a state constitutional amendment passed by referendum which prohibited the legislature from including homosexuals among protected classes in state civil rights legislation).

34. For discussion of internal judicial struggles in wholly domestic cases in "wicked" societies, see RONALD DWORKIN, *LAW'S EMPIRE* 101-13 (1986). But seriously wrong domestic rules can produce accommodations with foreign immoral law as well. See, e.g.,

distinction between the conflict of slave laws and other, supposedly workaday conflicts—for at least three reasons. First, conflicts arise in the same way in (2002) **Law and Justice 480** both kinds of cases. “Better” law happens to be available, that is all. Second, the policy problems accompanying judicial choices of the “worse” law will arise in both kinds of cases. Third, whatever learned writers have to say about right reason, cases will continue to be judged by their outcomes. Formulaic reasoning, however dutiful, or indeed, any other form of legal argument, however brilliant, cannot save from condemnation a foolish or unjust result.

It is a dangerous misconception that the function of formulaic reasoning is to provide blind justice and an even hand between the parties. That is not what formulaic reasoning is for. The true function, and the only legitimate function, of formulaic reasoning, is to provide a class of argument with its own kind of persuasiveness, in support of a just result.

VI. CONFLICTS REIMAGINED: THE CONFLICT OF POLICIES INTERNAL TO THE FORUM

Intriguingly, the slavery cases exhibit a feature of conflicts cases that, once brought to light, explains much about conflicts generally. It is a characteristic that the legal realists were trying to describe. It explains why, in their view, conflicts cases are not very different from domestic cases.³⁵ If we return to the previous passage in which the interests-in-fact of both northern and southern states were described, we will see at once that northern and southern judges shared the same sort of ambivalence.³⁶ In other words, these slavery conflicts can be understood—perhaps much better understood—as policy conflicts *internal to the forum*. The argument

Burger-Fischer v. Degussa A.G., 65 F. Supp. 2d 248, 253 (D. N.J. 1999). dismissing survivors’ claims against the German firms of Siemens and Degussa for setting up factories near the German death camps and, with other companies, working 700,000 slave laborers to death. Those enslaved were people sent from all over German-occupied Europe. As the slaves died their bodies were simply incinerated in the conveniently-located death-camp ovens. The federal court had several reasons for allowing these German companies to retain the profits of this enterprise. For the reaction of one student writer, see, e.g., Kara C. Ryf, Note, *Burger-Fischer v. Degussa AG: U.S. Courts Allow Siemens and Degussa to Profit from Holocaust Slave Labor*, 33 CASE W. RES. J. INT’L L. 155 (2001).

35. Cf. Cook, *The Logical and Legal Bases*, supra note 1, at 469, 475, 478 (arguing that a court “enforces not . . . foreign right[s] but a right created by its own law”).

36. See supra notes 29-30 and accompanying text.

is that even workaday conflicts are better understood as conflicts of policies internal to the forum.³⁷

It is a corollary of this reconceptualization, reflected in the law of judgments, that if the decision of a conflicts point is dispositive, it is not to be understood as a choice of law merely, but as a decision on the merits. In this sense there are no “conflicts cases.” There are only *cases*. Understanding this, we may be led to the conclusion that the long struggle to understand how to choose law may have been pointless. If the policies that are in conflict are actually the forum’s own policies, there is no other law that should govern or that can govern or that will, in fact, govern. As many others have seen, there is no law but forum law. Yet this insight can generate no support for a rule of “forum preference.” If the conflict is among internal forum policies, then “forum preference” is obviously not an answer. *It is the question.*

Imagine, for example, a case in a southern court. A woman born as a slave in that place asserts that she became “free” by residing in a free state, by operation of its laws. (The reader will recognize the configuration of the notorious *Dred Scott v. Sandford*.³⁸) From the point of view of the court—a court in a slave state—the free state might seem to have only the remotest “interest” in the liberty of this freedwoman who had become **(2002) Law and Justice 481** free while temporarily residing on its territory. The southern state is the joint domicile of the parties, of both the slave and the master. The freedwoman no longer resides in the north. She stands now at the southern bar of justice. Her “owner” is asserting valuable rights of “property” in her under the law of this state. But who would re-enslave her?³⁹ The judge at the slave state certainly is sensitive to the weight of the

37. For analogous analyses, see Louise Weinberg, *The Federal-State Conflict of Laws: “Actual” Conflicts*, 70 TEX. L. REV. 1743, 1756 (1992), arguing that the Supremacy Clause requires reconceptualization of the federal-state conflict of laws as a clash of national policies; Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 836 (1989) (same); Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1225-26 (1977) (same). For an analogous discussion of internal conflicts among domestic courts as problems in the conflict of laws, see Jeffrey L. Rensberger, *Domestic Splits of Authority and Interstate Choice of Law*, 29 GONZ. L. REV. 521 (1994).

38. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

39. Cf. Lord Mansfield’s remarks in *Somerset v. Stewart*, 98 Eng. Rep. 499, 509. 1772): “Compassion will not, on the one hand, nor inconvenience on the other, be to decide; but the law . . . Contract for sale of a slave is good here. . . . But here the person of the slave himself is immediately the object of enquiry; which makes a very material difference.” On the other hand, *The Slave, Grace*, 166 Eng. Rep. 179, 183 (Adm. 1827)

property claims of her alleged “owner,” but he also feels the force of her claim that she is free. The fascinating thing is that the courts of the slave states in such cases typically *did* rule in a slave’s favor, at least until near the close of the antebellum period. They sometimes said they were extending “comity” to the laws of the “free” state.

Now, a realist would also point out that there is no important difference between the case just described and one in which a slave had any other ground for claiming freedom. Why should it matter that she had resided in a free state? All that was required was that she assert *any colorable ground* on which the court could hold her free. The two-state configuration was not the only configuration that could engage a southern court’s internal policy struggle between its interests in enforcing slave law and its general interests in personal liberty. In a conflicts case, courts could attribute the interest in liberty to a free state; but in wholly domestic cases, judges in the slave states would sometimes find other ways of ruling for the slave, even though there was no other sovereign to whom the interest in liberty could be ascribed.

VII. IMMORAL LAW AND THE HIGHER LAW

The existence of liberty interests in a slave state should not surprise us. The ideals of the Revolution,⁴⁰ after all, were the ideals of Virginia and South Carolina as well as of Massachusetts and Pennsylvania. They became the ideals of Missouri and Texas as well as of Ohio and Wisconsin. In seceding from the Union the southern states themselves invoked the revolutionary ideal of liberty. Even if one does not read the Constitution of 1787 as embracing this “higher law,” it existed in other founding documents: the Declaration of Independence of 1776 and the Northwest Ordinance of 1787.⁴¹ It also existed usefully in judicial language, from

(Stowell, J.), held that a slave who had lived as a slave in England, but sued for freedom upon her return to the West Indies, had lost her rights, the status of slavery having re-attached to her. The Taney Court also was of the view that a slave state could re-enslave a returning freedwoman. See *Strader v. Graham*, 51 U.S. (10 How.) 82, 93-94 (1850) (Taney, C. J.).

40. See generally Christopher L. M. Eisgruber, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273 (1988); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

41. Ordinance of July 13, 1787, reprinted in I CONSTITUTIONAL DOCUMENTS AND RECORDS, 1776-1787, at 168 (Merrill Jensen ed., 1976). The Ordinance was enacted by the Confederation Congress, sitting in New York during the Constitutional Convention in Philadelphia. Among other things, the Ordinance abolished slavery in all of the old

Somerset's Case on, language that courts both north and south freely adopted as expressing their own policies. As these expressions became embedded in authoritative judicial opinions, they became positivistically identifiable as the policy of the state. So, notwithstanding slavery, and notwithstanding the racism and racial laws of those times, the ideal of personal liberty was widely shared, north and south.

(2002) Law and Justice 482 One cannot say that the antislavery ideal became *national* policy. It would not do so until the Thirteenth Amendment. There was no Equal Protection Clause in the Bill of Rights. This is part of the tragedy of our antebellum history. From the beginning a national ideal of personal liberty was crowded out by another strong national policy pointing the other way. It is one of the sad turns in the story of the slavery cases that an appeasing if not actively proslavery national policy, implicit in the Constitution of 1787, emerged full-blown in the antebellum period, and came increasingly to transcend every other ideal in the minds of some of the judges. This was the imperative, with us from the Founding, of holding the Union together at all costs. The Federalists regarded noisy criticism of the south and its peculiar institution as reckless and disregarding of the exigencies of the situation.⁴² The Marshall Court was part of the political culture of silence and postponement intended to hold the Union together in the formative period. The Taney Court, an actively pro-slavery Court, did what it could to advance the slave interest.⁴³ But in the northern courts, state and federal, fear for the Union⁴⁴ was at the root of accommodations to slavery law. It was this appeasing “interest” that competed for vindication even at a “free” forum.

Northwest Territory, an area occupied today by Ohio, Indiana, Illinois, Wisconsin, Michigan, and part of Minnesota.

42. See, for a fine current discussion of what he calls “The Silence,” JOSEPH J. ELLIS, *FOUNDING BROTHERS* 81-119 (2000).

