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*Tribute to Symeon C. Symeonides*

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# Book Review - Conflict of Laws: American, Comparative, International: Cases and Materials

Hilary K. Josephs

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# Book Review—*Conflict of Laws: American, Comparative, International: Cases and Materials*

Hilary K. Josephs\*

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## I. INTRODUCTION

This essay will focus on the contribution to the field made by a recent casebook co-authored by Professor Symeonides (“SCS”) with Wendy Collins Perdue (“WCP”) and Arthur T. von Mehren (“ATV”): *Conflict of Laws: American, Comparative, International: Cases and Materials*.<sup>1</sup> My comments will extend to the Teacher’s Manual which accompanies the Casebook. To summarize, the Casebook is a model teaching tool which at the same time has character. It projects the personalities of its authors, and their passion and dedication to the subject, without being didactic, tendentious, or polemical.

Although I have taught conflict of laws materials regularly in courses such as international business transactions, international trade law and public international law, I have taught the “traditional” course just once. So, I make no claim to being a specialist on the subject of conflict of laws as it is “traditionally” conceived. Consequently, this review might be most helpful to other neophytes who are asked to cover the traditional course when the resident specialist retires or goes on leave.

In complete honesty, there were three main reasons why I adopted the Casebook in my own course. First, I knew two of the co-authors personally from meetings of the American Society of Comparative Law. Second, the very title of the book expressed an avowedly catholic attitude about the subject. No conflict of laws textbook can reasonably disregard comparative and international perspectives. The

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\* Professor of Law, Syracuse University.

1. Symeon Symeonides et al., *Conflict of Laws: American, Comparative, International: Cases and Materials* liii - 940 (1998) (hereinafter known as “Casebook”).

United States is not only a highly mobile society (which, in the twentieth century, compelled a change in judicial attitudes towards jurisdiction and choice of law) but also an assimilationist culture, international marketplace and major exporter of foreign direct investment. Third, the Casebook was fresh off the press and required no supplementation.

While preparing this review I took a closer look at three other casebooks and their teacher's manuals: Brilmayer, *Conflict of Laws: Cases and Materials*;<sup>2</sup> Cramton, Currie, Kay & Kramer, *Conflict of Laws: Cases-Comments-Questions*;<sup>3</sup> and Rosenberg, Hay & Weintraub, *Conflict of Laws: Cases and Materials*.<sup>4</sup> This is not an exhaustive list, but those textbooks I was able to obtain readily as desk copies. All were perfectly adequate but I was content in retrospect with my original choice.

## II. HARDCOPY CASEBOOKS IN THE ELECTRONIC AGE

To place this review in a more general context, one should explore the function of a hardcopy casebook in the electronic era, when primary sources and much secondary material are readily available from legal databases or the Internet. Professors can put together their own casebooks through photocopy centers or avail themselves of "customized casebook" formats supplied by the database services.

Yet, the "electronic revolution" is not yet complete. There is nothing, for example, in the CALI Library on conflict of laws. The legal publishers apparently have abandoned, at least for the present, their brief experiment with casebooks on CD-ROM.

If the supply is not available, neither is the demand forthcoming. Despite a high degree of computer literacy among law students, in my classes there are still relatively few students who carry laptop computers and who might benefit significantly from a casebook published on CD-ROM or the Internet.

From casual discussion with other law professors, who have taught in totally "wired" environments, I conclude that the electronic classroom is not without its problems and distractions—the clacking of keyboards, the class's fixed focus on computer screens to the exclusion of other visual or aural stimuli, and the opportunity for students' attention to drift away undetected. With the exception of one course in which I posted an electronic syllabus with links to cases and other sources, I still use hardcopy casebooks, documentary supplements and photocopied materials.

## III. CONFLICT OF LAWS IN THE NEW MILLENIUM

Another general issue is the place of the course, conflict of laws, in the law school curriculum. Typically it is not a required upper-level course like

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2. (4th ed. 1995).

3. (5th ed. 1993).

