

BOOK REVIEWS

THE LAW OF MULTISTATE PROBLEMS. BY ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN. Boston: Little, Brown & Co., 1965. Pp. lxx, 1646. \$15.00.

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The Law of Multistate Problems is an extraordinary book. It is extraordinary in format, as law school materials go, for it is far more than a casebook: thoughtful, novel and consistently provocative textual notes are employed throughout this 1600-page volume to illuminate the authors' comprehensive and well-edited collection of cases. It is extraordinary in substance, for at least two major reasons. First, it justifies, as no other casebook or treatise has yet succeeded in doing, the integral treatment of jurisdiction, recognition of foreign judgments and choice of law in a single course. Second, it imposes an analytical structure upon the materials (the authors call it a "functional" analysis) which compels a re-thinking of fundamental principles and a heightened appreciation of the functions of legal systems and legal rules. These very virtues make the book a difficult one to use—in mild measure, undesirably difficult because of the elaborate structure of the book which may tend to make teaching from it rather inflexible; but in greater measure difficult in the wholesome manner of seminal works which stretch the mind of the reader. Professors von Mehren and Trautman of the Harvard Law School are to be congratulated for a significant contribution to the Conflict of Laws.

The book is perhaps the most effective educational tool which has emerged from the conflicts renaissance. It is characteristic of that renaissance in its recognition that the quest for uniformity and certainty epitomized in the first Restatement was overemphasized, deceptive and in large measure misguided; that a rational and responsible approach to choice of law must be premised upon an investigation of the rules vying for application and of their underlying policies; and that questions of choice of law, jurisdiction and recognition of foreign judgments all center about the common core not of territorial power but rather of state interest and litigative fairness. In short, the Conflict of Laws is seen not as a body of knowledge and of juridical techniques divorced from those which govern wholly domestic litigation; it rather builds upon the latter, drawing sustenance from the policies underlying

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the rules of tort, contract and property which are to be applied and testing these in a multistate context.

These characteristics help to explain much that is novel in *The Law of Multistate Problems*. Rather than adopt the traditional format within the field of choice of law, *i.e.*, the compartmentalization of the materials into substantive areas, such as torts, contracts, property, trusts, corporations, etc., the authors have drawn from all of these areas when thought appropriate to illustrate a given analytical step in their "functional" analysis. As great an innovation is their opening chapter, designed to introduce the student to choice of law methodology and to highlight the similarities to the methodology of decision in a domestic case, where problems falling within the "penumbra" of legal rules are resolved by an investigation into the purposes of those rules. The "style" of the book is immediately apparent. A textual note puts the subject of the chapter in broad and provocative perspective; selections from secondary sources afford some understanding of the development and purposes of the substantive rules governing a domestic legal problem; interspersed among the cases and texts are difficult questions which give some hint of the vexing (and quite often, presumably unanswerable) questions which lie ahead in the balance of the book.

After opening the second chapter with a survey of different schools of thought in choice of law,¹ the authors focus upon the significance of territorialism in conflicts thinking. The physical location of particular events has had an almost hypnotic hold upon choice of law, and the materials in this section of the chapter raise the question which most characterizes the book: Why? A fine textual note (pp. 59-65) sets forth and evaluates the theoretical and pragmatic support for a territorialist approach to choice of law. It leaves the reader questioning the assumption that the physical location of a transaction in a particular state is in itself an index of that state's interest in the application of its law—even assuming that it affords a clear and administrable test, another assumption left tottering by a perusal of the materials. The reader is further compelled by the cases² and by the authors' questions to evaluate for himself the relevance to choice of law of the simple fact of difference in space between the actor and the legal system whose rules of conduct are sought to be applied to him. This no doubt requires an analysis in the particular case of the purpose of those rules,

¹ Some rather tight editing makes these excerpts tough going. The opinion of Mr. Justice Holmes in *Mutual Life Ins. Co. v. Liebong* (p. 39), barely comprehensible under the best of circumstances, is rendered completely incomprehensible as excerpted. Especially troublesome, for different reasons, is the authors' choice of purportedly representative samples of the thought of the late Professor Brainerd Currie. The excerpts set forth (pp. 58-59) give a somewhat misleading impression by presenting a position which Professor Currie later discarded in material respects, see note 12 *infra*, but which unfortunately serves as the focus for the authors' criticism throughout the book.

² *American Banana Co. v. United Fruit Co.* (p. 65), *Scheer v. Rockne Motors Corp.* (p. 69) and *Steele v. Bulova Watch Co.* (p. 72).

the nature and utility of the actor's conduct, the norms prevailing at the place of conduct, the fairness and foreseeability of applying the "foreign" rule of law.

The chapter ends with a brief statement of the authors' functional analysis in choice of law (pp. 76-79). In its underlying approach, the functional analysis is much the same as that of Professors Currie³ and Cavers⁴ (among others⁵), and in some measure Professor Ehrenzweig:⁶ it requires, for an informed choice of law, an examination of the purposes of the rules vying for application and a determination whether those purposes would be effectuated by application in the case before the court.⁷

In its particulars, the functional analysis of Professors von Mehren and Trautman takes the following form: (1) The court determines the issue in dispute, and then determines which states of those having some relationship to the transaction being litigated have a rule of law on the disputed issue which expresses a policy which would be furthered were the rule applied to the case; any state with "some interest in regulating an aspect" of the case is called a "concerned jurisdiction."⁸ (2) Any such jurisdiction is, however, only prima facie concerned, for it may well be that this jurisdiction, were it able to formulate a rule to govern the issue in dispute, would be willing in light of factors unique to a multistate case to forego the application of the rule which it would apply in a purely domestic case; that jurisdiction's "regulating rule" might thus conceivably be either its own domestic law, the domestic law of another state involved in the case, or a rule especially devised for this multistate case which cannot be found in the domestic law of any concerned jurisdiction. (3) If each "concerned jurisdiction" would adopt the same "regulating rule" for the case, then such is the rule which the court should apply; but even if there remains at this stage a conflict in the regulating rules, despair is not in order, for the conflict can still be resolved in a rational manner either by determining that there is one jurisdiction which is "pre-dominantly concerned" or else by evaluating the "strength" and "sig-

³ B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

⁴ CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965).

⁵ See, e.g., Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215 (1963).

⁶ Ehrenzweig, *The Place of Acting in Intentional Torts: Law and Reason versus the Restatement*, 36 MINN. L. REV. 1 (1951).

⁷ Implicitly rejected is the "jurisdiction-selecting" approach (early attacked in Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933)), of the Restatement Second of Conflict of Laws, which, although conceding the need for a more discriminating analysis of different issues than did its predecessor, refers in the usual case only to a chosen legal system whose law will govern regardless of its content. Compare Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679 (1963).

⁸ The authors are not, however, wholly consistent in the use of the term, sometimes using it to refer to a jurisdiction with a (first-stage) concern expressed in its domestic law, sometimes to a jurisdiction with a concern which survives the second-stage process of formulating a regulating rule. See, e.g., pp. 327-28.

nificance" of the respective concerns. (4) Only those cases which do not lend themselves to a resolution at the third stage (and these will be very few indeed) are properly treated as "irreducible conflicts" and even in such cases the authors make some suggestions for a reasoned and fair disposition. The authors concede that the application of the functional analysis will in many cases present vexing problems for the courts (pp. 299-304), but are convinced (as the reader soon becomes convinced) that the problems are meet for judicial resolution and are, unlike many of the problems posed by the vested rights analysis, at least relevant to the purposes of a rational system of conflict of laws rules.

The functional analysis builds in several respects upon the work of others. What is most significant and constructive is the subtlety and the depth of articulation which the authors bring to their analysis, as well as their suggestive use of traditional case materials. On occasion, as will be suggested below, it might be argued that their construct becomes unrealistically subtle and overly elaborate. But no one can fault the authors with a failure consistently to ask the relevant questions and to suggest solutions which are bound to elicit reader response and reaction. No higher commendation can be given a book designed for use in the law school curriculum, especially in a course frequented by upperclassmen.

Chapter III (comprising some 350 pages by itself) is the key chapter dealing with choice of law, implementing in detail the four-step functional analysis. In keeping with their philosophy that choice of law must begin with a determination of the reach of policies underlying domestic rules of tort, property and contract, the authors wisely supplement the traditional case materials with textual passages illuminating the substantive principles of law being considered.⁹ They also confront the student with a new and basic vocabulary: the "concerned jurisdiction" (not really very different from the "interested state" as normally employed in conflicts parlance), "relating elements" (those elements in a transaction which make it relevant to ask how a particular jurisdiction would dispose of the case), the "direct" concerns of a jurisdiction (those which derive from its rules of substantive domestic law) and its "general" concerns (the concern of a forum in the application of its own rules governing the process of adjudication, the concern of the jurisdiction in which the parties are domiciled for the well-being of its own). The terms are by no means indispensable, but serve a useful shorthand function. The authors' collection of materials in the area of interspousal and intrafamily immunity demonstrates the utility of the functional analysis in uncovering "false conflicts," cases in which the governing rule may be drawn from the domestic substantive law of one state, thus advancing its underlying

⁹ Especially helpful is an extended excerpt from Glanville Williams' "The Aims of the Law of Tort" (pp. 109-15).

policy, without frustrating any applicable policy of any other jurisdiction involved in the case. In such cases, there is only one concerned jurisdiction, and the seeming "conflict of laws" is resolvable at the first stage of the functional analysis.