43. See, e.g., *Strader v. Graham*, 51 U.S. (10 How.) 82, 93-94 (1850) (Taney, C. J.) (holding that each state’s law determines the status, slave or free, of persons domiciled there); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 425-26 (1856) (Taney, C. J.) (holding that black persons could not be citizens of the United States; holding Congress without power to abolish slavery because that would be a taking of property without due process of law).

44. For general background on states’ rights theories, see discussions in Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE D. L. REV. 1113, 1149-1157 (2001); Louise Weinberg, *Fear and Federalism*, 23 OH. N. L. REV. 1295, 1304-1313 (1997).

The proslavery concern in northern courts, then, was not merely for a vested property right,⁴⁵ but more fundamentally, for a supposed founding bargain that judges then believed held the Union together.⁴⁶ Chief Justice Shaw of Massachusetts believed strongly in adhering to that bargain. Although Shaw found ways of freeing slaves who were brought into the Commonwealth with the consent of their masters, he, and judges after him, drew a sharp distinction between those slaves and runaway slaves. To his mind, the Fugitive Slave Clause of Article IV⁴⁷ was part of a constitutional compromise **(2002) Law and Justice 483** without which the south would never have ratified the Constitution.⁴⁸ As the country lurched toward its

45. Slave property, of course, in 1856 was held protected by the Fifth Amendment in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 425-26 (1856), *superseded by* U.S. CONST. amend. XIII (1865) (abolishing slavery); U.S. CONST. amend. XIV § 4 (1868) (denying compensation by nation or state to former slaveholders).

46. In fact there is little or no evidence for the supposed bargain. On August 28, the Committee of Detail reported out a clause providing for the surrender of fugitives from justice. See JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 545 (Adrienne Koch ed., 1966). Pierce Butler and Charles Pinckney of South Carolina then moved that the states also be required to surrender fugitive slaves. Roger Sherman of Connecticut remarked drily that it was no more proper to seize a slave in public than a horse. *Id.* at 546. Butler withdrew his motion, but renewed it the next day, and it was agreed without discussion or vote. *Id.* at 552. Neither at the Philadelphia Convention nor in the state ratifying conventions does there seem to have been any mention of the Clause as an element of a constitutional compromise. Moreover, unlike other clauses in Article IV, the Fugitive Slave Clause gives no power to Congress. It was argued by ROBERT COVER, JUSTICE ACCUSED, *supra* note 3, at 88, that certain other evidence supports the “crucial compromise” thesis. He found such support in remarks made in the period of ratification. But a fair reading of his authorities shows only that the advantage of the Fugitive Slave Clause to the south became a point in the Constitution’s favor, not that it embodied a crucial compromise. On the other hand, see the interesting assurance of Justice McLean, sitting on circuit in *Miller v. McQuerry*, 17 F. Cas. 335, 338 (C.C.D. Ohio 1853) (No. 9583):

“I am aware it has been stated, that the subject of slavery was not discussed in the convention, and that the reclamation of fugitives from labor was not, at that time, a subject of much interest. This is a mistake. It was a subject of deep and exciting interest, and without a provision on the subject no constitution could have been adopted. I speak from information received from the late Chief Justice Marshall. . . .”

47. The Fugitive Slave Clause provides: “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.” U.S. CONST. art. IV, § 2, cl. 3, *superseded by* U.S. CONST. amend. XIII.

48. See LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 91 (1957).

greatest disaster,⁴⁹ some northern judges sought to avert the impending crisis by extending comity, when they could, to southern law. They did this in a naïve but sincere belief that by doing so they could appease the south and save the Union. And some judges in the south, who hitherto had extended a humane comity to liberating northern law, came to believe that, as the south's political power declined, it was essential to the survival of the south's social system to support slavery more consistently.⁵⁰ So it is possible to view the conflict of slavery laws in all courts as a conflict between internal forum policies. On the one hand, there would be proslavery policies, reflecting some supposed greater good (whether to preserve the slave system, as in the south, or, as in the north, to hold the Union together).⁵¹ On the other hand, there would be policies, shared by north and south, reflecting the "higher-law" ideal of personal liberty.

One can often see this struggle on the living page. Sometimes it can appear as a struggle between claims of legal right and the impulse toward basic decency. Consider one federal judge's attempt at an evenhanded summary of the situation:

"On the one side we have a citizen of a sister state . . . claiming . . . certain property, . . . and insisting upon her right to my order to have this property delivered to her by the injunctions of the constitution of the United States, which I am bound to obey. In the other party, . . . we have an individual who has lived among us for more than twenty-three years; has a wife and family of children depending upon him, and a home, from all which he must be separated, if the claimant has made good her right."⁵²

49. A good history of the years before the Civil War, notwithstanding the cadging of its title from Hinton Helper, is DAVID M. POTTER, *THE IMPENDING CRISIS: 1848-1861* (1976).

50. See Reid, *Lessons of Lumpkin*, *supra* note 3, at 624 (discussing the eventual view of Georgia's Chief Justice Lumpkin that slavery was ordained by God).

51. For some judges the "greater good" was simply a positivistic fidelity to law. See, for example, *Johnson v. Tompkins*, 13 F. Cas. 840 (C.C.E.D. Pa. 1833) (No. 7416), an action for damages for harboring a fugitive slave, in which Justice Baldwin, sitting on circuit, instructed the jury not to indulge their "humane and benevolent feelings," or to forget that "the first duty of citizens of a government of laws [is] obedience to its ordinances." *Id.* at 844. The jury awarded damages of \$4000. *Id.* at 855. Of course there were other policies which might yield a choice of proslavery law. For example, judges might suppose they would discourage interstate commerce by failing to protect the "property" of visitors.

52. *Case of Williams*, 29 F. Cas. 1334, 1341 (E.D. Pa. 1839) (No. 17,709) (ultimately

As if to emphasize the conflict of northern policies, as the antebellum period drew closer to its tragic conclusion, northern federal courts became scenes of riot. In **(2002) Law and Justice 484** Massachusetts the new Fugitive Slave Act of 1850 was received with particular resentment.⁵³ In Boston, after the spectacle of Anthony Burns⁵⁴ in chains, paraded down State Street past outraged crowds, buildings draped in black, and flags at half-mast, to the ship that waited to take him back to Virginia,⁵⁵ it became too difficult for local authorities to lend courts and jails to slave rendition proceedings. No further enforcements of the Fugitive Slave Act occurred there.⁵⁶

In these cases, then, as in all litigated cases raising questions of law, there was a choice between two arguable positions that reasonable people could and did maintain. Nevertheless there generally remained a “right” answer. I say “generally” because inevitably there will be some cases in which special circumstances make the rightness of the antislavery position somewhat equivocal.⁵⁷

ruling against rendition of the alleged fugitive slave).

53. See, e.g., *In re Charge To Grand Jury—Fugitive Slave Law*, 30 F. Cas. 1015, 1015, (D. Mass. 1851) (No. 18,263) (“The fugitive slave law . . . was received, in Massachusetts, with almost universal regret and disapprobation. With not a few, it produced great excitement and exasperation. Some openly avowed a determination to resist it by violence, declaring that it was a matter of conscience not to permit it to be executed.”). For my more complete remarks on, and a more complete account of, the struggle to enforce the fugitive slave laws, see Weinberg, *Night-Thoughts of a Legal Realist*, *supra* note 3, at 1345-1359.

54. See ALBERT J. VON FRANK, *THE TRIALS OF ANTHONY BURNS: FREEDOM AND SLAVERY IN EMERSON’S BOSTON* (1998); Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 *CARDOZO L. REV.* 1793 (1996). In Burns’ case, discussed by Professor Finkelman, the Massachusetts court succeeded in achieving a formal rendition of a fugitive, to the gratification of much of the southern press. But by the time a group of Boston businessmen were able to buy Burns’ freedom back, *id.* at 1820 n.150, Burns health was broken; he had been kept shackled on the bare ground for four months by way of punishment. *Id.* at 1829-30.

55. See LEVY, *THE LAW OF THE COMMONWEALTH*, *supra* note 39, at 106; Finkelman, *Legal Ethics*, *supra* note 52, at 1825.

56. See generally J. Morgan Kousser, “The Supremacy of Equal Rights”: *The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment*, 82 *NW. U. L. REV.* 941 (1988).

57. See *infra* note 61.

Consider the breakthrough case of *Commonwealth v. Aves*.⁵⁸ The question before Massachusetts' Chief Justice Shaw in that case was whether a black child, Med, was the property of one Slater. Shaw explained the history of slavery and abolition in Massachusetts; he dithered with the choice-of-law question whether the forum was bound to respect the property rights of an individual under the laws of the domicile; he reviewed the cases. But then he began again in a fresh direction. The Constitution imposed a duty of return, but the Constitution put it in terms of "fugitives."⁵⁹ Little Med had been brought *voluntarily* into a free state. Was there a constitutional duty to return her? No. No, not at all. Thus freeing his mind from the imperatives of the supposed founding bargain,⁶⁰ Shaw could give the same short answer to the question before him that Lord Mansfield had given. In the absence of law supporting slavery at the forum, there could be no property rights in human beings.⁶¹

In this famous case, how could it have advanced Chief Justice Shaw's thinking to have gone through some prescribed choice-of-law analysis? On the other hand, there were considerations of fact, bearing on the merits, to which Shaw might have turned **(2002) Law and Justice 485** rather more attention. Med's mother was a slave, returning with Mary Slater to New Orleans. There was an intervention, and the child was taken and made the object of a court proceeding. Shaw parted the child from the mother. He put the child into temporary guardianship and contemplated that a probate court would take some further steps.⁶² Doubtless he saved Med from slavery; but one fears that he also injured both Med and her mother. It is one of those cases that are harder than at first appears.⁶³ Our social workers and family courts struggle with analogous problems every day. There are

58. 35 Mass. (18 Pick.) 193 (1836).