4. (10th ed. 1996).

professional responsibility or constitutional law. However, students might be strongly motivated to take the course because the subject is still tested on the bar examination in about half the jurisdictions, including New York, Connecticut, Pennsylvania, Virginia, and the District of Columbia. All are jurisdictions with "greater urban areas" where large numbers of lawyers are concentrated.

At the same time, though the U.S. population is so concentrated in particular states or urban areas, law school populations are increasingly diverse and their post-graduation destinations unpredictable. Las Vegas is now the fastest growing urban area of the country.<sup>5</sup> Other thinly populated states like Utah and Idaho boast above-average rates of economic development.<sup>6</sup> The community property states to which retirees have flocked are suddenly forced to confront novel conflict of laws issues.<sup>7</sup> Therefore, a casebook does not do justice to the subject if it restricts itself to the law of a few jurisdictions. The Casebook,<sup>8</sup> and Professor Symeonides's annual surveys in the *American Journal of Comparative Law*, appreciate this reality and supply an overview of "conflicts geography."

Those who teach conflict of laws do not seem to be afflicted with the same professional self-doubt that one finds in the case of specialists on comparative and international law.<sup>9</sup> To be sure, the picture is not entirely rosy.<sup>10</sup> Perhaps the field of conflict of laws has fared better in the American law school curriculum because emigré intellectuals from Europe did not dominate it as much as they did comparative law, and there was always an active cadre of home-grown scholars.<sup>11</sup>

Still, from my experience responding to inquiries of alumni who did not take the course and from reading postings on listservs, I think that too many practicing attorneys are insufficiently sensitive to conflict of laws issues. I recently attended a CLE program where a speaker jocularly declined to comment on a conflict of laws issue because, although he had taken the course in law school, he had not done well in it. Conflict of laws issues strike at the very heart of an attorney's livelihood, as demonstrated by a recent California Supreme Court decision which found that a New York law firm had engaged in the unauthorized practice of law when it handled a dispute between two California companies.<sup>12</sup>

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5. See Frank Rich, *Who Doesn't Want to Be a Millionaire*, N.Y. Times, Nov. 20, 1999, at A13.

6. See Robert D. Hershey, Jr., *For Manufacturing Jobs, Boom Towns Past and Future*, N.Y. Times, Oct. 6, 1999, at G1.

7. In *Hughes v. Hughes*, a divorce and division of property case, the Supreme Court of New Mexico noted that by 1970 almost half of the state's population came from elsewhere (See Casebook, *supra* note 1, at 388).

8. See Casebook, *supra* note 1, at 283-88.

9. See e.g., Symposium: *New Directions in Comparative Law*, 46 Am. J. Comp. L. (1998); John A. Barrett, Jr., *International Legal Education in U.S. Law Schools: Plenty of Offerings, But Too Few Students*, 31 Int'l Law. 845 (1997).

10. As Professor Brilmayer observes, on p. 29 of her teacher's manual, "[f]oreign scholars often express surprise that American choice of law theory pays so little attention to events unfolding abroad . . . except for those American law teachers who are foreign born or who teach comparative law, we tend to be rather self-absorbed."

11. I owe this conjecture to Peter E. Herzog, himself an expert on both comparative law and conflict of laws.

12. *Birbrower, Montalbano, Condon & Frank, P.C., v. Esq. Business Services*, 949 P.2d 1, *cert.*

## IV. CORE SUBJECT MATTER AND NEW DEVELOPMENTS

With varying degrees of emphasis, all of the textbooks cover the following subject matter: (1) the traditional (or territorial) approach to conflicts and its various exceptions; (2) the modern approach (most significant relationship, interest analysis, better law) and its exceptions; (3) statutory approaches to conflicts issues; (4) special problems in choice of law (e.g., divorce, child custody, complex litigation and products liability); (5) proof of foreign law; (6) constitutional limitations on assertions of jurisdiction and choice of law; (7) conflicts between state and federal law; (8) recognition of judgments, domestic and foreign; and (9) conflicts in an international setting (e.g., extraterritorial jurisdiction, act of state, international commercial arbitration).