This analytic approach is not new, but it is novel as a basis for the organization of teaching materials. By breaking away from the topical structure conventional in conflicts casebooks and treatises, the authors have however created some troublesome pedagogical problems. *Gray v. Gray* (p. 117), a familiar interspousal-immunity case, in which the locus of the accident affords the tortfeasor-spouse immunity from suit but the forum and domicile of the parties permit suit, is a fine example of a false conflict: the immunity rule of the locus embodies policies directed at spouses domiciled there or actions between spouses commenced in its courts, and to permit suit in the state of the domicile is not to frustrate the domestic policies of the locus. To reverse the pattern of applicable laws between forum-domicile and locus is to create a "true conflict," or at least a conflict which cannot be resolved at the authors' first stage of analysis. *Mertz v. Mertz* is such a case (p. 121). Surely an attempted resolution of the conflict is demanded at this point. But this requires the use of techniques which the authors would apparently have the teacher hold in abeyance until some later stage of the functional analysis. Perhaps the student should be encouraged to take a tentative step toward a solution even at this early stage, with re-analysis once the later stages are reached.¹⁰

The authors next pass, in treating of those jurisdictions with "general" concerns, to the forum state, and to the question of "substance" and "procedure" for purposes of choice of law. Also introduced is the public policy doctrine, which for the functional analysis poses the question whether the forum, merely as the place where a claim is adjudicated, has a "concern" in the fairness and justice of the rules of law which it applies. The user of the book should not overlook at this point the materials on public policy, procedure and penal laws which unhappily are hiding some 300 pages beyond in the materials on characterization (pp. 461-69).

Having identified those jurisdictions which, because of their domestic rules of law or their relationship to the litigation or to the parties, have evinced a "concern" for the outcome of the case, the authors move on to the second step of their functional analysis. They would have the forum examine each concerned jurisdiction in order to

¹⁰ Whenever the instructor does choose to confront the conflict created by the immunity rule of the forum-domicile and the non-immunity rule of the locus, reference to the recent decision of the Pennsylvania Supreme Court in *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966), is indispensable. In *Johnson v. Johnson*, — N.H. —, 216 A.2d 781 (1966), where the forum was instead the place of injury (which had abolished the rule of interspousal immunity), it nonetheless chose to resolve the true conflict by foregoing the application of its domestic law and applying the immunity rule of Massachusetts, where the parties were domiciled.

determine the "regulating rule" which each would fashion—whether from its own domestic law, the domestic law of some other concerned jurisdiction, or indeed, and most interestingly, a rule which is not found in the legal system of any one jurisdiction but is rather a "multi-jurisdictional" rule, uniquely responsive to the demands of a multistate transaction.¹¹ It is perhaps at this stage that the authors' analysis is most novel and constructive, for they here suggest that the rule which any concerned jurisdiction (whether forum or not) would have regulate the case is not necessarily its own rule of domestic substantive law. The analysis thus parts company with that at one time espoused by Professor Brainerd Currie, who would have had the forum apply its own rule of domestic law whenever the policies which underlie it would be advanced thereby, *i.e.*, whenever the forum is a concerned or interested jurisdiction (p. 58). Professor Currie thereafter abandoned that proposition, and conceded that it was appropriate for the interested forum to re-assess its interest in light of the interests of other states and perhaps to give it a more "moderate and restrained" interpretation.¹² The advance of Professors von Mehren and Trautman beyond this formulation of Professor Currie is that they provide concrete analytical tools to determine *when* a concerned jurisdiction should be willing, in light of the multistate elements of the case being litigated, to depart from its domestic rule in formulating a "regulating rule."

The authors catalogue those policies which may warrant a departure from a state's domestic rule. Some of those policies are relevant in the wholly domestic case, but take on added dimension in the multistate case; others are unique to the multistate transaction. Some of the policies are said by the authors to evince "state" concerns, while others evince "individual" concerns. Space permits but mention here of the policies of reciprocity, facilitation of multistate activity,

¹¹ A recent, striking example of a multijurisdictional rule is to be found in *Credit Bureau Management Co. v. Huie*, 254 F. Supp. 547 (E.D. Ark. 1966), in which the question for decision was the enforceability of a five-year postemployment noncompetition provision. Under the law of Texas, where the contract was executed, a restriction of unreasonably long duration is nonetheless subject to judicial revision, and five years is not deemed unreasonable. Under the law of Arkansas, the forum and the place of employment, a five-year restriction is deemed unreasonable and the court will not save the clause by rewriting it. The federal court fashioned a multi-jurisdictional rule, holding that an Arkansas state court would, because of a strong local public policy, refuse to enforce the five-year restriction as written but would, because of the Texas contacts with the case, employ the Texas technique of saving the provision by rewriting. The court issued an injunction covering a two-year period, although this would not have been the result in a wholly domestic case in either state.

The formulation of such a multijurisdictional rule regarding a single issue in a conflicts case raises analytical and possible constitutional problems akin to those raised when a court, in passing upon several issues, selects the governing rule regarding one issue from one jurisdiction and the governing rule regarding a disparate issue from another. See the discussion at text accompanying notes 34-43 *infra*.

¹² See CHEATHAM, GRISWOLD, REESE & ROSENBERG, *CONFLICT OF LAWS 477-78* (1964) (statement prepared by Professor Currie); B. Currie, *The Disinterested Third State*, 28 *LAW & CONTEMP. PROB.* 754, 757 (1963). See generally M. Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 *CALIF. L. REV.* 845 (1961).

evenhandedness, administrability, effectiveness (the so-called state interests) and the individual's claim to fairness, rationality and workability of legal rules.¹³ These general policies are fleshed out by carefully selected cases and by textual notes. The authors treat the opinion of Justice Traynor in *Bernkrant v. Fowler* (p. 241), involving the question whether the California statute of frauds should control a Nevada business transaction, as an example of a concerned jurisdiction drawing its regulating rule from the law of another state in view of the burden upon multistate commercial activity which would otherwise result. Professor Currie hailed *Bernkrant* for its restrained and moderate attitude toward the application of forum law.¹⁴ The authors' carefully articulated analysis assists the conflicts scholar in even greater measure to appreciate those circumstances in which such restraint and moderation are in order. It also highlights the creative role of the courts in resolving conflicts problems—by the application in part of domestic legal policies and in part of policies, short of constitutional dimension, of peculiar pertinence in the multistate context. Nowhere is this creative role more sharply etched than in the authors' treatment of the multijurisdictional rule, a rule of decision especially fashioned for the multistate case, with its source in the various domestic rules vying for application but with an exact parallel in no single domestic legal system (pp. 313-27).

Once the forum constructs a regulating rule for each jurisdiction, many cases will reveal themselves to be cases of false conflict. This is not the familiar false conflict created when only one state has in its domestic law expressed a relevant concern, but rather is one in which all concerned jurisdictions would fashion the same regulating rule. When there exists a true conflict between regulating rules, the authors proffer means of resolving the conflict. The authors make it clear that they wish to do battle (as have others¹⁵) with the proposition of Professor Currie that the resolution of conflicts between state rules (he no doubt had state domestic rules rather than the authors' "regulating rules" in mind) is not meet for judicial determination. The

¹³ Professor Yntema set forth seventeen policies relevant to the choice of law process, these being reducible to two: security and comparative justice. Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721, 734-35 (1957). The policies endorsed by Professors Cheatham and Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952), were reiterated and updated by Professor Reese, *supra* note 7. Most recently, Professor Leflar has proffered five such policies: predictability of results; maintenance of interstate and international order; simplification of the judicial task; advancement of the forum's governmental interests; application of the better rule of law. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966). Almost immediately, Professor Leflar's approach was applauded and applied by the Supreme Court of New Hampshire in *Clark v. Clark*, — N.H. —, 222 A.2d 205 (1966).

¹⁴ B. CURRIE, *op. cit. supra* note 3, at 718; B. CURRIE, *supra* note 12.

¹⁵ See, e.g., Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); Cavers, *The Conditional Seller's Remedies and the Choice-of-Law Process—Some Notes on Shanahan*, 35 N.Y.U.L. REV. 1126, 1139-40 (1960); M. Traynor, *supra* note 12; Reese, Book Review, 16 U. TORONTO L.J. 228 (1965).

rule of one jurisdiction may be obsolescent (pp. 336-37). The rules of the concerned jurisdictions, although in form contradictory, may in fact be bottomed upon the same policy and thus both point to the same result (pp. 337-40). Each concerned jurisdiction might point to one as the "predominantly concerned jurisdiction" (p. 341). These and other constructive suggestions (pp. 376-78, 392, 394-95, 406-08) for the resolution of true conflicts are tendered by Professors von Mehren and Trautman. They demonstrate convincingly that the resolution is worth attempting, is commonly practicable and is within the range of judicial competence.