59. *Id.* at 219

60. *Id.* at 220-21.

61. *Id.* at 224. See, currently, for the effect in southern courts of the increasingly ingrained view of black people as property, THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860* (1996).

Chapel Hill: The University of North Carolina Press, 1996presumption of property

62. *Id.* at 225.

63. See also *Selectmen v. Jacob*, 2 Tyl. 192, 196-98 (Vt. 1802) (per curiam) (holding slavery so abhorrent that the law would not impose a duty on the slavemaster to care for a blind old woman whom he had abandoned. But I assume that this judgment in effect allotted her upkeep to the village.

some family situations from which it is thought better to remove the child at any cost; perhaps this such a case.

VIII. THE SCALES OF JUSTICE BLIND AND THE PROBLEM OF “JUSTICE” TO THE SLAVEMASTER

I said just now that the slavery cases generally had a “right” answer. Apart from the judgment of history, and the light shed by the Civil War Amendments, the statement is true in the sense that we⁶⁴ can evaluate law as immoral when we perceive a higher law. That seems to be the theory underlying the prosecution of war crimes against those who obey immoral orders.⁶⁵ In assuming that the slavery cases generally had a right answer, I do not think I am begging a question of the justice due the slavemaster. “Justice” was never due the slavemaster. That judgment of history seems to have been made not only explicit, but somewhat *retroactive*, in Section Four of the Fourteenth Amendment. Section Four provides that not a penny of compensation be paid, by state or nation, to the former slaveholders for the loss of their slaves.⁶⁶ The south read this as a vindictive punishment for the rebellion. Perhaps it was, although arguably it was about as helpful to the reconstruction state governments as it was hurtful to the former slaveholders. But what it *means* is that the alleged “property” of the masters was no property at all.⁶⁷ Section Four codifies what *Somerset’s Case* and *Aves’ Case* held, that property in human beings can exist only in the slavemasters’ own, lower forms of law; and only on their own books.

64. By “we” I mean the exigent we who must find ways of inhabiting a reasonable pluralistic liberal society, and would recognize *a priori* that slavery is not among the contributions to the pluralism because a denial of basic human rights. See, e.g., for a fine current discussion, JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (Erin Kelly ed., 2001). Circularly, “we” are also we who would know when a military order must be disobeyed.

65. Note the commonplace distinction between the “greater good” that generally justifies, e.g., obedience to military commands, and the “higher law” that might justify disobedience to an immoral military command.

66. U.S. CONST. amend. XIV, § 4 provides, in pertinent part: “But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.”

67. .See *Osborn v. Nicholson*, 18 F. Cas. 846, 846-48, 850, 854-55 (C.C.E.D. Ark. 1870) (No. 10,595) (adverting to Lord Mansfield’s language in *Somerset’s Case*, as well as to the Thirteenth Amendment, in an 1870 opinion refusing to provide relief in an action for the contract price of slaves), *rev’d*, 80 U.S. (13 Wall.) 654 (1871).

The slavemaster never had any property rights which the free courts were bound to respect.

But even if courts had been required to consider the costs to the master of freeing a slave, the costs of slavery to the slave would have been immeasurably greater. The (2002) **Law and Justice 486** value of a free life cannot be measured by the value of sunk capital and its profits. Lawyers know that damages cannot be limited to restitution and profits. In his Second Inaugural Address, Abraham Lincoln saw who owed what to whom. This was the way Lincoln, at last frankly waging war on slavery, balanced the scales of justice: “[A]ll the wealth piled by the bondsman’s two hundred and fifty years of unrequited toil shall be sunk, . . . until every drop of blood drawn by the lash shall be paid by another drawn with the sword. . . .”⁶⁸ Neutral scales of justice had never been appropriate for the slavery cases, and lady Justice need never have put on her blindfold. There was no principled “choice-of-law” method for such cases because there was no principled alternative to the rule of liberty. The further lesson may well be that “conflicts justice,” beyond due process, can rarely be due to one duly found liable for serious harm to another. A tort case in which a high court, on conflicts grounds (due process not having been offended by the choice of law), reverses a judgment on a verdict for the plaintiff, is a denial of justice on the face of it. It follows that, if a court dismisses a case on conflicts grounds (the truth of the allegations of the complaint being assumed and due process not offended by the choice of law), that must also be a denial of justice. If an antipathy to “result-orientedness” blinds us to this simple but important insight, it is the antipathy that must be mistaken, not the insight.

The catch-phrase that justice must be “blind” has led to the widely shared conviction that, if some “neutral principle” seems to require it, an unjust result is the just result. But it is bizarre to suppose that justice must be blind to injustice—that injustice is what justice requires. The obligation of impartial justice is to be blind to *persons*.⁶⁹ That is a very different thing.

68. *Second Inaugural Address* (March 4, 1865), II ABRAHAM LINCOLN, THE COMPLETE WORKS 656, 657 (John G. Nicolay & John Hay, eds., 1894).

69. See, e.g., Judiciary Act of 1789, 1 Stat. 73, Sec. 8: “And be it further enacted, That the justices of the Supreme Court, and the district judges, before they proceed to execute the duties of their respective offices, shall take the following oath or affirmation, to wit: “I A.B., do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me . . . , according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.”

Justice must be impartial among claimants, whether they are rich or poor, Democrats or Republicans, believers or atheists. Among defendants, Justice must impose no harsher liabilities on the the disliked than on the popular. Justice must not favor the influential tortfeasor against the isolated claimant, or the popular claimant against the disliked defendant. But it would be absurd to imagine there is some obligation of evenhandedness between tortfeasor, as tortfeasor, and claimant, as claimant.⁷⁰

IX. ESCAPING DISFAVORED LAW

A choice of law is only one of the devices judges can and do use to avoid disfavored law⁷¹ or unjust results.⁷² Judges can insist on a procedural requirement;⁷³ **(2002) Law and Justice 487** distinguish an otherwise controlling case; construe legislation narrowly or as having an exception;⁷⁴ and sometimes can even triumph over disfavored law by reading it literally.⁷⁵ Traditional canons of construction can help. If all else fails, a court may hurl a judicial thunderbolt and strike down the disfavored law as unconstitutional.⁷⁶ But in the slavery cases, given the silence of the

70. For the related but counter-intuitive argument that the only neutral choice of law is plaintiff-favoring, see Louise Weinberg, *Mass Torts at the Neutral Forum*, 56 ALBANY L. REV. 807, 820-21 (1993).

71. See generally GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (discussing the range of judicial devices for avoiding harmfully obsolescent statutes).

72. See Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L. J. 1916, 1959 (1987) (suggesting common-law strategies to avoid immoral results in slavery cases).

73. E.g., *Case of Williams*, 29 F. Cas. 1334 (E.D. Pa. 1839) (refusing rendition of an alleged fugitive slave because conflicting testimony could not satisfy the burden of proof of the alleged slave's identity, which burden was on the master).

74. For a narrow construction of a pleading in a case against a would-be rescuer of a slave, see *Hill v. Low*, 12 F. Cas. 172, 173 (C.C. E.D. Pa. 1822) (Bushrod Washington, Cir. Justice) (holding in an action for damages for obstruction of a slave arrest under the Fugitive Slave Act of 1793 that it was error to instruct the jury that an attempt to rescue a slave *after* his arrest was an "obstruction" of the arrest).

75. E.g., *Van Metre v. Mitchell*, 28 F. Cas. 1036, 1042 (C.C. W.D. Pa. 1853) (dismissing two counts of an action for a statutory penalty for harboring and concealing fugitive slaves, on the ground that although the slaves might have been harbored they were not concealed but kept in "avowed, concerted and systematic defiance of the law.>").

76. See *In re Booth*, 3 Wis. 13 (1854), *rev'd sub nom. Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858), in which the Wisconsin state court did declare the Fugitive Slave Act of 1850 unconstitutional, striking it down, among other things, under the Fifth Amendment, for want of provisions for notice and a hearing. *Id.* at 67-69. For the various arguments in the colloquy among the Wisconsin judges in *In re Booth*, see *id.* at 36, 40-

Marshall Court, and the permissiveness of the Taney Court,⁷⁷ arguments from the Constitution generally did not seem available to antebellum judges trying to apply what to them seemed a higher law.⁷⁸ They characteristically deployed the resources of the common law.