Students have already been introduced to the highly abstract subjects of constitutional limitations on assertions of jurisdiction and conflict between state and federal law in either or both constitutional law and civil procedure. Subjects such as extraterritorial jurisdiction and acts of state are typically covered in either or both public international law and international business transactions. However, it is wise for casebook authors to include otherwise repetitive material. One cannot expect students to understand difficult subject matter after a single exposure. Electives are the rule after the first year of law school. Furthermore, even if students wanted to follow a logical and coherent learning sequence, course schedules are too unpredictable for such meticulous planning.

In terms of length, the textbooks ranged from about 800 to 1100 pages (including prefatory material, tables, and index). From my experience with casebooks in other courses, a length of about 1000 pages should be sufficient for a three-credit course; otherwise, the book becomes, simply, physically cumbersome. The Casebook has an extensive bibliography of primary and secondary sources, a summary of contents, a table of contents, a table of cases, a table of Restatements, and an index—in short, all of the finding aids one might need to locate material within the book or explore related subject matter not included. Quotations of sections of the Restatement within the Casebook obviate the need for students to purchase an additional documentary supplement. Being an entirely new publication, the Casebook avoids the problem of the “well-known” text which has gone through many incarnations, is far removed from the original authorship, and needs to be rethought and restructured, rather than simply updated and expanded.

The succinct introductory chapter of the Casebook places the subject of conflict of laws in both synchronic and diachronic historical perspective. This chapter provides a wide angled view of conflict of laws in the United States today, through summaries of four cases covered in more detail in later chapters (an air crash disaster, an environmental pollution case, a shareholders' dispute within a Hong Kong corporation, and the will of a French domiciliary which contains a choice of New York law).

There is also a brief history beginning with choice of law in ancient Greece and ending with early American law. The Greek contribution to the development of Western legal culture is undervalued, but this historical treatment, and SCS's law review articles, help to rectify the situation.<sup>13</sup> A tone of sweet reasonableness pervades the historical summary. The reader is reassured that theoretical controversies have existed since time immemorial and that the competing demands of consistency and flexibility can never be finally reconciled.

Being of recent publication, the casebook includes up-to-date coverage of "hot" issues such as personal jurisdiction in the age of the Internet and conflicts among state, federal, and Native American law. Although time did not allow me to assign reading on the latter subject, I was at least able to refer the class to materials in the Casebook. The topic is certainly of immediate interest to law students in central New York, where several land claim controversies are ongoing and affect the property interests of thousands of homeowners.

#### V. THE ACADEMY AND THE "OUTSIDE WORLD"

Due to the solidly common law orientation of the first year curriculum, American students do not need to be convinced of the importance of judicial decision-making, but the role of the law professor and the place of legal scholarship are another matter. In contrast to the European countries, the status of the legal academic is not that high, and the exchange of expertise between the academy and government has diminished over time.<sup>14</sup> Judges are more forthright today than in the past in elucidating the policy choices behind their decisions, but in so doing, they have exposed themselves to withering criticism by the professoriate.<sup>15</sup>

However, the Casebook provides numerous examples of the creative role which an academic can still play in the legal process. Cases such as *Neumeier v. Kuehner*,<sup>16</sup> discussed in further detail below, are evidence of the practical impact of legal scholarship on the formulation of common law rules. Material on the ALI's complex litigation project and the drafting of conflicts provisions in the Louisiana and Puerto Rican codes demonstrate the collaborative efforts among legal scholars as well as between legal scholars and the judicial and legislative branches of government. Finally, the Casebook includes material on proof of foreign law and the crucial importance of expert testimony. SCS served as a consultant to plaintiffs

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13. Aristotle's *Nicomachean Ethics* provide the epigraph for *Exception Clauses in American Conflicts Law*, 42 Am. J. Comp. L. 813 (1994 Supp.).