The functional analysis, and the authors' selection of illustrative case materials, is eminently illuminating and provocative. But the authors' penchant for classification and for elaborate definition and organization creates some problems—problems not only of pedagogical technique, most of which can be surmounted, but also of a more substantive nature.

Many of their formulations and distinctions have an air of unreality. The notion, for example, that the forum should ascertain a regulating rule for *each* concerned jurisdiction is troublesome. It is usually difficult enough to pinpoint the policy which underlies a given rule of substantive state law¹⁶ and to determine whether that policy will be reinforced by the application of that rule to a multistate transaction. It is almost chimerical to believe that the forum can, with any approach to accuracy, divine the extent to which each concerned jurisdiction would forego the application of its domestic rule in favor of a different regulating rule drawn from another jurisdiction or group of jurisdictions. A more administrable approach, and one which more accurately accords with the manner in which courts actually function—and which will no doubt lead in most cases to the same result as that suggested by the authors—is to have the forum alone investigate the domestic rule of each concerned jurisdiction and test those rules against the multistate policies (facilitation of commercial activity, administrability, fairness, etc.) proffered by the authors. Of course, in so testing the vitality of the various domestic rules in the multistate context, the forum ought not ignore any assistance it may get from conflicts decisions rendered by courts of the concerned jurisdiction in question; in this sense, a "renvoi" (of sorts) may be helpful in resolving a conflict. But in the absence of an already available, relevant and functionally based selection of its "regulating rule" by another jurisdiction—and such absence will be the rule—it does not seem a fruitful or wholly ingenuous enterprise for the forum to purport to fashion such a regulating rule for each jurisdiction involved in the

¹⁶ Compare the views of the various judges writing in *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965), with regard to the policies underlying the Colorado guest statute. See generally Kramer, *Interests and Policy Clashes in Conflict of Laws*, 13 *RUTGERS L. REV.* 523, 540, 550, 554 (1959).

case. In *Bernkrant*, for example, the California court did not purport to determine whether Nevada would have, under the circumstances of the case, foregone applying its domestic rule because of the "relating elements" in California; it was sufficient that, by the forum's own testing of California law against multistate policies, the California law lost its "claim" to application.¹⁷

Issue may be taken, for much the same reasons, with the authors' requirement that the forum determine whether each concerned jurisdiction would focus upon one as predominantly concerned. It is illusory to believe that this can be done with any degree of confidence. It is also illusory to assume that the forum, once determining for itself which state is the one of predominant concern, by a careful analysis of the case and weighing of the respective state policies, will surmise that any other concerned jurisdiction would reach a different conclusion. So long as the forum is objective and presumably enlightened in its selection of the state which it believes to possess the predominant concern, is not that all that can be expected?

Another deficiency worth noting stems from the authors' penchant for abstraction and classification. Their division, into "state" concerns and "individual" concerns, of the policies relevant to the decision of a concerned jurisdiction to depart from its domestic rule is too facile (and, in any event, a dubious analytical aid). The "facilitation of multistate activity," clearly a cardinal policy to be weighed in making a choice of law, is placed by the authors in the category of "state concerns." More accurately, it is a *mélange* of concerns—that of the individual for certainty and planning in commercial transactions, of the state in not impeding the flow of human and tangible resources into its territory,¹⁸ and even more important, of the federal union in the removal of restrictions upon the flow of those resources. The supposed "state" concern for "evenhandedness" also creates analytical difficulties. It raises for the authors the question whether it is wiser, in choosing an applicable legal rule, to treat equally all of the persons living in the same jurisdiction (even those engaged in transactions outside the state) or all of the persons engaged in a common transaction (regardless whether they come from different states). Thus is uncovered the "inherent ambiguity" (p. 255) of the policy of evenhandedness. For this writer, the policy has no independent utility. The resolution of the ambiguity—the determination whether it is the law of the "locus"

¹⁷ Professor Leflar too sees it as the forum's responsibility to examine the domestic policies of the respective states in the light of his proffered "choice-influencing considerations." See note 13 *supra*. The court in *Clark v. Clark*, — N.H. —, 222 A.2d 205 (1966), followed suit.

¹⁸ Cf. *Lilienthal v. Kaufman*, 239 Ore. 1, 15, 395 P.2d 543, 549 (1964): "It is in Oregon's commercial interest to encourage citizens of other states to conduct business with Oregonians. If Oregonians acquire a reputation for not honoring their agreements, commercial intercourse with Oregonians will be discouraged. If there are Oregon laws, somewhat unique to Oregon, which permit an Oregonian to escape his otherwise binding obligations, persons may well avoid commercial dealings with Oregonians."

of the transaction which should govern the rights of the parties to it or whether it is the law of the parties' residence which should govern—can be made only by examining the underlying policies of the respective laws in their domestic context and, if there is a true conflict, by attempting to resolve it by application of the relevant multistate policies, such as facilitation of multistate commercial activities. That is the only way to answer the question whether a Texas woman should be sheltered by a Texas rule of wifely incapacity when sued in Texas on an obligation contracted by her outside the state (pp. 259-61), and whether a Connecticut automobile rental agency should be subjected to vicarious liability under the law of that state for the torts of the borrower committed elsewhere (pp. 261-63). Indeed, in the latter case, who is to say whether the "transaction" which will subject all parties thereto to an "evenhanded" rule is the Connecticut rental agreement or the foreign tort? It is in fact not clear why evenhandedness is placed by the authors among the "state" concerns relevant to the formulation of a regulating rule. If evenhandedness is a "state" concern because of the desire of the state to encourage respect for the objectivity of its legal processes,¹⁹ then it seems clear that that concern will be amply effectuated whenever the court gives a reasoned statement—by reliance upon policies drawn from domestic and multistate contexts, without any reference to evenhandedness—of the manner in which it has made its choice of law.

The materials on choice of law are rounded out by chapter IV, which deals with the contemporary relevance of the familiar but largely discredited subjects of characterization, incidental question and renvoi. Most provocative is the authors' treatment of renvoi.²⁰ The troublesome doctrine is dusted off and given a significant role to play in a functional choice of law analysis. But this is not the renvoi which raises the spectre of the *circulis inextricabilis*. The streamlined version requires that the forum examine the conflict of laws rules of another jurisdiction in order to delineate the extent to which that jurisdiction would itself apply its domestic law in a multistate context. The forum is thereby aided in ascertaining the measure of the foreign state's concern in the transaction being litigated. The traditional renvoi technique required the forum to apply the "whole law" including the conflicts law of another state (without any prior examination of that state's domestic law) so as to mirror the disposition its courts would make of the particular case. The authors' use of the conflicts rules of the foreign state is, however, to assist in resolving the threshold question of the reach of state concerns.

¹⁹ To this extent, this concern is congruent with what the authors have classified as the "individual" concern for fairness and rationality in multistate rules (pp. 284-85).

²⁰ An earlier presentation of these views may be found in von Mehren, *The Renvoi and Its Relation to Various Approaches to the Choice-of-Law Problem*, in *XXTH CENTURY COMPARATIVE AND CONFLICTS LAW* 380 (Nadelmann, von Mehren & Hazard ed. 1961).

A fine note (pp. 549-52) on renvoi in a "period of transition" raises among other questions the interesting one of the relevance of the conflicts rules of a particular foreign state to a functional choice of law when that state still clings to the vested rights philosophy of the first Restatement. Can such a conflicts rule be said accurately to provide a measure of the foreign state's "concern" for the application of a domestic rule in this multistate case? Assume that a plane bearing a passenger domiciled in state *X* is on the return leg of a roundtrip flight out of *X* and crashes in state *Y*, near the *X* border. Suit for wrongful death is brought by the survivors of the *X* domiciliary in a court of state *F*, full compensatory recovery being sought as provided under the law both of *F* and *X*. The defendant seeks to limit recovery to \$3000, pursuant to the law of state *Y*, where the plane crashed.²¹ Is the forum to discount the apparent "concern" of state *X* for full compensation because there is a conflicts decision rendered in *X* which has held the *Y* limited-liability rule to govern? If, in looking to the *X* decision foregoing the application of its own law, the *F* court could say that this was a product of a functional determination of state *X*'s concern, then presumably *F* should defer to that determination because made by the ultimate interpreters of *X* law and policy, the courts of *X*. What, however, if the *X* court decided to forego the application of its own law because state *Y*, the place where the plane crashed and the passenger was killed, was the only state, under the Restatement systematics, with "legislative jurisdiction" over the transaction? *F* could conclude that in making a choice of law its own (*F*'s) evaluation of the reach of state concerns, based on a reasoned analysis, should govern; a misapprehension on the part of state *X* of the possible reach of its own law should not deter the *F* court from doing justice in this case. There is much to be said for *F* so doing, for *X*'s choice of law rule is obviously not in terms an expression of the desired reach of its domestic law. The *F* court does, however, have the obligation to determine whether the *X* court's use of the "place of wrong" rule was in fact thought by the *X* court to coincide with its own estimate of state interests. Cases such as *Mertz v. Mertz* (p. 121), *Kilberg v. Northeast Airlines, Inc.* (p. 146) and *Grant v. McAuliffe* (p. 329) show that a court may speak the language of outmoded characterization while evincing a true concern for the underlying transaction by the application of its own law.²² Professors

²¹ The "hypothetical" is patterned after *Long v. Pan American World Airways, Inc.*, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965).

