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C

CHOICE-OF-LAW

Alternative Approach to Hague

Develop a system where (1) no member will favor its law without advancing a principled basis for doing so, (2) no member will depart from recognized norms of choice of law without giving compelling reasons for doing so, (3) no member will refuse to respect a claim for national uniformity based on a recognized practice of referring to the law of a particular member in order to achieve uniform treatment of all persons involved in a transaction, without giving compelling reasons for doing so.

Arbitrary Choice of Law in Hague

Choice of Minnesota law was arbitrary in Hague under a mutual interest and utility analysis, a territorial analysis, or an instrumental methodology.

Brilmayer Approach

Professor Brilmayer would divide a state's policies into domestic and multistate. A contact, in order to justify application of forum law, must be of a type that domestic policy is intended to regulate.

Suggested Modification of Brilmayer Approach — a contact should be significant, for choice of law purposes, if it connects the controversy with one of the states involved. A state may apply its own law if a contact bears formal substantive relevance or informal policy relevance to a state's regulatory effort, but not otherwise.

Burden on the Supreme Court

Supreme Court has shown a reluctance to exercise constitutional control over state choice-of-law practices due to a desire to avoid the heavy burdens that full-scale involvement with this subject matter would entail.

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Administrative Remedies
Resort to the administrative process is futile where a child has been negligently placed and has been made to suffer the consequences of time spent in classes inappropriate to his or her
Establishing Causation
Causation may be the most difficult element of an educational tort case. A plaintiff, however, need only show that defendant's conduct was a substantial factor in bringing about the harm.

Establishing the Duty
New York case law suggests that an educator's relationship to a student may give rise to a duty to act with care.

Hoffman v. Board of Education
The New York Court of Appeals held that the placement of a student into classes for the mentally retarded, along with a twelve year failure to retest, was not actionable.

Judicial Intervention
The New York Court of Appeals in Hoffman relied heavily upon the assumed inappropriateness of judicial involvement in the educational process.

Plaintiff's Injuries
The injuries of an improperly placed child include stigmatization, psychological harm, and loss of learning potential.

Standard of Care
An educational standard of care could be derived from the standards and customs of the profession.

EMOTIONAL HARM
Continued Sufficiency of Ensuing Physical Injury
The author suggests the abandonment of the ensuing physical injury rule.

Dillon Doctrine
The California Supreme Court in Dillon v. Legg, rejected the zone of danger rule, concentrating instead on the degree of foreseeability that emotional harm might result from a plaintiff witnessing an injury caused by the driver's negligence.

Parasitic Emotional Harm Recoveries
These damages are recoverable for emotional harm caused in connection with physical injury. They are generally known as "pain and suffering damages."

Relevant Factors
The author suggests a list of proposed factors that courts should consider in assessing claims for emotional harm.

Right to Emotional Tranquility
Courts have been reluctant to allow recovery for emotional harm that is not manifested physically. One reason is the problem of establishing causation and the severity of the injury suffered.

FEDERAL CIVIL PROCEDURE
Diversity Jurisdiction
Federal courts have a duty to decide issues of unclear state law as a state court would to promote uniformity of decisions within the state.

The problems presented in a post-Erie diversity case are magnified when state law is unclear or undeclared, and serve only to strengthen the argument in favor of abolishing diversity.

When state law is unclear, a federal court's ability to predict the state law outcome correctly is especially important because its decision may play a role in the future development of state law.

FOREIGN CORRUPT PRACTICES ACT
Culpable mental state under the FCPA: "reason to know"; the need to reform this standard.

The Business Accounting and Foreign Trade Simplification Act is an attempt to clarify the accounting obligations and potential liability of the business community.
HOLMES, OLIVER WENDELL

See also Legal Theory—The Common Law this index

Generally
Holmes' choice of a position on the Massachusetts Supreme Judicial Court rather than a professorship at Harvard was motivated by a desire to apply his theories to practice 639-41, 704-07
Holmes' tenure on the Massachusetts bench did not meet his high expectations as most of the cases decided were dull and did not lend themselves to complex analysis of common law doctrine 642-49

Jurisprudence
Holmes identified judging as an exercise in balancing competing social policy choices at a time when few other jurists were prepared to concede that judging was anything other than finding and applying preexisting legal principles 642-49, 665, 690-91
Holmes believed that judges should defer their policymaking choices, especially in the area of public law, to those of the "community," enunciated through the legislature656-65, 676-77

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INTERNATIONAL HUMAN RIGHTS

Generally
Focusing on only severe violations of human rights will help bring about broader participation and cooperation among states 769-72

Prospects for the Future
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After World War I, a determination to create a new structure for international society led to the formation of the League of Nations. The lack of effective protection for human rights, however, allowed terrorism to grow to unimagined dimensions 386-89
The Nuremberg trials led to a confirmation by the world community that there are crimes against humanity. With the formation of the United Nations, the clamor for human rights protection was irrepressible. The colonial system was eroded, and a consensus was reached in defining aggression 389-96