14. See Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. Legal Educ. 313 (1989); Andrew Miga, *In Washington, a Day of Low Comedy and Tedium*, Boston Herald, Dec. 9, 1998 (Lexis; News Library) (during House of Representatives' impeachment hearings, Rep. Hyde wondered jokingly if lawmakers could somehow earn college credits for listening to college professors and legal scholars).

15. See Kaye, *supra* note 14, at 314.

16. Casebook, *supra* note 1, at 244.

in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*;<sup>17</sup> ATV was an expert witness on Swiss choice-of-law in the same case.<sup>18</sup>

## VI. THE TEACHER'S MANUAL

As with the other conflicts casebooks which I examined, there is a Teacher's Manual, which runs to 164 pages. SCS and WCP each covered about half of the chapters in the Casebook, but in terms of pages, their contributions were unequal. SCS wrote approximately 125 pages or 75 percent of the Teacher's Manual. SCS made extensive use of case briefs, rendered as charts, where WCP used prose explanation.

A teacher's manual is probably considered *de rigeur* these days by publishers and their editorial boards. It is provided as a courtesy to professors and usually is not intended for distribution to students. It may indeed be necessary for someone who is new to law school teaching, who may be doing a number of new preparations simultaneously (while trying to meet the publication requirements for retention, promotion, and tenure), and who does not have the luxury of time to do a lot of background reading in the law reviews. In any event, the instructor is always free to rely on it or disregard it.

Based on my experience with teacher's manuals on other subjects, I think that they can shed light on the authors' objectives in selecting particular cases, in deciding the order of placement, and in identifying the cases which are key and those which are optional under the pressure of time. They may lend a psychological boost in dealing with cases which are messy and baffling. For a casebook which is some years old, they provide essential updating. They sometimes reflect the creative tension among their authors, much like majority, concurring, and dissenting judicial opinions. When read together with the extensive annotations in the Casebook, the Teacher's Manual addresses these objectives to some degree, but on the whole did not realize its full potential.

To the extent that the Teacher's Manual provided detailed case briefs, it would have been more useful to my students than to me. An experienced teacher should be able to create a mental picture of a brief in his head after reading the case. I would have preferred that students read what the authors had to say about the material because otherwise, as a practical matter, students would resort to less reliable sources such as commercial outlines and student notes on the Internet.

The use of rhetorical questions in the Casebook, intended to call the student's attention to the "subtext" of the cases, is perhaps too subtle an approach even for second and third year law students. For instance, even the Teacher's Manual was not helpful with Question 2,<sup>19</sup> on *American Motorists Insurance Co. v. ARTRA Group, Inc.* This case involved the interpretation of a group of insurance policies issued in Illinois but arguably covering environmental risks in Maryland. I found

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17. Casebook, *supra* note 1, at 384.

18. Casebook, *supra* note 1, at 382-83.

19. Casebook, *supra* note 1, at 80-81.

the "answer" in one of SCS's law review articles where he says point blank that the Maryland court (deliberately?) made erroneous assumptions about Illinois conflicts law.<sup>20</sup>

## VII. A SAMPLER

In this section I would like to compare the various casebooks in their approaches to particular core areas of subject matter. First, the *Neumeier* rules, their evolution and subsequent application (material authored by SCS); second, constitutional limits on personal jurisdiction and choice of law (material authored by WCP); and third, choice of law and choice of forum clauses in international contracts (material authored by SCS and WCP).

### A. *The Neumeier Rules*

I commend SCS's decision to trace the evolution of the *Neumeier* rules through New York cases of the Fifties and Sixties, as an excellent example of the common law process. The *Neumeier* rules are controlling only in New York but are influential elsewhere also.<sup>21</sup> *Neumeier* and its progeny are the subject of an entire subsection of the chapter on contemporary approaches to choice of law, about 25 pages in the Casebook. The opinion by Chief Judge Fuld in *Neumeier*, with its numerous references to the law review literature, reveals the profound influence of academic writing.<sup>22</sup>