²² *Mertz* has in fact been thus "re-constructed" by the New York Court of Appeals in *Intercontinental Hotels Corp. v. Golden*, 15 N.Y.2d 9, 203 N.E.2d 210, 254 N.Y.S.2d 527 (1964), as has *Kilberg* by the Court of Appeals for the Second Circuit in *Pearson v. Northeast Airlines, Inc.*, 307 F.2d 131, 136 (dissenting opinion), *adopted on rehearing en banc*, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963). For the views of Justice Traynor on his opinion for the court in *Grant*, see R. Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 670 (1959). See generally Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956).

von Mehren and Trautman themselves, in their excellent note on the "connecting factors" which dominated the Restatement approach (pp. 178-209), show that these were bottomed in many respects, often covertly, upon considerations relevant to a functional analysis. Our hypothetical state *F* should thus be cautious in rejecting the "old fashioned" rule of state *X* as though it were completely irrelevant to the "functional" question before it. Moreover, the possibility of state *F*'s applying a rule of law different from that which the courts of state *X* would apply to the same case (especially when state *X* has the greatest concern with the welfare of the plaintiffs) gives rise to the possibility of forum shopping, the discouragement of which should no doubt be one multijurisdictional policy in any functional choice of law analysis. Perhaps, however, forum shopping is a small price to pay for the sort of development in choice of law which might well result were *F* to employ its own functional standard and apply the domestic law of state *X*. This would in turn furnish a pointed clue to state *X* in the next case that its adherence to the philosophy of the old Restatement should be re-examined.

The Law of Multistate Problems next presents materials on jurisdiction and on recognition of foreign judgments. This is not to say that the materials on choice of law are forgotten. Indeed, one of the outstanding features of the book is the constant reference to problems of choice of law as a means of illuminating the areas of jurisdiction and recognition. The illumination is in fact so great that the reader becomes immediately and firmly convinced that to treat jurisdiction and recognition before choice of law—as it is commonly done in casebook and textbook—is an unpardonable pedagogical blunder. Once familiar with the authors' suggested approach to choice of law—as critically analyzed and refined in the classroom—the student, assisted by the authors' provocative text and questions, is far better able to grapple with such questions as: What are the state and individual concerns which should be considered in allocating judicial power among various jurisdictions? How are these concerns related to those relevant to a proper choice of law? How are these concerns affected by the rendition of a judgment in another jurisdiction?²³

A most searching, but difficult, essay at the outset of the chapter on jurisdiction sets forth the authors' view regarding the relationship between choice of law and jurisdiction (pp. 599-601). The authors appear to suggest that, ideally, the concern of a jurisdiction with a multistate transaction will be tested and effectuated in the choice of law process. If all jurisdictions employ the functional analysis, such

²³ As a suggestive predicate for the materials on jurisdiction and judgments in the multistate dimension, the authors expose the reader to the problems of allocating judicial business (by rules of competence and venue) and giving preclusive effects to judgments (by rules of *res judicata* and collateral estoppel) within a single jurisdiction (pp. 553-86).

that the choice of law process is fluid and the location of the litigation will not affect the choice of law, then the rules of adjudicatory jurisdiction can be based on other factors: the relationship between the forum state and the parties, and considerations relating to the conduct of a trial and the enforcement of judgment there. To the extent that the choice of law process does not function freely (such as in divorce, crimes, workmen's compensation),²⁴ then a state's concern with the transaction (as contrasted with its relationship to the parties and with litigation considerations) will properly govern the question of adjudicatory jurisdiction.²⁵

This formulation of the relationship between choice of law and adjudicatory jurisdiction contrasts markedly with that of Professor Ehrenzweig.²⁶ Ehrenzweig's emphasis upon choice of forum law as the norm is complemented by proposed rules of jurisdiction which allocate power to adjudicate to some "convenient" forum, which in the normal case will be a state which—in the nomenclature of von Mehren and Trautman—has a "concern" in the case because of its relationship to the transaction being litigated. The Ehrenzweig model thus approaches the kind of case which Professors von Mehren and Trautman would view as atypical and as not particularly desirable: the case in which there is some clog or "egocentricity" in the choice of law process. To the extent that egocentric choice of law is an element in Professor Currie's philosophy, there too the authors would have to countenance a departure from their ideal of allocating judicial business solely on the basis of the relation of the forum to the parties and its convenience from the point of view of trial and enforcement. Time and space do not here afford ample opportunity to delve into the merits of this dispute. Something is of course to be said for a court's applying a rule of law with which it and counsel are familiar. Much more, however, can be said—at least in a federal union such as ours—for a willingness by the forum to evaluate impartially the concerns which foreign states as well as itself have in a particular litigation and to apply a rule which will best accommodate those concerns, even though that rule may be unfamiliar. Nor is it a negligible virtue to counter whenever possible the disrespect for law which may flow from the foreknowledge that the result of a case will differ avowedly solely because of the location of the lawsuit—at least when the difference is attributable to factors other than the respective concerns of each forum with the administration of its courts. The logical result of the Ehrenzweig proposition is that, in order to guarantee that rules of

²⁴ See the excellent note, pp. 84-90.

²⁵ The authors elaborate on their thesis in von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

²⁶ See CHEATHAM, GRISWOLD, REESE & ROSENBERG, *op. cit. supra* note 12, at 478-79 (statement prepared by Professor Ehrenzweig); EHRENZWEIG, *CONFLICTS IN A NUTSHELL* 42-43 (1965); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 312-14 (1956).

adjudicatory jurisdiction will afford some assurance that the application of forum law will be reasonable, the threshold jurisdictional determination may necessarily have to turn upon a particularized examination and weighing of state policies.²⁷ But it is surely far more desirable to allocate judicial authority in a manner with which the parties can readily comply, which will be relatively easily administrable by the courts (either the court asserting jurisdiction in the first instance or any court called upon to enforce a judgment rendered by a court whose jurisdiction is subject to collateral attack), and which will not require an examination even akin to one upon the merits of the case (especially when such an examination might lead to dismissal, delayed initiation of an action elsewhere and difficult problems of *res judicata* in any new forum).

The authors' main contribution in this chapter is their application of a functional approach to test the accepted standards for allocating adjudicatory authority among various jurisdictions. They probe for the nature of the relationship between a jurisdiction and the parties to or subject matter of a dispute which warrants subjection of the defendant to suit there, whether on all causes of action or only those stemming from that very relationship. The authors prod the reader to articulate the functional justification for founding jurisdiction to adjudicate any cause of action against the defendant of whatever nature (what the authors call "general" jurisdiction) upon the traditional bases: presence within the state at the time of service, domicile, consent to suit. They conclude that a person's domicile or permanent residence is the sort of strong affiliation with a state which most justifies subjecting him to suit there as a general matter. It might be objected that the domicile of a corporation, its state of incorporation, is too tenuous a basis for jurisdiction because of its technical nature; but it has the distinct virtue of providing the plaintiff with one single certain forum. By putting such questions as whether general jurisdiction to adjudicate might properly be lodged in the *plaintiff's* home state, thus adopting the practice employed in France and reversing the traditional common law jurisdictional bias in the defendant's favor, the authors really require the reader to test some unspoken assumptions.²⁸ The same is true when the authors deal with *Pennoyer v. Neff*²⁹ and more generally with the wisdom of using the defendant's property within the state as a basis for "general" jurisdiction which is limited to the value of the property. Again, the continental practice is most illuminating,

²⁷ That this is all too realistic a possibility is revealed by the opinion of Judge Maris, writing for the Court of Appeals for the Fifth Circuit, in *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344 (5th Cir. 1966).

²⁸ Compare von Mehren & Trautman, *supra* note 25, at 1164-79.

²⁹ The authors' claim to novelty of approach is conclusively established by the inclusion of *Hanson v. Denckla*, 357 U.S. 235 (1958), *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *Pennoyer v. Neff*, 95 U.S. 714 (1878)—in that order! (Pp. 602, 644, 675.)

for in Germany the defendant's property, whatever its value, will furnish a basis for "unlimited general jurisdiction" and thus a potential personal liability far in excess of the value of the local property.³⁰ It becomes clear in any event that whatever might be suggested as a functional reason for using land as a touchstone for limited general jurisdiction (and the authors think that there is precious little to be said for it, a view held increasingly by others³¹), the "quasi in rem" jurisdiction which is based upon tangible personal property within the jurisdiction and intangible property with its "situs" there has even more dubious a justification today.