In one 1833 case, the supreme court of South Carolina held that a secret trust to manumit a slave did not violate South Carolina's anti-manumission statute.⁷⁹ Although ordinarily there is nothing surprising in permitting a trust to trump legal arrangements, a judge bent on vindicating the state's policy against manumission could have given the statute a broader interpretation and could have been less hospitable to the hidden trust. Similarly, in 1830 a Georgia court refused to apply, but could have applied, Georgia's anti-manumission law retroactively to a will directing out-of-state manumission.⁸⁰ As late as 1855 a North Carolina case granted liberty to a group of slaves, based upon the expectations of the testator, towards those "he holds most dear."⁸¹

When a forum in another state is available, a court can avoid disfavored law without seeming to apply foreign law, simply by remitting the parties to the other forum. It is also possible that a court could require the parties to go to another place to *act*. In a case in 1835, the supreme court of South Carolina imposed a duty on executors of an emancipating will to carry out the terms of the will, notwithstanding South Carolina law forbidding emancipation of a slave by will; the court held that in order to execute the will the executors must remove the slave from the state to free territory.⁸²

43, 64-70 (Smith, J.), and *id.* at 82-84 (Crawford, J., dissenting). For a good presentation of the *In re Booth* saga, see Jenni Parrish, *The Booth Cases: Final Step to the Civil War*, 29 WILLAMETTE L. REV. 237 (1993).

77. *See supra* note 40.

78. Cf. *Rankin v. Lydia*, 9 Ky. (2 A. K. Marsh.) 467, 470 (1820) (Mills, J) ("Slavery is sanctioned by the laws of this state, and the right to hold [slaves] under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature, or the unwritten and common law.").

79. *Cline v. Caldwell*, 1 Hill 423, 427 (S.C. 1833) (per curiam).

80. *Jordan v. Bradley*, 1 Ga. 443 (1830). Later Georgia cases decline to follow *Jordan*. For a useful survey of cases in a range of southern states, see A. E. Keir Nash, *Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution*, 32 VAND. L. REV. 7 (1979). The courts of Tennessee and Texas, in Nash's view, were consistently the most liberal. *Id.* at 132.

81. *Mayo v. Whitson*, 47 N.C. 231, 239 (1855).

82. *Frazier v. Executors of Frazier*, 2 Hill Eq. 304, 315-16 (S.C. 1835). See A. E.

In another (2002) **Law and Justice 488** case a Mississippi court held that a master could lawfully manumit a slave by taking her outside the state, although he could not lawfully take her back into the state.⁸³ In this Mississippi case, the court also held that, although a freedman could neither enter nor leave the state, he could go to another state and receive a pecuniary legacy of Mississippi property there.⁸⁴

Such decisions may be less liberal than appears. Particularly in late examples, such cases can reflect what was to become a fixture of deep south ideology: the policy of absolute adherence to the will of the slavemaster. This is one way of explaining from a southern point of view why, when a slave brought voluntarily to a free state continued to “sojourn” there against the will of the master, comity to the free state’s law would be withheld.⁸⁵

I mention these last cases, requiring or permitting removal of a slave to free territory, because they begin to approach the category of conflicts cases. The one feature of conflicts cases that sets them apart from other cases is that they are cases in which the facts span two different places. But from these last cases contemplating suit or action in a free state, one can also see that the possibility of a second source of law is not limited to cases in which the facts span two different places. Conflicts cases are not essentially different from other cases in which courts cast about for a device to avoid an otherwise applicable legal rule.

The sort of manumission cases we have been discussing, for example, arise in conflicts cases as well as wholly domestic cases. A choice of law favoring manumission, even in a southern court, was possible as late as 1848, although there was a concern for public safety⁸⁶ which, among other things, by 1858 had made a manumission unthinkable to the same court.⁸⁷

Keir Nash, *Negro Rights, Unionism, and Greatness on the South Carolina Court of Appeals: The Extraordinary Chief Justice John Belton O’Neill*, 21 S.C. L. REV. 141, 158, 174 (1969).

83. *Shaw v. Brown*, 35 Miss. 246, 269-70(1858) (holding that although manumitted blacks could not enter or leave Mississippi, in another state they could take a pecuniary legacy of property originating in Mississippi).

84. *Id.* at 321.

85. See, e.g., *Louis v. Carbarrus*, 7 La. 170, 173 (1834) (in an action for freedom, reversing a verdict for the slave and remanding for a clearer showing that the slave’s sojourn in a free state was with the consent of the master).

86. An interesting anticipation of this is seen in Lord Mansfield’s remarks holding over *Somerset’s Case*: “The setting 14,000 or 15,000 men at once loose by a solemn opinion, is [very] disagreeable in the effects it threatens.” 98 Eng. Rep., 509. Mansfield

Somerset's Case, to return to that example, can be viewed as a conflicts case, in the sense that, in *Somerset*, Lord Mansfield departed from the domiciliary law which ordinarily would have determined the status of persons. James Somerset was set free even though, under the laws of his home state, Virginia,⁸⁸ he was a slave. On the other hand, as in many American cases, the reasoning in *Somerset's Case* was not conflicts reasoning. Starting from the explicit moral premise that slavery was "odious," and the observation that such "high dominion" is insupportable by reason and therefore could be supported only by "positive" law,⁸⁹ Lord Mansfield observed that England had no laws (2002) **Law and Justice 489** to support the master's dominion over Somerset, or to prohibit Somerset from exercising the freedoms enjoyed by others in England.⁹⁰ Instead of reaching for law elsewhere to fill this vacuum, Lord Mansfield took it that the master, having no coercive government power at his disposal, could make no claim in England to the custody of Somerset at all. Somerset had to be released: "Whatever inconveniences, therefore, may follow from the decision, I can not say this case is allowed or approved by the law of England; and therefore the black must be discharged."⁹¹

X. THE CONFLICT OF SLAVERY LAWS: THE FIRST PHASE – THE "SOJOURNERS"

urged the parties to settle, but responded to their evident refusal, "If the parties will have judgment, *fiat justitia, ruat coelum.*" *Id.*

87. Compare, e.g., *Vance v. Crawford*, 4 Ga. 445, 458-59 (1848) (declaring foreign manumission in accordance with Georgia policy), with *Sanders v. Ward*, 25 Ga. 109, 117 (1858) (declaring foreign manumission to be neither in the letter nor the spirit of the law). These examples are offered by Reid, *Lessons of Lumpkin*, *supra* note 3, at 624.

88. James Somerset had been domiciled in Virginia, but was being held for eventual sale in Jamaica. *Somerset*, 98 Eng. Rep., at 510.

89. "So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasions, and time itself from whence it was created, or erased from memory." *Somerset v. Stewart*, 98 Eng. Rep., at 509.

90. *Id.* Chief Justice Shaw held to the same effect in *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 225 (1836), adding the remark that the freed slave became "entitled to the protection of our laws." *Id.* at 218 (emphasis supplied.) JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 92 (1834), also read the position broadly: "It has been decided, that the law of England abhors, and will not endure the existence of slavery within the nation; and consequently, as soon as a slave lands in England, he becomes *ipso facto* a freeman. . . ."

91. *Somerset*, 98 Eng. Rep., at 510.

I turn now, for the lessons we can glean from them, to the slavery conflicts cases proper. Historians and legal scholars seem to discern two or three phases in the way courts chose law in slavery cases.⁹² Let me try to sketch a quick composite picture of these views, interjecting an occasional comment of my own. Interestingly, we can scarcely identify as “conflicts cases” the two-state slavery cases. The antebellum courts did very little choice-of-law reasoning. Typically, in a two-state case, an antebellum court might consider, at most, whether it should exercise its sovereign powers, or should extend “comity” to a sister state.

In the first period, before the states’ rights controversy of the early 1830s, courts of both slave⁹³ and free states⁹⁴ are generally thought to have extended “comity” to each others’ laws. But the cases adduced for that view do not support it. It is true that southern judges show a relatively liberal humanity then, and, indeed, right through until the last few years of the antebellum period.⁹⁵ Where a slave had been freed through **(2002) Law**

92. See generally FINKELMAN, AN IMPERFECT UNION, *supra* note 3 (two phases); FEHRENBACHER, SLAVERY, LAW AND POLITICS, *supra* note 6; Nash, *Radical Interpretations*, *supra* note 3; Reid, *Lessons of Lumpkin*, *supra* note 3; Wiecek, *Somerset*, *supra* note 13.

93. For the story of the consolidation of the slave system in the south, see generally KENNETH STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH (1956). Also of interest is MARK TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST (1981); Finkelman, *Exploring Southern Legal History*, *supra* note 3; Eugene D. Genovese, *Slavery in the Legal History of the South and the Nation* (book review), 59 TEX. L. REV. 969 (1981); and see Symposium, *Legal History of the South*, 32 VAND. L. REV. 1 (1979).

94. For the story of the early abolition of slavery in the north, see generally JOANNE POPE MELISH, DISOWNING SLAVERY: GRADUAL EMANCIPATION AND “RACE” IN NEW ENGLAND, 1780-1860 (1998); ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH (1967). Also of value is Wiecek, *Sources of Antislavery Constitutionalism*, *supra* note 3. Northern case law on this problem is much sparser than southern, perhaps for the probable reason that cases are sparse generally: slave owners did not like to sue in the north. Cf. *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 208 (1936) (Shaw, C. J., stating that he cannot find earlier Massachusetts cases in point).