Of the cases which generalize application of the *Neumeier* rules to torts outside the realm of automobile accidents, I think that the outcome in *Schultz v. Boy Scouts of America, Inc.*<sup>23</sup> is the most difficult to justify to students. SCS's commentary following the case tries valiantly to ease the pain: "Before rebelling against the *Schultz* result, try, if you can, to block from your mind the 'heinous nature of the alleged tortious conduct' and to think in terms of 'conflicts justice.'"<sup>24</sup> True, *Schultz* served to impose discipline on lower courts which were not applying the *Neumeier* rules consistently and to discourage forum-shopping by non-domiciliaries.<sup>25</sup>

20. *Choice of Law in the American Courts in 1998: Twelfth Annual Survey*, 47 Am. J. Comp. L. 327, 343-45 (1999).

21. See Peter Hay & Robert B. Ellis, *Bridging the Gap Between Rules and Approaches in Tort Choice of Law in the United States: A Survey of Current Case Law*, 27 Int'l Law 369, 394 (1993). Cramton's coverage is the most limited of the four textbooks, not surprising in view of Kramer's contempt for the *Neumeier* rules, which add "nothing to choice of law thinking." (Casebook teacher's manual at 86).

22. In his concurring opinion, Judge Breitel protests what he perceives to be the excessive influence of academic proselytizing on the opinion of the court. *Neumeier v. Kuehner*, 31 N.Y.2d 121, 130 (1972).

23. Casebook, *supra* note 1, at 250.

24. *Id.* at 257.

25. See Hay & Ellis, *supra* note 21, at 377. *Cf. Mitchill v. Lath*, where the estimable Judge Andrews opines: "We have believed the purpose behind the rule [the four corners rule of parol

Nonetheless, I would classify *Schultz* with *Peevyhouse v. Garland Coal & Mining Co.*,<sup>26</sup> as a case where the professor, being the authority figure in the classroom, is compelled to justify an outcome he finds personally repugnant. It is one of those rare textbook cases of a wrong without a remedy of any kind for the plaintiffs and their children: the errant priest was not criminally prosecuted; there was no civil recovery of damages; one child committed suicide, the other suffered permanent psychological harm, and the parents divorced.<sup>27</sup> While the case led to heightened awareness of sexual abuse of children and litigation with successful outcomes,<sup>28</sup> it remains a chilling example of the human costs imposed by "strict" application of rules. It did not even tidy up all the jurisprudential loose ends, such as uncertain distinctions between conduct-regulating rules and loss-regulating rules.<sup>29</sup>

### B. Constitutional Limitations

Although the subjects of constitutional limitations on jurisdiction and choice of law are included in civil procedure and constitutional law, they definitely merit review in a conflict of laws class, as WCP notes in the Teacher's Manual.<sup>30</sup> It is important for students to understand that the scope of legislative authority and judicial authority are not co-extensive, and that the U.S. Supreme Court constrains the latter more than the former. Intuitively, broad assertions of judicial jurisdiction should be more easily defensible than flexibility in choice of law, but the U.S. Supreme Court is clearly of the opposite view.<sup>31</sup>

Unfortunately for scheduling purposes, these issues require extended treatment. If only the U.S. Supreme Court had begun and ended its modern exegesis of constitutional limitations with *International Shoe v. Washington*!<sup>32</sup> Today it is thought of as a "jurisdiction" case but really was a "choice of law" case; the two issues were treated as intertwined.<sup>33</sup> However, more than two hundred years after the founding of the Republic, nearly 150 years since the Civil War, and more than half a century after the Great Depression and World War II, the Supreme Court still huddles over issues of states' rights inter se and states' rights vis-à-vis the federal government.<sup>34</sup> The result is often obfuscation rather than clarity. I respectfully disagree with Professor Brilmayer that teaching *Burnham v. Superior Court of*

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evidence] was a wise one not easily to be abandoned. Notwithstanding injustice here and there, on the whole it works for good." 247 N.Y. 377, 380 (Ct. App. 1928).

26. 382 P.2d 109 (Okla. 1962).