In a section of the chapter dealing with "departures from normally accepted jurisdictional bases," the authors have compiled an especially suggestive collection of "door-closing" cases—cases involving trespass to foreign real property, the "internal corporate affairs" doctrine, the ordering of affirmative activity outside the forum state, and the enforcement of an unfamiliar or cumbersome foreign remedy and of foreign tax claims. All are tied together by an assumed inability (on the part of the forum) of the choice of law process to function properly, the authors thus once again effectively relating the problems of choice of law and adjudicatory jurisdiction. There can be little doubt that in large measure judicial reluctance to handle such cases is no longer evident, and that where once rules of jurisdiction (both constitutional and discretionary) were employed to regulate the fair adjudication of these cases, today there is an increased willingness to treat such actions as "transitory" rather than local, to allocate them according to standards of fairness and convenience rather than according to fixed notions of a single proper forum and to regulate the rights of the parties through more flexible choice of law rules.

Chapter VII, "Recognition of Foreign Judgments," provocatively and profoundly outlines in its introductory notes problems enough for a full course: a comparison between recognition of judicial judgments and nonjudicial determinations (pp. 833-34); the interrelation between jurisdictional standards and recognition practice, and between recognition practice and choice of law (pp. 836-40); a comparison between recognition of judgments in the "international" sense and *res judicata* in domestic litigation (pp. 835-36). A key problem is posed at the outset, again a fundamental one requiring the dusting off of some unspoken assumptions, and again suggested by the civil law experience (more particularly, Germany's): Why, in the United States, do we generally restrict the forum in an action upon a foreign (both interstate and international) judgment to a re-examination of the

³⁰ A short but provocative note (pp. 682-83) shows how this very question was handled in the United States, before the adoption of the fourteenth amendment, under the full faith and credit clause.

³¹ See, e.g., Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962). Compare Hazard, *A General Theory of State-Court Jurisdiction*, in 1965 SUPREME COURT REVIEW 241 (Kurland ed. 1965).

jurisdiction of the rendering state (at least when never litigated there) but not of the choice of law made there? As noted, the authors treat recognition as of a pattern with choice of law and jurisdiction, each concept being tested in the crucible of state concern. For them, the crucial question in recognition practice is the extent to which the propriety of the recognizing state in giving effect to its concern is in some way mitigated once the issue in question has been adjudicated in the rendering state. So phrased, the wisdom of precluding relitigation becomes in large measure a function of the basis for jurisdiction in the rendering state, the choice of law made there (pp. 984-87), the issue being litigated, changed circumstances since the entry of judgment, etc. This theme carries through the later materials on full faith and credit (pp. 1458-66).

In the final chapters of *The Law of Multistate Problems*, the authors filter the problems of choice of law, jurisdiction and recognition through the institutions of our federal system.³² What limitations are placed by the federal Constitution (more particularly, the due process and full faith and credit clauses) and by the nature of our federal system upon the freedom of the constituent states in choosing the applicable law, in allocating judicial business and in effectuating judgments rendered in sister states? Apart from some perplexing organizational decisions by the authors,³³ these chapters maintain the same challenging level of presentation which characterizes the book. The authors have compiled a most helpful and conveniently packaged discussion of the full faith and credit clause, drawing largely

³² Chapter VIII, "Authoritative Sources of Substantive Law in a Federal System," is a departure from the usual conflict of laws subject matter. It is an application of the authors' functional approach to the problems created within a federal system in the formulation and enforcement of substantive rules of law, problems normally covered in the law school curriculum in the course in Federal Jurisdiction. The three broad areas of investigation are these: (1) What are the respective state and federal concerns which should determine the content of substantive rules to be applied in the courts within the federal union? (2) What is the relationship between the allocation of competence between state and federal government to make rules of substantive law and the competence to enforce those rules in their respective courts? (In effect, this is a study of federal-court enforcement of state-created rights, and state-court enforcement of federally created rights.) (3) What is the legitimate scope of "procedural" rules in federal court litigation of state claims (the *Erie* problem), and in state court litigation of federal claims? This states only in broadest outline the type of problem which is treated with sophistication by the authors and which provides an interesting parallel to their treatment of these relationships as between tribunals of coordinate authority. Unfortunately, the chapter is almost guaranteed to be the prime candidate for excision by the harried teacher of Conflict of Laws. This is one price which must be paid by the progenitors of a 1600-page book designed for use in the typical conflicts course.

³³ It is not, for example, wholly clear what the authors had in mind in organizing § 4 of chapter IX as they have (a typical subheading being "Limitations Upon Federal Power Over State Formulation of Allocating Rules in the Exercise of Adjudicatory Jurisdiction," p. 1343), other than to parallel the organization of chapter VIII, see note 32 *supra*; nor is it wholly clear why the cases in § 4 (*Tennessee Coal, Iron & R.R. v. George*, *Hughes v. Fetter*, and *Missouri ex rel. So. Ry. v. Mayfield*) are not in § 3 (the "Allocation of Adjudicatory Jurisdiction Among the States"); nor why many of the cases in § 3 are in this chapter (such cases dealing with the limitations imposed by the federal system upon the *subject matter* jurisdiction of the state courts).

upon secondary works (pp. 1222-41), and trace in a fine textual note (pp. 1247-58) the relatively active role carved out for it by the United States Supreme Court in years past (regarding shareholder assessments, fraternal benefit societies, insurance and torts). The contemporary significance of this constitutional provision for choice of law is called into question by the familiar string of workmen's compensation cases starting with *Bradford Elec. Light Co. v. Clapper*,³⁴ and the more recent decisions of the Supreme Court in *Clay v. Sun Insurance Office* (p. 1300) and of the United States Court of Appeals for the Second Circuit in *Pearson v. Northeast Airlines, Inc.* (p. 1287). Perhaps the most provocative question regarding the current vitality of the full faith and credit clause is the extent to which one state may constitutionally fashion a "hybrid" rule to govern a multistate case by applying certain provisions of a foreign statute and ignoring other provisions (or replacing them by rules of law drawn from another state). In *Pearson*, New York conflicts law created a hybrid wrongful death rule in which the underlying liability was drawn from the law of Massachusetts, the place of the fatal plane crash, but the rule regarding extent of recovery was drawn from the law of New York.³⁵ The dissenting judges thought this such an emasculation of the overall scheme of liability under the Massachusetts wrongful death statute as to constitute a denial of full faith and credit to that act.

The most recent chapter in the history of that constitutional provision as a restriction upon choice of law is the decision of the United States Supreme Court in *Crider v. Zurich Insurance Co.*,³⁶ rendered after publication of the book under review. There too the issue was the freedom of the forum to fashion a rule for litigation drawn only in part from a foreign statute. An employee injured in Alabama commenced an action in the Alabama federal court against his employer's insurer, relying upon an earlier state-court default judgment secured directly against the employer. That earlier Alabama action was based upon the Georgia Workmen's Compensation Act, despite an express provision in that act requiring that claims thereunder be processed through the Georgia compensation board. In the federal court action against the insurer, the court concluded that the default judgment was void as beyond the subject matter jurisdiction of the

³⁴ (P. 1266); *Alaska Packers Ass'n v. Industrial Accident Comm'n* (p. 1268); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n* (p. 1272); *Carroll v. Lanza* (p. 1274).

³⁵ This "hybrid" rule was a hybrid in theory only. In practical effect, its content was in all material respects identical to the New York domestic rule (i.e., complementing the unlimited ceiling was a measure of recovery based upon compensation, not culpability as under the Massachusetts statute). It did not, therefore, partake of the attributes of what Professors von Mehren and Trautman denominate a "multi-jurisdictional" rule, see note 11 *supra*. This fact, it is submitted, makes *Pearson* far less troublesome than the dissenters there believed, and clearly distinguishable from the type of problem presented in *Crider v. Zurich Ins. Co.*, discussed at text accompanying notes 36-43 *infra*.

³⁶ 380 U.S. 39 (1965).

Alabama state court and therefore subject to collateral attack by the insurer; such was the effect under Alabama law of the failure to honor the Georgia remedial-administrative provision. The United States Supreme Court reversed, concluding that the Alabama law voiding the earlier judgment was premised upon an erroneous belief that the full faith and credit clause required deference to the Georgia remedial provisions. The Court treated as squarely binding its earlier decisions regarding choice of law in workmen's compensation cases; those cases had held that the state of employee residence and injury has such a strong interest in affording relief that its law may properly be applied there despite an exclusive-relief provision of some other relevant compensation act. The Court also noted *Tennessee Coal Co. v. George*,³⁷ in which it held that full faith and credit did not require deference to the localization provision of a foreign statute with regard to litigation arising from railroad accidents there.