95. *E.g.*, *Shaw v. Brown*, 35 Miss. 246, 273 (1858) (stating that the law of the free state would operate to free a Mississippi slave sent there with the consent of the owner); *Betty v. Horton*, 32 Va. 615, 626-27 (1833) (holding that two female slaves had become domiciled in Massachusetts and therefore could not be re-imported as slaves into Virginia); *Lunsford v. Coquillon*, 2 Mart. 401, 408 (La. 1824) (holding that a former slave became free *ipso facto* when her owner moved with her from Kentucky to Ohio with an intention of residing there [citing other southern cases]); *Winny v. Whitesides*, 1 Mo. 472, 475-76 (1824) (holding that removal of a slave to free territory with the consent of the master frees

and Justice 490 operation of law in a free state, judges in the south quite often did not think it right to re-enslave her. In those days the presence of free black people in a southern state was not yet perceived as too demoralizing to slaves, dangerous to whites, or debasing to free white labor.

In some cases southern courts say they are extending “comity” lest northern courts retaliate.⁹⁶ But in fact even the northern cases that withhold freedom from slaves sojourning in the north do not seem to support the view that there was a general rule of “comity.” Rather, those cases seem to have to do with the temporariness of the sojourn. If the master took up a long-term residence in a free state, a slave suing for her freedom there could obtain it in this period, as in later periods.⁹⁷ But even in northern courts,

the slave, but distinguishing the situation of slaves sojourning briefly in a free territory); *Rankin v. Lydia*, 9 Ky. 467 (1820) (holding that removal of a slave to a free state with the consent of the master frees the slave); *Griffith v. Fanny*, 21 Va. 143 (1820) (same); *Harry v. Decker*, 2 Miss. (1 Walker). 36 (1818) (same). Cf. *Neal v. Farmer*, 9 Ga. 555, 569 (1851) (although holding it not a felony to kill a slave, acknowledging the claims of religion and humanity and the protections of the common law as opposed to the interests of the master); *semble, Graham v. Strader*, 44 Ky. 173, 182 (1844) (opining that slavery would re-attach in Kentucky upon the voluntary return of a former slave, but acknowledging the claims of humanity).

96. See, e.g., the well-known early case of *Rankin v. Lydia*, 9 Ky. 467, 479 (1820) (Mills, J., stating, “If the comity between this and the state of Indiana . . . [is] removed, and it is once known that their vested rights are denied . . . , it is calculated to produce retaliatory measures, and to cause them to detain . . . our transient slaves. . . .”).

97. In *Commonwealth ex rel. Hall v. Cook*, 1 Watts Pa. Rep. 155, 157 (1822) (on a writ of habeas corpus), the Cook family represented to the court that when they moved from the District of Columbia to Pennsylvania, their slave, Hannah Hall, indentured herself orally for seven years in consideration of manumission. The Pennsylvania court rejected this transparently cooked-up lease-back arrangement, and held that the slave become free by operation of the Pennsylvania emancipation statute when brought into Pennsylvania, the master having the requisite intention of taking up a permanent residence there. A slave born in a free state was often considered free at birth in both northern and southern courts. See also *Butler v. Hopper*, 4 F. Cas. 904 (C.C. D. Pa. 1806) (Bushrod Washington, Cir. J.) (holding that Pierce Butler’s slave Ben became free by operation of the laws of Pennsylvania because Butler was domiciled there at the time; and Ben became free at a time when Butler was not serving in Congress as representative from South Carolina, and therefore not privileged). In southern courts, see, e.g., the remarkably late case of *Union Bank of Tennessee v. Benham*, 23 Ala. 143, 151, 155 (1853) (holding that a black man born in a free state could try by habeas corpus the legality of his detention by a sheriff for execution of a debt, although not permitted to try his freedom against his master by habeas corpus: “[It] would hardly be contended, that a white man not held in servitude . . . , and confined in jail, could not try the legality of his confinement by habeas corpus”); see also *Gentry v. McMinnis*, 33 Ky. 382, 390 (1835) (reasoning that “if the defendant’s mother was free at her birth, she herself is necessarily free; and that, if she were born in Pennsylvania

especially in this earlier period, it was regarded as deeply unfair to strip the master of his rights of “property” when the slave accompanied the master to a free state for only a **(2002) Law and Justice 491** brief sojourn there.⁹⁸ On similar thinking, southern courts that otherwise would grant freedom to one whose master had become domiciled on free soil refused to do so when the sojourn on free soil was intended to be of short duration.⁹⁹

since the year 1789, even though her mother was a slave, she was, by virtue of the abolition statute of that year born free, and was only subjected to a state of pupilage until she attained twenty eight years of age; and that, consequently, the fact that she was brought here, before she was entitled to liberation from custody, . . . cannot have affected her legal right as a free person”); *Merry v. Tiffin*, 1 Mo. 725, 726 (1827) (holding, in an action of assault and battery for freedom brought by John the slave, that, having been born in free territory in Illinois, though held in servitude for 36 years, “John is free”).

98. Northern sympathies for the property rights of masters gave way only very slowly. *E.g.*, *Willard v. Illinois*, 5 Ill. 461, 472 (1843) (permitting a prosecution under Illinois law for assisting a slave to escape while temporarily in Illinois, notwithstanding Illinois’ abolition of slavery itself in its constitution; arguing that to do otherwise would “weaken, if not destroy, the common bond of union amongst us. . . .”). Illinois may be a poor example since its southern sections shared the more southern-leaning sentiments of the border states. For disturbing post-bellum examples of this attitude in the Supreme Court of the United States, see *supra* notes 16, 61. See also the acknowledgment by Lord Mansfield in his remarks preliminary to *Somerset’s Case*, 98 Eng. Rep., at 509: “Contract for sale of a slave is good here; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement.”

Sometimes the right to enforce the fugitive slave laws in northern courts was justified on property rights grounds. *E.g.*, *Johnson v. Tompkins*, 13 F. Cas. 840, 843-44 (C.C. E.D. Pa. 1833) (Baldwin, Cir. Justice) (charging the jury: “If this is unjust and oppressive, the sin is on the heads of the makers of laws which tolerate slavery, or in those who have the power, in not repealing them; to visit it on those who have honestly acquired, and lawfully hold property, under the guarantee and protection of the laws, is the worst of all oppression, and the rankest injustice towards our fellow-men. It is the indulgence of a spirit of persecution against our neighbours. . . .” Justice Baldwin went on to say that if a master could not recover his slave then the creditor could not his loan, and the rule of law would come to an end. Baldwin made no such argument in *Groves v. Slaughter*, 40 U.S. (15 Pet.) 286, 326 (1841) (Baldwin, J., holding that slaves were not “property” but “persons” and thus not an item of “commerce” within the meaning of the Commerce Clause).

In the end, “property” rights in black persons were more fully understood, and the formal abolition of slavery in this country was achieved, although at immeasurable cost, without compensation to the former “owners.” Cf. U.S. CONST. amend. XIV, § 4: “But neither the United States nor any State shall assume or pay any . . . claim for the loss or emancipation of any slave; but all such . . . claims shall be held illegal and void.”

99. This was acknowledged by the Kentucky court in *Rankin v. Lydia*, 9 Ky. (2 A. K. Marsh.) 467, 470 (1820), see *supra* note 69. The difference between the two kinds of cases is described in *Anderson v. Poindexter*, 6 Oh. St. 622, 627 (1856) (Bowen, J.) (stating that “Some enlightened jurists in the slave states admit that if the master take his slave into a

In other words, the states were *not* applying each other's laws. Rather, all states applied liberating law, and all states made an exception when the slave's sojourn in the north was considered too brief to count. These results reflected shared dual policies in all states. All courts tried to free slaves when that issue was presented, but all courts became concerned about fairness to the property rights of the owner who had not intended to stay in the free state, but to return home, with her slave. One measure of the internalization of this conflict in any court is that in wholly domestic cases, as we have seen,¹⁰⁰ similar conflicts emerged, with similar results. Those wholly domestic cases can have had very little to do with the conflict of laws or concerns of comity.

In the "temporary sojourn" cases, the insistence in both sets of courts on keeping the slave in bondage seems to have been a function of an ingrained belief, one that was to erode only very slowly, in the possibility of "property" in human beings.¹⁰¹ Northern **(2002) Law and Justice 492** judicial accommodation of property rights in such cases has not been without its defenders. It is also possible to see in such cases the vindication of important policies, the sanctity of "property" certainly. There were also undoubtedly multistate policies at stake concerning the mobility of commerce. In addition there was a perceived national policy, the supposed need of the Union to placate the south. It is also possible to value the ideal of comity for its own sake, or for the sake of the expectations of the slaveholder. Even today, in support of the notion of retaliatory comity some might find worthwhile the north's willingness to pay the price of injustice in northern courts in the hopes of avoiding retaliatory injustice in the courts of the south.¹⁰²

free state to reside permanently, that he thereby becomes emancipated, but, at the same time they hold that if he go there with him for a temporary purpose, . . . if the servant return voluntarily into the state where he was legally held to service, the rights and powers of the master re-attach. . . . This distinction between the effect of a temporary and a permanent removal of slaves is maintained upon the ground that the property of an individual does not cease to belong to him on account of his being in a foreign state. . . .").