27. See Lawsuit Barred in Boy Scout Suicide, May 1, 1985 (Nexis; News Library).

28. See Douglas Martin, *Catholics Turn to Courts In Cases of Priestly Abuse*, N.Y. Times, Feb. 24, 1993, at B4 (Nexis; News Library).

29. See Hay & Ellis, *supra* note 21, at 380-83.

30. Casebook Teacher's Manual at 125.

31. Casebook, *supra* note 1, at 440, 604.

32. 326 U.S. 310, 66 S.Ct. 154 (1945).

33. Casebook, *supra* note 1, at 607-08.

34. See Linda Greenhouse, *Justices to Rule on Right of Women to Sue*, N.Y. Times, Sept. 29, 1999, at A20.

*California*<sup>35</sup> is as simple as "shooting fish in a barrel."<sup>36</sup> Only the Chief Justice and Justice Kennedy joined Justice Scalia without reservation or qualification in the judgment of the Court. Justices White, Brennan, and Stevens each wrote concurring opinions.

As to jurisdiction, the Casebook includes extended excerpts from six U.S. Supreme Court decisions, beginning with *World Wide Volkswagen Corp. v. Woodson*.<sup>37</sup> The chapter closes with *In re DES Cases*, an object lesson in how a strong-minded judge with expertise in complex litigation can cut a wide swath through the jurisdictional jungle. Choice of law also receives generous coverage, beginning with *Home Insurance Co. v. Dick*.<sup>38</sup>

### C. Choice of Law and Forum Clauses in International Contracts

By contrast with Supreme Court jurisprudence on constitutional limitations, this material is straightforward. Starting with *The Bremen v. Zapata Off-Shore Co.* in 1972,<sup>39</sup> the Court has been deferential to choice of law and choice of forum clauses in international contracts, even in standard form, non-negotiated agreements.<sup>40</sup> Similarly, the Court approves the use of alternative dispute resolution. The Court has followed a parallel track domestically by enforcing arbitration clauses in brokerage agreements<sup>41</sup> and ordinary consumer service contracts.<sup>42</sup>

The Supreme Court generally supports the extraterritorial reach of U.S. statutory law. It reaffirmed the "effects" doctrine of territorial jurisdiction—first articulated in *United States v. Alcoa* a half century ago—in *Hartford Fire Ins. Co. v. California*.<sup>43</sup> The Court poses scant restraint to the exercise of legislative or executive authority abroad.<sup>44</sup>

## VIII. CONCLUSION

Though the first year law school curriculum remains largely the same, the upper level elective curriculum has expanded by leaps and bounds.<sup>45</sup> A student can no

35. Casebook, *supra* note 1, at 664.

36. Brilmayer Teacher's Manual at 66. In all fairness to Professor Brilmayer, she is merely following up on Justice Stevens's comment that *Burnham* was "a very easy case."

37. See Casebook, *supra* note 1, at chap. 8.

38. See Casebook, *supra* note 1, at chap. 5.

39. See Casebook, *supra* note 1, at 709.

40. See *Carnival Cruise Lines Inc. v. Shute*, 499 U.S. 585, 111 S. Ct. 1522 (1991), *overruled by statute*, 46 U.S.C. S. Appx.183(c) (1999).

41. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.* 490 U.S. 477, 109 S. Ct. 1917 (1989).

42. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834 (1995).

43. See Casebook, *supra* note 1, at 548.

44. See *W.S. Fitzpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 110 S. Ct. 701 (1990) (act of state doctrine does not bar litigation brought under anti-racketeering statutes); *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S. Ct. 2188 (1992) (allowing DEA abduction of Mexican citizen from Mexico despite existence of extradition treaty); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 113 S.Ct. 2549 (1993) (allowing Coast Guard interdiction of refugees on the high seas).

45. Harvard Law School counts 257 upper-level electives. Brock Brower, *The Law School and*

longer expect to take even a majority of the electives offered in his second and third years. In an environment of rapid change, Professors Symeonides, Perdue, and von Mehren have demonstrated with this new textbook the continuing vitality of their field and have made it accessible to a new generation.