INTERNATIONAL LAW

Charter of the United Nations
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With the context of a decentralized world legal order, an international legal duty must be consented to by a state before it is bound by it. Explicit consent refers to a treaty obligation and tacit consent refers to a practice that the state believes to be required by international law 757-58
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Decentralized World Legal Order
In a decentralized world legal order all states are judicially equal and are sovereign as to their own citizens 754, 760, 767

LEGAL THEORY—THE COMMON LAW

See also Holmes, Oliver Wendell this index
Case Method of Legal Analysis
In The Common Law, Holmes turns towards the case methodology and away from a philosophic methodology in which common law doctrine is criti-
Historical Analysis of Legal Institutions
The major thesis of *The Common Law* was that the changes in legal institutions could be explained by a historical analysis of the changes in social institutions. Although Holmes suggested that it is the forces outside the law that determine its growth, *The Common Law* does not really explore these forces but concentrates on internal forces such as judicial case law.

Legal Positivism
*The Common Law* expounds a theory of legal positivism; the law should be based on observable facts and objective standards rather than on subjectivity.

Social Darwinism
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PROPERTY LAW
Right to Sublease
New York's common law on the right to sublet is of little guidance in applying Section 226-b of the Real Property Law.
The paucity and incongruity of the recorded legislative history make determining legislative intent of Section 226-b an arduous task.
Litigation has resulted in a dispute among the lower courts as to the proper interpretation of Section 226-b with regard to tenants' remedies.
The controversy in the lower courts has not been diminished by the decisions of the appellate courts.
Section 226-b creates an inequity by dividing tenants into two distinct classes—sublessors and assignors.
The statute fails to establish a resident's standard of reasonableness for evaluating a landlord's response to a notice to sublet.
Recommendations for redrafting of Section 226-b.

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SOCIAL CHOICE THEORY
Legal Order
Assumptions: Perfection connotes a system in which one makes the best use of limited resources. The rationally egoistic strand in human motivation justifies studying a legal system that governs a hypothetical population of rational egoists. Some limitations on the legal system are inevitable.
The modified Arrow theorem, based on the assumption laid down earlier and the two postulates of game theory, says that no legal order can ensure that the best technically feasible course of events will ensue.

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SUPREME COURT
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It is a misconception that the increasing fragmentation of opinions during Stone's tenure as Chief Justice was a result of his inability to induce the Court to act in concert.
Justice Frankfurter's role as a force that lead to fragmentation of the Supreme Court.
The Court's formulation of new constitutional rules not readily derivable by interpretation of the constitutional text is a force leading to fragmentation.

TAX LAW

Incentives for Historic Preservation

The National Historic Preservation Act (NHPA) Amendments of 1980 provide an important link between historic preservation policies and national community development goals.

The NHPA of 1966 was created to preserve the historical and cultural foundations of America as living part of our community life and to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our nation.

The Tax Reform Act of 1976 adopted federal tax incentives for preservation efforts.


Taxpayer Compliance Measurement Program (TCMP)

Issuance of TCMP summonses under the authority of section 7602 has produced considerable controversy and an increase in litigation.

The summons power of the Internal Revenue Service and the Supreme Court's interpretation of that power is defined in section 7602 of the Internal Revenue Code.

The TCMP, a statistical research project of the Internal Revenue Service, is designed to elevate taxpayer compliance with the tax laws while reducing the Service's operating costs by improving procedures for selection of returns for audit.

The TCMP audit procedure is a thorough examination of the complete income tax return.

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Products Liability

Formulation of the design defect test in New Jersey has led to confusion in its application.

Development of products liability is based on negligence, implied warranty and strict tort liability.

Examination of the two-pronged test, consumer expectation and risk-utility, exposes tension between negligence and strict liability principles.

Comparison of New Jersey and California application of the design defect test and its effect on outcomes.

Successor Liability for Defective Products.

A new test of successor liability, continuity of enterprise, merges the centrally important interplay of tort and corporate principles.

Both historically and presently the prevalent approach in analyzing the liability of a successor corporation is to view the continuation of ownership interest between predecessor and successor.

Products liability law and the strict liability trend have moved from the requirement of privity of contract to a complete disregard for the formal limitations of contract law.

The product-line theory is both a troublesome and yet meritorious tort concept of successor liability.

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CORRECTION

Page 722, footnote 26 & line 2: The Note, "Holmes, Peirce & Legal Pragmatism," 84 Yale L.J. 1123 (1975), mistakenly attributed to Professor Rand Rosenblatt, was authored by a student-writer, James D. Miller, while a member of the Yale Law Journal.
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