100. See *supra* notes 45-60 and accompanying text.

101. Of course property in slaves was put under the protection of the Bill of Rights in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 425-26 (1856). That case in all its bearings was overturned by the Civil War Amendments.

102. This seems to be the implication of the work of such proponents of "comity" as Larry Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, 24 CORNELL INT'L L. J. 245 (1991). *But see* Louise Weinberg, *Against Comity*, 80 GEORGETOWN L. J. 53-94 (1991) (arguing that reciprocal comity would pose dangers).

It is worth pausing to comment on this idea of retaliatory comity.¹⁰³ Transparently, adherence to a rule of reciprocal or retaliatory “comity” in a slave case in the north would trade the freedom of an individual in a real case for the freedom of a speculative future person in a speculative future case. And it would do this on the irrational hypothesis that the southern court in that later case would be willing to penalize a freedman for the unrelated fault of a court far away—even though that same southern court habitually construed its own laws narrowly to free a slave.

XI. THE SECOND PHASE: THE RULE OF LIBERTY

It may be a measure of dissatisfaction with the concept of property in human beings that northern courts began to abandon it.¹⁰⁴ The dividing line appears some time after *Aves’ Case* and the tariff/states’ rights crisis of the early 1830s. Moving into a second, middle, phase of the antebellum period, after *Aves Case*, northern courts tended increasingly to take the view, as we might argue today,¹⁰⁵ that all states shared a reciprocal interest in the liberty of persons within their respective borders. Increasingly, northern courts were willing to grant freedom to sojourners unconditionally.¹⁰⁶

103. The classic case is *Hilton v. Guyot*, 159 U.S. 113 (1968). Arguably disapproving such retaliations, see, e.g., *Zschernig v. Miller*, 389 U.S. 429 (1968).

104. FINKELMAN, AN IMPERFECT UNION, *supra* note 3, at 99, finds that *Willard v. The People*, 4 Scam. 461 (Ill. 1843) is the last northern case furnishing protection to the “property” of a slave owner in transit; but, as he points out, *id.* at 282, *Dred Scott* restored the right of transit. See generally Reid, *Lessons of Lumpkin*, *supra* note 3, at 572 (“The Northern Reaction Against Comity”).

105. Cf. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (stating that “In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest.”).

106. Arguably it had become easier for northern courts to take a moral stand. The gradual manumission laws, in place by 1804, would have had the unintended consequence of producing a transfer of the northern slave population to the south, see Tocqueville, 1 *Democracy in America* 367 (1831), as Northerners in slave states like New York, Pennsylvania, and New Jersey perceived that they must liquidate their investments in slave property. Some northern legislatures reacted to these sales, and to the concomitant breaking up of black families in the north, by prohibiting the export of slaves for sale. But the slave population of the north dwindled rapidly. Nevertheless the northern black population could not have been anywhere near that of the south even at the time of the Constitutional Convention. In *The Federalist Papers* No. 54, for example, Alexander Hamilton or James Madison treats the problem of slavery as a problem of the southern states; and Madison’s notes of the Convention throughout show Southerners, particularly South Carolina and Georgia, as standing for the slave-owning interest. I do not know how the revolutionary army’s recruitment of slaves affected the different sections; there was a

(2002) Law and Justice 493 What would happen, then, on these evolved better understandings, during this middle period, when a slave came into “free” territory? The answer to that question now came more sharply to depend on whether the slave was a “fugitive,” or had been taken by her master “voluntarily” into a “free” state.¹⁰⁷ In “voluntary” cases, as I read them, the answer would be affected less and less by the duration of the sojourn in the “free” state. The distinction between the “voluntary” and “fugitive” cases was prompted by Article IV of the Constitution, with its provision for the return of “fugitive” slaves.¹⁰⁸ The distinction was first drawn importantly by Chief Justice Shaw in 1836 in *Commonwealth v. Aves*.¹⁰⁹ Shaw drew the distinction instrumentally, to carve out a class of cases in which “comity” need not be extended to slave law, although later the distinction came to seem inevitable and natural. Indeed, *Aves* is remembered more generally as perhaps the first case affirmatively rejecting the principle of comity to slave law.¹¹⁰ In this middle period, then, northern courts began to apply their own laws to free a slave even on brief sojourns in the state, as long as the slave was in the state with the owner’s consent.¹¹¹ “*Volenti non fit injuria.*”¹¹²

scheme in place by which the owner received compensation and the slave liberty.

107. Reports even of federal cases having to do with the fugitive slave problem are quite sparse through the 1830s; these include *Johnson v. Tompkins*, 13 F. Cas. 840, 855 (C.C. E.D. Pa. 1833) (reversing an award of penalties for obstruction of a recapture); *Hill v. Low*, 12 F. Cas. 172, 173 (C.C. E.D. Pa. 1822) (Washington, Cir. Justice) (reversing because incitement to escape is not obstruction of arrest); *In re Susan*, 23 F. Cas. 444, 448 (C.C. D. Ind. 1818) (holding for the first time that the Fugitive Slave Act of 1793 was constitutional; holding that the proceeding provided is summary, and that state laws are immaterial).

108. Art. IV, § 2, cl. 3.

109. *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 219 (1836) (Shaw, C. J.). In fact Chief Justice Tilghman of Pennsylvania drew this distinction even earlier in *Wright v. Deacon*, 5 Serg. & Rawl. 62, 63 (Pa. 1819) and *Commonwealth v. Holoway*, 6 Binn. 213, 218 (Pa. 1814). See also the opinion of Justice Bushrod Washington to the same effect in *Butler v. Hopper*, 1 Wash. C. C. Rep. 499 (C.C. D.C.), cited in *Aves*, *supra*, at 221.

110. Earlier cases in Massachusetts are noted in LEVY, THE LAW OF THE COMMONWEALTH, *supra* note 33, at 62-71.

111. See, e.g., *Jackson v. Bulloch*, 12 Conn. 38, 49 (1837) (freeing a slave that had sojourned two years temporarily in the state, but distinguishing the case of a slave solely in transit).

112. *Aves’ Case*, 35 Mass., at 14 (Shaw, C. J.)

But what would happen if this freed person tried to return to her family in the “slave” state?¹¹³ The arresting feature of this second period is that some southern courts continued for a time to extend “comity” unilaterally, applying northern state law to free a slave. The principle was, “Once free always free.”¹¹⁴ One sees this happening quite late in the period. The most prominent example is the first litigation in Dred Scott’s case, in the Missouri trial court. Because Scott had been taken voluntarily to a free state and to a free territory, and had resided in each for a considerable time, he argued that he had become “free” by operation of their respective laws, and the Missouri trial court so held.¹¹⁵

(2002) Law and Justice 494 Such agreement, north and south, expanding the factual basis for a choice of liberating law, suggests the emergence in this middle period of what the late Professor Ehrenzweig would have called “a true rule.”¹¹⁶ By analogy to his “rule of validation,”¹¹⁷ Ehrenzweig might have called this a “rule of liberty.” A rule of liberty could almost be said to have been typical until perhaps the 1850s, when the national agony became too acute for such forbearance.

If southern judges were freeing slaves, why didn’t they act more broadly, to rid their states of slavery altogether? It is true that antebellum judges and writers seem to have known, as modern courts seem to have forgotten, that the forum does not actually “avoid” its law, whatever it

113. Under the case of *The Slave, Grace (Rex v. Allan)*, 166 Eng. Rep. 179, 183 (Adm. 1827) (Stowell, L.), the received position was that the original domicile did not violate international law by re-enslaving a freedman.

114. See, e.g., *Fenwick v. Chapman*, 34 U.S. (9 Pet.) 461, 465 (1835). See also *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 560 (1856) (McLean, J., dissenting): “In *Spencer v. Negro Dennis*, (8 Gill’s Rep. 321,) the court say: ‘Once free, and always free, is the maxim of Maryland law upon the subject. . . .’”

115. *Scott v. Emerson*, 15 Mo. 576, 592 (1852) (reversing the trial court’s ruling in Scott’s favor). Between 1824 and 1852, when the Missouri supreme court decided *Scott v. Emerson*, Missouri cases had held that taking a slave into a free territory, at least when there had been an intention to establish a permanent residence there, freed the slave. *Winny v. Whitesides*, 1 Mo. 259 (1824) seems to be the first such reported Missouri decision. E.g., *Wilson v. Melvin*, 4 Mo. 592, 599 (1837). Later Missouri cases followed Emerson. E.g., *Sylvia v. Kirby*, 17 Mo. 434, 435 (1853).

116. Albert A. Ehrenzweig, *Choice of Law, Current Doctrine and “True Rules,”* 49 CALIF. L. REV. 240, 241 (1961) (identifying phenomenon of “true rules” of choice of law beneath judicial language).