The Supreme Court speaks to questions of conflict of laws but rarely. How unfortunate that on this rare occasion, the Court produced as obscure, misleading and unilluminating an opinion as it did in *Crider*. One would hardly realize, from a reading of the opinion, that the case dealt not with the constitutional power of a state to apply its own compensation statute and to administer it through the adjudicatory tribunal designated by that statute, but instead with the constitutional power of a state to afford in its own courts relief under the compensation statute of another state in the face of provisions in that statute for administration through a specialized local agency. The state of injury certainly has a concern for the well-being and compensation of one injured there, especially when he is a domiciliary. Cases such as *Alaska Packers*,³⁸ *Pacific Employers*³⁹ and *Carroll v. Lanza*,⁴⁰ viewed by the Court as in substance "on all fours" with the situation in *Crider*, dealt only with the question whether the state of injury might effectuate this undoubted interest by choosing to apply its own law (with the concomitant jurisdictional implication in each case that the state of injury could properly afford relief there through its own tribunals). There was thought in those cases, in effect, to be no countervailing interest—either in the policy of some foreign state related to the case or in any policy inherent in our federal union—in requiring that deference be given a rule of law in that foreign state making relief under its compensation statute exclusive (even assuming the exclusivity provision to be intended for multistate rather than purely domestic purposes). This resolution of the constitutional problem is especially satisfactory in light of the power of the foreign state, if sufficiently related to the transaction, to effectuate its own interest by affording

³⁷ 233 U.S. 354 (1914) (p. 755).

³⁸ 294 U.S. 532 (1935) (p. 1268).

³⁹ 306 U.S. 493 (1939) (p. 1272).

⁴⁰ 349 U.S. 408 (1955) (p. 1274).

the employee additional relief under its own more benevolent statute in a subsequent compensation proceeding there.⁴¹

The problems actually raised by *Crider* are of a completely different dimension. Even interpreting the Alabama rule regarding the defect of subject matter jurisdiction in its courts as one based upon an assumed constitutional compulsion rather than upon an independent state policy (an interpretation convincingly repudiated by the dissenting judges and by the Court of Appeals for the Fifth Circuit upon remand⁴²), this constitutional question is far more complex than the Court was willing to acknowledge. The defendant in *Crider* conceded that the injured employee could, consonant with the Supreme Court's workmen's compensation cases, choose to enforce in the appropriate Alabama tribunal a claim under the Alabama common law or workmen's compensation statute. But does this answer the question whether Alabama may choose to effectuate its interest in the transaction by affording its own courts to the employee seeking relief under a foreign law exclusively administered there by a nonjudicial tribunal? The answer is by no means clear. Once granted that an Alabama court or agency can grant relief under its own law, the strength of its interest in the granting of some other form of remedy becomes more attenuated. Conversely, the interest which Georgia has espoused in the expeditious and uniform application of its compensation law through a specialized agency, an interest shared by an employer subject to that act, may be undermined when the act is administered by a judicial tribunal of general jurisdiction in another state, possibly without access to the same sorts of data (factual and legal) which the Georgia agency would use. For these reasons too, the analogy to *Tennessee Coal Co. v. George*, in which the foreign venue provision was simply an attempt to localize an ordinary tort action triable before an ordinary judicial body, is similarly remote.

That is not to suggest that the *Crider* result is wrong, and that it does indeed violate the full faith and credit clause when one state ignores the special remedial provisions of a statute while giving effect to its underlying provision of liability. It may well be that such a hybrid rule for litigation is constitutionally unobjectionable, at least in the absence of the rule's resulting in such a violent distortion of the purpose of the foreign statute as to be arbitrary and unfair⁴³—and perhaps even in such a case, the defendant's objection will smack more of lack of due process of law than denial of full faith and credit. What is distressing is that the Supreme Court, despite the admonition of Mr. Justice Goldberg in dissent, completely ignored

⁴¹ See *Industrial Comm'n v. McCartin*, 330 U.S. 622 (1947) (p. 1455).

⁴² *Crider v. Zurich Ins. Co.*, 348 F.2d 211 (5th Cir. 1965), *cert. denied*, 382 U.S. 1000 (1966).

⁴³ Compare the dissenting opinion of Judge Friendly in *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, 564 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

these differences between *Crider* and the earlier cases, completely failed to shed any light upon the relevance of the full faith and credit clause to this increasingly important problem of "hybrid" rules, and provided little incentive for the lower courts to be more discriminating in their analysis of conflicts problems. In this area of the law, so clearly touching upon the sensitive relationship between states and so clearly demanding that extra measure of judicial statesmanship which should be the hallmark of the Court presiding over our federal judicial system, the lack of a more edifying performance is gravely disappointing.

The penultimate chapter of *The Law of Multistate Problems* deals with what is customarily known as recognition of sister-state judgments, but what the authors choose to label the "effect of prior adjudication on choice of law in a federal system." Their treatment is of a piece in quality and substance with their earlier chapter on recognition practice, and effectively unites the problems of choice of law, jurisdiction and recognition of judgments within a federal system. This is immediately obvious in the manner in which the authors frame the subject matter of the chapter: "the extent to which the existence of a prior adjudication alters the way in which the various interests of sister states are to be accommodated" (p. 1420). In effect, the authors seek to balance on the one hand the power of a state (a second forum passing upon a matter which has been the subject of litigation elsewhere) to apply that rule of law which will best effectuate its legitimate interests, and on the other hand the need in a federal system for repose and for the unified treatment of state judgments. Full faith and credit, representative of the latter policies, is therefore treated by the authors not as an absolute but rather as one consideration, admittedly of great significance, which may be overborne if the concerns of the recognition state are in the circumstances especially meritorious and can be effectuated only by relitigation. The authors thus consider the choice of law in the original forum as of crucial relevance to the application of the full faith and credit clause. For if that state's choice was particularly disregarding of the concerns of the recognition state (even though not so much so as to run afoul of the Constitution), or where the litigation involves a continuing transaction or status and the recognition state was not "in the picture" at the time of the first adjudication and its concerns could not therefore have been considered in the first court's choice of law, then perhaps the recognition state should not be denied the power to assume jurisdiction of the case and to effectuate its concerns through a new choice of law.⁴⁴ This provocative view of federal recognition practice departs from the traditional understanding that only questions of jurisdiction in the rendering court are normally subject to collateral examination elsewhere, and

⁴⁴ For an earlier analysis along the same lines, see the excellent article by Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153 (1949).

that the resolution of the merits of the case by a court with jurisdiction, including its decision as to the applicable law, is immune from attack. What the authors are doing, in effect, is to countenance a control over choice of law which is short of constitutional control (*i.e.*, when the first forum's choice of law disregards the concerns of the second state but not in such an egregious manner as to constitute a failure of due process), and which is exercised by means of recognition practice and collateral review rather than in the first instance by appellate review.

The authors' analysis, comparable to that in their chapter on foreign-nation judgments, is more troublesome in the context of our federal system. Certainly, the full faith and credit clause should not be viewed as an unqualified imperative. But the judicial institutions within our federal system should provide a sufficient guarantee of fair accommodation of state concerns in any given litigation such that collateral attack elsewhere should be most severely restricted. The parties are able to have decisions which are made by the first forum regarding choice of law screened through the appellate system of that state and ultimately in the federal Supreme Court. The defense of forum non conveniens and, in the federal courts, a motion for transfer have become increasingly available to the defendant who is victimized by an unsound assertion of jurisdiction which may have as an unfortunate concomitant an equally unsound choice of law.⁴⁵ And, as the Supreme Court has noted in a related context, there is in any event no guarantee that the decision in the second forum will be any more meritorious than that in the first.⁴⁶

The problem at hand is represented well by the familiar case of *Fauntleroy v. Lum* (p. 1420), which becomes something of a *bête noir* for the authors (pp. 1466, 1481). It is for them a case in which an improper jurisdictional nexus (transient presence) was combined with an improper choice of law (the first forum confirming an arbitral award enforcing a gambling debt contracted in the recognition state contrary to the public policy there), thus arguably justifying the recognition state's effectuating its own concerns through relitigation. Given the fact that the concern of the recognition state was in existence and obvious at the time of the suit on the arbitral award, that the choice of law question seems merely to have been one regarding the allowable grounds for overturning such an award (rather than the broader-ranging question whether gambling debts contracted in the recognition state and unenforceable there may be enforced initially by direct suit elsewhere), that the choice of law could have been screened on appellate review, and that there was no reason to be suspect of the

⁴⁵ Even in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), the Supreme Court stated that the conflict of laws rules of the transferor court might not necessarily apply when a state court there would have dismissed the action on the grounds of forum non conveniens. *Id.* at 639-40.

⁴⁶ *Sherrer v. Sherrer*, 334 U.S. 343, 350 (1948), quoting from *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938).

impartiality of the adjudicatory process as a whole in the first forum, there should be little reason to overcome the ordinarily applicable impulse toward repose and nationwide recognition which is embodied in the full faith and credit clause. That jurisdiction in the first court was based "nonfunctionally" upon transient service may be, as it is for the authors, a special reason to be alert to possible abuses in the choice of law process. But that fact alone, and even in tandem with the other circumstances of *Famileroy*, does not warrant a re-examination in a collateral proceeding, rather than on appellate review, of the adjustment of state concerns which is made by the first forum. There is no reason to think that the job will in the nature of things be better done the second time around. This is not, of course, equally true when the subject matter of the litigation is a continuing relationship, especially one of significance for the community, such as a family relationship, which becomes the object of "concern" by a new state after a completed litigation elsewhere. In such a case, the authors' admonitions regarding a flexible approach to full faith and credit are especially well taken.⁴⁷

The Law of Multistate Problems is clearly designed for the law school and those who dwell within. Because of its analytical organization, its difficult textual notes and its overall "functional" orientation, it will not be the conflicts source first sought by the practitioner or the hasty researcher. This, despite its detailed index and its table of contents of novella length. Little harm done. The practitioner and hasty researcher have at their disposal a number of current and serviceable treatises, topically organized, with ample black letter. The work of Professors von Mehren and Trautman must be judged, as a course-book and as a contribution to legal scholarship, by different standards—standards which they themselves have now established at a robustly high level.