117. ALBERT A. EHRENZWEIG, *A TREATISE OF THE CONFLICT OF LAWS* 465 (1962) (identifying phenomenon of a true “rule of validation” for contract cases beneath judicial language).

purports to be doing.¹¹⁸ Its evasions, as much as its narrowing or liberal constructions, generally will reflect what the policy of the forum actually is. Yet it would be fatuous for us today to criticize those courts for not declaring slavery to be against public policy and have done with it. A southern state's economy was too profoundly invested in slavery¹¹⁹ for a judicial *coup de main* to have had any efficacy. And however clear might be the requirements of justice in the individual case, the requirements of the situation as a whole would have seemed altogether different to a southern judge then.¹²⁰ The rights of "property," the needs of public safety, considerations of the welfare of aged or infirm black dependents, the want of constitutional principle to the contrary, all seemed to fix the slave system irrevocably upon the state. The best, then, that southern courts could do with slavery in this second antebellum period was to construe away their own "odious" law whenever it was possible on the facts, as we have seen. And when two-state facts gave them the opportunity, they could depart from forum law and choose liberating law instead.

XII. THE FINAL PHASE: POLARIZATION AND THE "TRANSIT" CASES

As the south saw the balance of political power tilting away, it increasingly resented the rhetoric of the north, implicitly one of both moral reproach and incitement to slave revolt. Southern rhetoric underwent a change. The people of the south had reconsidered the entire position, as one southern judge put this, and now the whole people were of one mind. The white master's utter dominion over the black slave, even when violent and cruel,¹²¹ was ordained by God.¹²²

118. *E.g.*, *Anderson v. Poindexter*, 6 Oh. St. 622, 656 (1856) (Swan, J., concurring, explaining that the forum in choosing foreign law makes that law its own municipal law). This was the view of JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS*, ch. II §23 (1834). Cf. ALI, *RESTATEMENT OF CONFLICT OF LAWS*, Sec. 5 Comment (a); Sec. 7(a) Comment (b) (1934).

119. See, currently, for a state-by-state analysis by an economist, JENNY BOURNE WAHL, *THE BONDSMAN'S BURDEN: AN ECONOMIC ANALYSIS OF THE COMMON LAW OF SOUTHERN SLAVERY* (1998).

120. See, for an interesting marshalling of background material on this difficulty, Alfred L. Brophy, *Harriet Beecher Stowe's Interpretation of the "Slavery Of Politics" in Dred: A Tale off the Great Dismal Swamp*, 25 Ok.C. U. L. Rev. 63, 68 (2000).

121. See Hon. Joseph H. Lumpkin [Georgia], *Report on Law Reform*, 1 U.S. MONTHLY L. MAG. 68, 77-78 (1850): "If duty to ourselves, as well as to our slaves, requires increased severity, by way of security, let it be imposed, regardless of the hypocritical cant and clamor of the fanatics of our own or other countries."

(2002) Law and Justice 495 The supreme court of Mississippi waited until 1859 to declare its “settled conviction,” in *Mitchell v. Wells*,¹²³ “that the interests of both races are best promoted by the institution of slavery as it exists among us.” So saying, the court abruptly veered away from its former course of accommodating decision¹²⁴ and held that a manumission effected in Ohio was ineffective in Mississippi. The consequence in that case was to re-enslave a freedwoman. This former slave was the daughter of her master. She had been taken to Ohio and freed there by her owner/father. The Mississippi court held her a slave again, denying her rights to inherit any of her father’s property in Mississippi.¹²⁵

The Georgia supreme court abandoned “comity” and liberty in an 1855 case, denying freedom to a former slave who had been manumitted in Maryland. Georgia’s peppery Judge Lumpkin insisted on this sharp departure from pre-existing law: “No one pretends that negroes can be carried to New York . . . and held there in perpetual bondage. . . . With

122. *Id.* at 77-78: “The conscience of the whole south, after having been thoroughly aroused to the most earnest and intense investigation of this subject by the merciless and unremitting assaults of our relentless foes, have become thoroughly satisfied that this institution — like government itself — is of God.” This and other expressions of Georgia’s point of view are discussed in Reid, *Lessons of Lumpkin, supra* note 3, at 624.

123. *Mitchell v. Wells*, 37 Miss. 235, 238 (1859). See the notorious remarks in *id.* at 262 (Harris, J.): “The State of Ohio, forgetful of her constitutional obligations . . . and afflicted with a negro-mania, . . . inclines . . . to her embrace, as citizens, the neglected race Suppose that Ohio, still further afflicted with her peculiar philanthropy, should . . . claim to confer citizenship on the chimpanzee . . . , are we to be told that ‘comity’ will require of the States not thus demented, . . . to meet the necessities of the mongrel race thus . . . introduced into . . . this confederacy?” But see *id.* at 635 n. 72 (Handy, J., dissenting), complaining that the court was adopting “barbarian rules which prevailed in the dark ages.”

124. *E.g.*, the then very recent *Shaw v. Brown*, 35 Miss. 246, 321 (1858) (holding that although manumitted blacks could not enter or leave Mississippi, in another state they could take a pecuniary legacy of property originating in Mississippi); *id.* at 273 (distinguishing *Hinds v. Brazealle*, 2 Miss. 88, 844 (1838)). *Hinds* involved a master’s return to the slave state with his manumitted slave after a brief departure for the sole purpose of manumitting the slave, thus working a “fraud on the law,” which disqualified the black devisee from taking.

125. *Mitchell v. Wells*, 37 Miss. 235, 257 (1859) (over a strong dissent, treating recent legislation which would deny free black persons rights to inherit Mississippi property, as indicative of the state policy which had always obtained, and denying a returned freedwoman the right to inherit any of her father/master’s property in Mississippi). The claimant in *Mitchell* had been taken to a free state by her father/master in order to set her free.

what more propriety can slaves be brought here and emancipated?”¹²⁶ In another case, while in fact ordering manumission, Lumpkin protested, “For myself, I utterly repudiate the whole current of decisions, English and northern, from Somerset’s case down to the present time, which hold that the bare removal of a slave to a free country . . . will give freedom to the slave.”¹²⁷

The Kentucky court of appeals, too, took a sudden turn toward forum law in its “sojourn” cases. In 1848, Kentucky had followed its earlier cases in recognizing the free status of a former slave who had lived in Ohio for two years.¹²⁸ But within a year the Kentucky court made a sudden about face, and insisted on its sovereign power to support the institutions of slavery within its own territory.¹²⁹ Even more strikingly, in another (2002) **Law and Justice 496** case the Kentucky court re-enslaved a black who had been declared free in a judicial proceeding in habeas corpus in Pennsylvania.¹³⁰

In this third, final chapter in the antebellum story, then, southern courts¹³¹ finally dug in their heels. The best-known example of this hardening of southern judicial attitudes is seen in the dramatic about-face of the Missouri supreme court in the original state-court litigation in *Dred Scott*.¹³² Under its existing precedents, as we have seen, Missouri would have recognized Scott’s freedom, based on his master’s long voluntary sojourn on free soil. But now the state court took a very different view:

126. *Knight v. Hardeman*, 17 Ga. 253, 262-263 (1855).

127. *Cleland v. Waters*, 16 Ga. 496, 513 (1854) (Lumpkin, J.). See also *Neal v. Farmer*, 9 Ga. 555, 557-661 (1851) (suggesting that *Somerset* abolished all slavery in England, but had no application in the United States).

128. *Davis v. Tingle*, 47 Ky. 539, 545-48 (1848).

129. *Collins v. America*, 48 B. Mon. 565, 571 (Ky. 1849).

130. *Maria v. Kirby*, 51 Ky. 542, 545, 551 (1851) (holding that, the parties being different, on the slave’s return to Kentucky in a state of slavery rather than freedom it was “as if she had not been absent;” and distinguishing a hypothetical case in which the slave had been adjudicated free in a proceeding between the same parties in the free state).

131. Nash, *Radical Interpretations*, *supra* note 3, at 301-08, argues that Texas, Tennessee, North Carolina, Florida, and Arkansas, among seceding states, and Maryland, Kentucky, and Delaware among other slave states, could not legitimately be included in this generalization. FINKELMAN, *AN IMPERFECT UNION*, *supra* note 3, at 11, takes the view that only Kentucky afforded comity by the outbreak of war, and in the north, only the border state of Illinois.

132. *Scott v. Emerson*, 15 Mo. 576, 592 (1852) (reversing the trial court, which had followed earlier Missouri cases).

“Times are not now as they were when the former decisions on this subject were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequences must be the overthrow and destruction of our government. Under the circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit.”¹³³

So Missouri changed the ground rules in the middle of Scott’s case, suddenly jettisoning its former conflicts rule of comity and the principle of “Once free, always free.” Scott complained of this in the United States Supreme Court¹³⁴—quite fruitlessly, since, under *Strader v. Graham*,¹³⁵ state laws on the status of slaves did not raise a federal question. *Strader*, indeed, was one of the linchpins of the Supreme Court’s policy in this dark time.