⁴⁷ In the final chapter of the book, the authors collect an assortment of familiar cases dealing with family relations. The student is certain to come to the chapter with an analytical framework of ample sophistication, reinforced by the authors' probing questions, such that the materials will afford an opportunity to test the application of the functional analysis in its various forms.

SECURITY INTERESTS IN PERSONAL PROPERTY. By GRANT GILMORE. Boston: Little, Brown & Co., 1965. 2 volumes. Vol. I—Pp. xxxiv, 651. Vol. II—Pp. xiii, 857. \$45.00.

Homer Kripke †

“Of making many books there is no end.” We may be sure that with the widespread acceptance of the Uniform Commercial Code by one state after another, there will not soon be an end to the commercial publishers’ output of books on the Code, some of them of very dubious merit. The bar is, therefore, particularly fortunate that the first full-scale treatise on a major portion of the Code is Professor Gilmore’s *Security Interests in Personal Property*. This work will deservedly preempt the field in the area covered until the Code is substantially amended or until there is a significant body of judicial decision worthy of discussion.

As I faced the problem of writing this review, my mind polished nicely rounded phrases of general praise for the book; but that kind of review has been forestalled by Harvard’s official encomium, making this treatise a co-winner of the Ames Prize for lawbooks published in 1965. It is, therefore, necessary to get down to specifics.

It should be said frankly that this book will not efficiently serve the limited goals of the lawyer approaching article 9 without previous experience or the lawyer checking anxiously for a single narrow point. In either of these situations there are more suitable reference materials. For the latter purpose the text of the statute is obviously the easiest and best source, provided the practitioner has a grasp of the relatively simple structure of article 9. However, for the lawyer who is either totally unfamiliar with the article, or anxious to check his conclusions, there are several elementary expository texts published by the ALI-ABA Joint Committee on Continuing Legal Education and similar state institutes. In addition, there is Dean Hawkland’s notable two-volume work, *A Transactional Guide to the Uniform Commercial Code*. Although more penetrating than these other research tools, its approach, as indicated by its title, makes it useful for quick uncomplicated inquiry. Each of these sources will, in most cases, yield an answer to a simple mechanical question more readily than Professor Gilmore’s treatise. But for the lawyer who has to probe more deeply into the overall structure, the underlying concepts and the relations between the various articles of the Code, or between such related concepts as “bona fide purchaser” of a security and “holder in due course,” there is nothing to match the Gilmore work.¹ There are only

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¹ Unless it be some of Professor Gilmore’s law review articles. See, e.g., Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954), only part of which is incorporated in this book.

two works in the field fit to be discussed on the same plane. Dean Hawkland's meritorious work is limited to the scope expressed in the title. While Mr. Coogan's two-volume collection, *Secured Transactions*,² remains indispensable for its in-depth analysis of particular problems, it does not claim the comprehensiveness of Professor Gilmore's treatise.

Security Interests in Personal Property is a massive undertaking. It is a thorough, all-embracing study of the several forms of chattel security, their history and their relationship to the law of sales, of negotiable instruments, of nonnegotiable choses, of documents of title and of letters of credit. The vast erudition of other leading scholars, such as Dean Hawkland, Professors Braucher, Honnold and Mentschikoff, has not been put on paper in comprehensive works, but only in casebooks or in relatively simple expository texts of the kind mentioned. Only in the present treatise do we find all these problems correlated at the level of maximum scholarly analysis, by one who, as the principal draftsman of article 9, is specially equipped to analyze its meaning in the light of its background.

Not the least important aspect of this scholarly view is Professor Gilmore's unique penchant for historical analysis. I was amazed at how often I felt that I had really understood little about many fields in which I had thought I was at home before I studied them in the historical perspective provided by this book. It would be very wrong to assume that the text of the Code wipes the slate clean and that prior statutes and prior case law are irrelevant. For a long time to come the old case law will be consulted not only where the Code seems to incorporate it, but also because the courts will have a natural tendency to interpret the Code so as to preserve established rules. More important, for those who believe that article 9 is not perfect and may in the future have to be changed, the lessons of the past will continue to be relevant. Yet old decisions have a habit of becoming meaningless to the modern lawyer who cannot recreate their context of thought. The nineteenth century decisions on corporate trust indentures and corporate "capital" as a trust fund have long demonstrated this phenomenon. An example closer to home is the case of *Zartman v. First Nat'l Bank*,³ where we find a mixture within one opinion of concepts which later analysis has fractionated into the free hand mortgage doctrine, the economic advisability of encumbering current assets, the after-acquired property clause, accessions, the purchase-money priority and the right of a mortgagee to rents before possession taken. It is fortunate that Professor Gilmore has squeezed the juice

² COOGAN, HOGAN & VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE (1966).

³ 189 N.Y. 267, 82 N.E. 127 (1907). See also its predecessors, *New York Sec. & Trust Co. v. Saratoga Gas & Elec. Light Co.*, 159 N.Y. 137, 53 N.E. 758 (1899); *Rochester Distilling Co. v. Rasey*, 142 N.Y. 570, 37 N.E. 632 (1894).

from the history of these concepts and the forms of security devices, and preserved for us their historic setting and meaning before that meaning vanishes with the loss of the nineteenth century context.

Professor Gilmore writes with the depth found in the best law review writing, surveying the meaning, intended meaning, the deficiencies of language of the Code and predecessor statutes and the appropriate interpretation of the language as it exists. Not infrequently, and especially where the Code impinges on the Bankruptcy Act, his conclusion is that even when read "in a cheerful spirit," the language is far from perfect. Those of us who struggled as Professor Gilmore's advisers in the drafting of article 9 were surprised at how intractable the material proved to be. It was easier to cure old problems than to avoid creating new ones. Again and again, to paraphrase the words of Professor Higgins, we thought, "By George, we've got it!" But the next time around, or later, after the text was officially finished, new difficulties appeared.

Therefore, throughout this book, as in Mr. Coogan's book, there are mild suggestions for amendment and restudy of article 9. The decorousness of these suggestions conceals an undercurrent of tension on this subject. The Permanent Editorial Board of the Code has until now sponsored only patchwork amendments since its establishment, and it has appeared, at least *sub silentio*, to reject all law review and treatise suggestions for amendment. While there is reason to hope for a change in the Board's attitude, concrete proof of such a change has not yet appeared. The resulting tension is revealed more plainly in book reviews than in treatises. In his review of the Coogan book, Professor Gilmore said:

Mr. Coogan has not, however, conceived it to be his duty to act as an apologist for the Code. Nor does he believe that the way to deal with hard problems is to sweep them under the rug. In the law review articles which have become chapters of his book, he was the first commentator to draw attention to a number of serious problems to which Article 9 returns no answer or a wrong answer or a doubtful answer.

. . . .

. . . . We are painfully coming to learn that cities, once built, must be continually rebuilt. In the same way, our statutes and our codes, once drafted, must be continually re-drafted. Fifty years ago the National Conference of Commissioners could launch a new Uniform Act and then forget about it for a generation. Today that cannot, in all decency, be done.

The Code will be amended. The only question is whether the process will be carried out wisely or, as has so

far been the case, improvidently. State variations from the "official" text of the Code are already becoming—as in California—a serious threat to any idea of national uniformity. The refusal of the sponsoring organizations to consider ways and means of dealing with the problem does nothing to discourage eccentric and usually ill-informed action by individual states.

. . . . It is also vital that the revisors accept the idea that amendment and revision are not merely confessions of past error, to be hushed up; they are the conditions of a dynamic growth in the largely codified law of the second half of this century.⁴

The opposing position may be called the "go slow with amendments" view. It is, basically, that the Code is a fine job which ought not to be denigrated by overemphasis on deficiencies that are alleged to be largely theoretical or even imaginary. It appears in print most clearly in the writings of Ray D. Henson, Esq., of Chicago,⁵ with whom the reviewer has had friendly disagreement on the subject over the years. Only time will tell us how well article 9 and the Code as a whole will wear under the stress of a period of depression and business bankruptcies. Fortunately, it is believed that there will soon be a structure for getting at the job of restudy on an organized and sponsored basis, instead of depending on the individual feats of analysis of such men as Professor Gilmore and Mr. Coogan.

In seeking to appraise Professor Gilmore's present views on change, it is interesting to go back nearly twenty years, to the beginning of the Code drafting process, and to see Professor Gilmore then forecasting where we would be today. In an article published in 1948,⁶ when only the Sales article of the Code had been exposed to public view, he pointed out that a supposition of face-to-face transactions had underlain the common law of sales and that failure to realize changing circumstances had made the Uniform Sales Act obsolete at the time it was written. He cautioned that we could not assume that trends

⁴ Gilmore, Book Review, 73 YALE L.J. 1303, 1306, 1308 (1964).

⁵ See his less than enthusiastic reviews of Coogan in 49 CORNELL L.Q. 703 (1964), and of Gilmore in 52 A.B.A.J. 471 (1966). Compare also his airy dismissal of the subordination problem in Henson, *The Problem of Uniformity*, 20 BUS. LAW. 689, 692-94 (1965), with others' struggle with that problem, Coogan, Kripke & Weiss, *The Outer Fringes of Article 9: Subordinations, Security Interests in Money and Deposits, Negative Pledge Clauses, and Participation Agreements*, 79 HARV. L. REV. 229 (1965). Also compare his ready answers to priorities and proceeds problems, Henson, "Proceeds" Under the Uniform Commercial Code, 65 COLUM. L. REV. 232 (1965); Henson, *Priorities Under the Uniform Commercial Code*, 41 NOTRE DAME LAW. 425 (1966), with the reviewer's difficulties with these problems. Kripke, *Suggestions for Clarifying Article 9—Intangibles, Proceeds and Priorities*, 41 N.Y.U.L. REV. 687 (1966).

⁶ Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341 (1948).

current during the Code drafting period were visible and understandable to those so close to the scene, and that too great detail and inflexibility in the new statute would produce similar problems of obsolescence, and would force a rewriting of such a code every twenty-five years or so.⁷

Gilmore feels that Karl Llewellyn would have adhered to his view that the Code should have been kept general, but that the pressures of the practicing lawyer participants in the drafting process made the Code increasingly detailed.⁸ We are thus driven back to his prediction that the Code would need revision every twenty-five years.

In less than twenty years since that warning, in only fourteen years since the Code was promulgated as a finished product, we have had to patch it to deal with the problems of stock clearing corporations,⁹ security interests in airplanes of foreign carriers,¹⁰ transmitting utilities,¹¹ financing through ship charters,¹² bookkeeping through computers¹³ and subordinations.¹⁴ There are other problems still to be faced: how to treat under the Code air-shipped goods which arrive before the shipping documents, how to adjust the warranty and tort

⁷ *Id.* at 1354-59.

Another point which shows Gilmore's prescience in 1948, as well as his humor, was his warning to the draftsmen of the Sales article of the Code that a statutory draftsman, like a dog, is entitled to only one bite, and that if he cannot say what he means in the statute, he should not be given a second chance in Official Comments. *Id.* at 1355. Had his advice been followed, the Comments to the Sales article would not have remained a debated and confusing aspect of the Code's law of Sales. See HONNOLD, *CASES ON SALES AND SALES FINANCING* 17-19, 27 (2d ed. 1962); Peters, *Remedies for Breach of Contract Relating to the Sale of Goods Under the Uniform Commercial Code*, 73 *YALE L.J.* 199, 205 (1963); Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 *WIS. L. REV.* 597.

⁸ Gilmore, *In Memoriam: Karl Llewellyn*, 71 *YALE L.J.* 813 (1962); Gilmore, *Book Review*, 73 *YALE L.J.* 1303, 1308 (1964). The reviewer has noted the tendencies in similar fashion:

Having guarded against conceptual jurisprudence, the draftsmen were equally concerned against adopting fixed rules of law which could make the Code become obsolete too rapidly. . . . It is fair to say that the draftsmen of the Code had an anticodification or antistatute predilection. They did not want to codify the law, in the continental sense of codification. They wanted to correct some false starts, to point the law in the indicated directions, and to restore the law merchant as an institution for growth only lightly kept in bounds by statute. . . . Where the practitioners wanted problems answered in the statute, the draftsmen were content to leave the answers to the judicial process.

Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 *U. ILL. L.F.* 321, 329, 331, 332.

⁹ *UNIFORM COMMERCIAL CODE* § 8-320.

¹⁰ *Id.* §§ 9-103(2), (5). Both of these sections are optional.

¹¹ Persons closely connected with the Uniform Commercial Code drafted a statute providing for a special filing rule for "Transmitting Utilities" which has been adopted by six states. See, e.g., *WYO. STAT. ANN.* §§ 37-64.1-4 (Supp. 1965).

¹² *N.Y. UNCONSOL. LAWS* ch. 416, §§ 2, 3 (McKinney Supp. June, 1966). These sections amend §§ 9-105 and 9-106 of the Code.

¹³ *N.Y. UNIFORM COMMERCIAL CODE* § 9-105(1)(j).

¹⁴ *N.Y. UNCONSOL. LAWS* ch. 416, § 1 (McKinney Supp. June, 1966), adding § 1-209 to the Code.

theories of products liability to reach the manufacturer without immolating the passive and helpless dealer handling packaged or technological products.¹⁵ As another example of changing technology, Professor Gilmore has argued that financing by assignment of contract rights not yet matured by performance is a recent development since the Code was drafted, except in the specialized field of building contracts, and in this area the Code controls problems only dimly foreseen in the drafting.¹⁶ The implication is that some time the Code will have to deal with these problems in a more informed fashion.

One should not conclude without mentioning that the book is not only profitable but pleasurable to read. It goes back to other great legal treatises of prior periods which had the flavor of the author's personality, not of dust from the publisher's sawmill. Grant Gilmore has a gift for a sharp dry turn of phrase in conversation, and more than most persons, he preserves it in the printed page. Other reviews have quoted examples, and I will indulge myself in the pleasure of picking three more:

The foregoing disclaimer is not meant to leave the impression that the author feels himself to be a minority of one, even though membership in such a minority is not always a thing to be despised. (P. 1283.)

[Speaking of equitable liens:] The English language is over-blessed with words which mean several unlikely things at the same time. English poetry no doubt benefits from the possibility of shorthand multiple reference but legal analysis does not. (P. 198.)

Thus by the typically muddle-headed process of thinking known as the genius of the common law, assignments of intangibles were made effective in fact while basic theory still proclaimed them to be legal impossibilities. (P. 202.)

Above all, Professor Gilmore does not display a defensiveness in his discussion of article 9 or an unwillingness to admit errors or

¹⁵ Several states have amended § 9-318 of the Code to expand the area of warranty liability. The New York legislature passed such a bill in 1966, which Governor Rockefeller vetoed. The reviewer participated in drafting a letter on behalf of committees of the Association of the Bar of the City of New York (cited by the Governor), which pointed out the desirability of further judicial exploration before this topic is frozen by statutes.

¹⁶ Gilmore, *The Assignee of Contract Rights and His Precarious Security*, 74 *YALE L.J.* 217, 221 (1964):

If . . . a draftsman has to deal with problems which can hardly be guessed at, arising under a vaguely perceived shift in practice, which may or may not prove to be permanent, it will only be by the purest of accidents or the most divine of inspirations that his contribution will be either right or helpful.

This article appears as chapter 41 of the work under review.

deficiencies because of his own part in the drafting.¹⁷ To borrow a quotable passage spotted by Professor King's eagle eye, Gilmore disposes of an article 9 Comment with the remark: "With deference, as Judge Learned Hand used to say, the author, in his capacity as treatise writer, would like to suggest that, in his earlier capacity as Comment writer for Article 9, he overshot the mark." (P. 345.) No doubt a quibbler might argue that in some of his statements on the business developments affecting the history of his subject, or in his views on the course of future decision or amendment, he has sometimes overshot the mark as treatise writer. But certainly not often. For longer than the period of influence of the shadowy Jones to whom the author pays tribute,¹⁸ chattel security law will bear the imprint of the analysis in this book.

¹⁷ This attitude stands in welcome contrast to that of Professor Williston, at least in his old age. In apparent response to Gilmore's comments on the obsolescence of the Uniform Sales Act at the time Williston drafted it, (discussed in text accompanying notes 6 & 7 *supra*), Williston stated:

It is argued in support of the Code that the existing uniform acts on negotiable instruments, on sales, and on documents of title were drafted many years ago, that they not only contained defects at the time when they were drafted but that changes in modern business situations and methods demand new laws. The answer to this argument, so far as concerning the law of sales of goods, is that, *in the main, customs of buying and selling have not changed*

Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 563 (1950). (Emphasis added.) This was written when we were well into the era of high speed mass distribution and prepackaging.

Perhaps the finest achievement of the Sales article in remedying obvious defects of prior law was in the area of the statute of frauds. Williston, however, argued that the changes were all wrong and destroyed the happy uniformity of the American law with that of the British countries, which he said should be permanently preserved. *Id.* at 573-74. Williston's unawareness of obsolescence was demonstrated when the British repealed their statute of frauds covering the sale of goods only four years later.

¹⁸ "I should like to acknowledge my own debt to the authors of these forgotten works—particularly to one Jones of whom I know nothing except that he wrote half a dozen remarkable books." (P. ix.) Gilmore quotes with a straight face a ridiculous purple passage from Jones on Chattel Mortgages and Conditional Sales to the effect that conditional sales go back to the earliest days of the human race and represent a basic human liberty, and he merely adds: "Nevertheless, the conditional sale has not generally had a good press." (P. 62).