What were the northern courts doing in this third phase? As the antebellum era was drawing to its disastrous end, the northern state courts are supposed to have taken an increasingly strident, abolitionist turn, thus joining the south in the flight from comity. But it needs to be remembered that forum law was already the choice rule in slavery cases in the north. The “brief sojourn” cases were an exception. What happened in this third chapter of the story is that northern courts, some federal courts among them, became increasingly willing to free slaves even in mere “transit.”¹³⁶ Abolitionist judges in some northern states began to free slaves merely passing through the state **(2002) Law and Justice 497** on the way to another. *Lemmon v. People* is the example usually given. In that New York case, a slave was held liberated although the master was not visiting the

133. *Scott v. Emerson*, 15 Mo. 576, 586 (1852).

134. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 465-66 (1856) (Nelson, J., concurring): “But what court has not changed its opinions? What judge has not changed his?”

135. 51 U.S. (10 How.) 82 (1850) (holding that the status of a slave was up to each state in its own courts).

136. See, e.g., *Daggs v. Frazer*, 6 F. Cas. 1112 (D. Iowa 1849) (action by a citizen of Missouri in trover for the return of 9 slaves lost on a visit to Iowa; action dismissed because trover would not lie in Iowa for the return of slaves). For antebellum discussion of the master’s right of transit, see Thomas Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America* 135-140 (1858).

state, as such, but merely waiting between ships.¹³⁷ An alarmed group of New York businessmen raised a compensatory fund of \$5000 for the southerner so unexpectedly deprived of his “property.”¹³⁸

Similarly, in *Anderson v. Poindexter*, the Ohio court ruled that Poindexter had become a free man simply by having been sent on an errand in Ohio by his Kentucky master.¹³⁹

One should not underestimate the importance of the northern shift from comity in the “transit” cases. It meant that a southern slaveholder in effect was losing what today we would call the right to travel, at least the right to travel accompanied by her slaves, which, to a southern slaveholder, was pretty much the same thing.¹⁴⁰

XIII. HOW THE “GREATER GOOD” TENDS TO BE MERELY SPECULATIVE

The American slavery cases, both north and south, can exhibit the moral and political consequences of subordinating justice in the individual case to some conceived “greater good.”¹⁴¹ In the south, the “greater good” of the slave system eventually displaced the rule of liberty. In federal courts trying to enforce the fugitive slave laws,¹⁴² the “greater good” of the Union

137. *Lemmon v. People ex rel. Napoleon*, 20 N.Y. 562 (1860).

138. After the initial hearing in *Lemmon*, New York businessmen reportedly contributed to a fund raised by the New York Journal of Commerce to compensate the master in that case. FINKELMAN, *AN IMPERFECT UNION*, *supra* note 3 at 297.

139. 6 Oh. St. 622, 631 (1856) (Bowen, J.).

140. This was argued in *Lemmon v. People ex rel. Napoleon*, 20 N.Y. 562, 580 (1860). For this reason, it is not unlikely that had the Supreme Court reviewed *Lemmon* it would have built upon *Dred Scott* to coerce legitimization of slavery upon the free states. See, for this argument, JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 179-81 (1988).

141. Consider, on this problem of “the greater good,” Eli Nathans, *Legal Order As Motive and Mask: Franz Schlegelberger and the Nazi Administration of Justice*, 18 L. & HIST. L. REV. 281 (2000); Symposium, *Nazis in the Courtroom: Lessons from the Conduct of Lawyers and Judges Under the Laws of the Third Reich and Vichy, France*, 61 BROOK. L. REV. 1121 (1995); David Luban, *A Report on the Legality of Evil: The Case of the Nazi Judges*, 61 BROOK. L. REV. 1139, 1145 (1995) (arguing that the Nazi judges were trained to apply law with the greater good of the state in mind rather than woodenly or positivistically, as had been supposed). Article 2 of the German Criminal Code of 1935 stated: “Punishment is to be inflicted on persons who commit an act which has been declared punishable by the Criminal Code, or which deserves to be punished according to the spirit of a rule of criminal law and healthy folk-feeling.” *Id.*

142. For a full discussion, see Weinberg, *Night-Thoughts of a Legal Realist*, *supra*

displaced the rule of liberty. The greater good in both these situations was not a question of hard facts; but mere speculation.¹⁴³ Sometimes a legislature is moved to act to accommodate considerations of the greater good. That is what happened when Congress enacted the fugitive slave laws. But if abstractions about the greater good produce seriously wrong positive law, enforcement in a country of just ideals becomes problematic. Enforcement of the fugitive slave laws became ineffective in the north.

In fact, no amount of northern judicial appeasement could have saved the country from civil war. Although one can grant that the judges who so desperately struggled to appease the south meant well, that policy was never sound. A northern court's (2002) *Law and Justice* 498 occasional recognition of slave status, remitting a black to a life of bondage, or the occasional conviction of a would-be rescuer by a northern jury, though watched with great interest in southern newspapers and courts, could not have averted the coming catastrophe. In any event, northern courts could not have done much more than they did in ordering the return of fugitives. The angry crowds that increasingly attended attempts at rendition show that northern courts were accomplishing all that was politically possible for them to accomplish. Even vigorous enforcement of the Fugitive Slave Act of 1850 could not have kept the south in the Union; no one supposes that today. The "greater good" the judges were striving for could never have amounted to more than a delaying tactic at best. It is hard to justify for such speculative and provisional gains the costs of accommodation to immoral law, costs to human liberty and life.

Thus, the slavery cases in the late antebellum period luridly display the injustice that can result when courts allow some speculative *greater good* to defeat the ideal of justice in the individual case.¹⁴⁴ These cases cast a dark shadow indeed on the orthodox advice to courts in two-state cases to consider "multistate policies," or "the needs of the interstate (or international) systems."¹⁴⁵ The northern cases remind us, rather, that the

note 3, at 1345-1359.

143. For further analysis of the problem of "the greater good" as a desideratum in choosing law, see Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 *IND. L. J.* 475, 492-97 (2000), and see *supra* note 20 and accompanying text.

144. For a more complete discussion of the ideal of "justice in the individual case," and its role in the history of the development of ALI, *RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS* (1971), see Louise Weinberg, *A Structural Revision of the Conflicts Restatement* 75 *IND. L. J.* 475, 497-501 (2000).

145. The reference, of course, is to Section 6 of the *Restatement (Second)*, *supra* note 140.

very purpose of the judicial function is to secure justice for the individual—sometimes, if need be, in the teeth of the system and its “needs.”

XIV. ENVOI: TWO CHEERS FOR FORMALISTIC REASONING

At the same time, the slavery cases in the southern courts should stand as a warning to those who would deprive courts altogether of the option of purporting to choose foreign law. One can be too much of a realist about such things, or perhaps too little of one. Judges need leeway to depart from bad law when they cannot strike it down, whether they do so by a narrowing construction or by holding that another state’s law unavoidably “governs.”

Inevitably there will be cases in which judges will cast about for, and should be able to find, ways of escaping from law that seems to strike a wrong note or from results with which they are not comfortable. Among the weapons in the judicial arsenal, they may look to some choice-of-law device or other formalism. It would be imprudent, even if it were possible, to deny them access to that option. Courts in the deep south did manage, through such means, again and again, to evade proslavery law. Courts should be able to call on all sorts of means, even formalistic ones, to afford justice. In argument before a court, and in the crafting of persuasive judicial opinions, formalisms cannot be discounted. As a practical matter, formal analysis is too deeply embedded within the very substance of law for us to suppose we can get by without it. Think of the sets of doctrinal multi-factored tests under which substantive legal issues themselves are decided by courts in our time.

From the experience of the slavery cases, we can see the limits of the realist critique. Nothing in that critique requires that judges be deprived of the serviceable expedient of avoiding forum law in a particular case without having to shoulder the burden of overtly changing it. Nothing in that critique requires depriving the parties of a serviceable pleading option. It is useful to the parties to be able to plead a particular claim or defense “under” the law of another “interested” sovereign, which (due process being **(2002) Law and Justice 499** satisfied) a court presumptively will respect, just as it is useful to courts to have the option of making a “choice of law” to solve an otherwise intractable problem.

Taking seriously the realists’ insistence that all cases are fundamentally the same, formally “choosing” law becomes only one among a number of options. Reasoning closer to the merits is probably always to be preferred. Surely it was better judging and better statecraft when Massachusetts’ Chief Justice Shaw ruled in *Aves’ Case* that in the absence of slave law at

the forum there could be no slavery there,¹⁴⁶ than it would have been had he ruled that the place of temporary sojourn “governs” slave status. It is a measure of how wrong our methodological wrong turns may have been that courts today do not seem to have the discretion in a two-state case to say what they want to say rather than what some prescribed methodology requires them to say. Courts had a little of that discretion, even in the gloom of the nineteenth century.

Although formalisms, divorced from the merits, can be unconvincing and dangerous, there is a place for them, as this study suggests. Formalism, as well as other forms of legal reasoning, can provide needed political cover to just decisions in unjust societies. In such societies, the giving of justice is a form of resistance. As long as a just judgment is made on carefully reasoned grounds, formalistic or otherwise, its justice will commend it to the judgment of history.

Other writings by Louise Weinberg are available at

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146. *See supra* note 58 and accompanying text.