

Spring 2023

Conflict of Laws: Final Exam

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Available for download:	Wednesday, April 26, 2023 Starting at 8:15 EDT
Must be electronically submitted:	Wednesday, April 26, 2023 due 8 hours after download or by 4:30 p.m. EDT , whichever is earlier

The exam mode is TAKEHOME. This exam is 7 pages long. Please check to see that you have all 7 pages.

MATERIALS

This exam is completely open-book and open-note. While taking it, you may consult any digital or paper materials that you find helpful. That said, you must not consult anyone else, employ AI software, or do new research on the Internet during the exam. *Your exam must be entirely your own work.*

By submitting your exam answer(s), you acknowledge the above instructions, and certify that the work you are submitting is your own, that you have not received unauthorized assistance on the exam, including unauthorized use of AI (such as ChatGPT and other large language models), and that you have followed applicable rules, including rules for accessing reference and other materials during the exam.

ANONYMITY

Exam4 automatically prints your Anonymous ID and word count on the exam. The exam may be administered to some students at different times, so don't discuss its contents with anyone until after the exam period ends.

To help with the anonymous grading of separate questions, *please use the "Answer Separator" function* to distinguish one question from another.

Harvard prohibits student contact with faculty in regard to the scheduling or administration of an exam for that student in particular before, during, and after the exam, until the student's grade is posted. Such contact is prohibited even if the anonymity of the student's exam is preserved; this policy extends to communications to the full class. As a result, I'm not allowed to communicate with you, including through email or the course website, while the exam is in progress or until the posting of final grades. (I will, however, be thinking about you guys!) In case of emergencies, *contact the Registrar's Office instead.*

CONTENTS

This exam consists of **two essay questions**. Your answers are limited to **3000 words** in total. This is a strict limit; additional words won't be read. (This isn't intended as a penalty, but as a uniform way of ensuring fairness across different answers.)

Of course, you aren't required to write that much, and brevity is appreciated. Make sure to watch your word count, so that you don't find yourself making substantial cuts in the last few minutes.

Each question is accompanied by a point value, a recommended time allocation, and a recommended word limit. These are only recommendations! Allocate your time and words in whichever way seems best to you.

SUGGESTIONS

In general, please follow the advice given in John H. Langbein's *Writing Law Examinations*, available on the website. A few specific recommendations:

- (1) *Make sure that you read each question carefully.* Pay attention to the point values: they signal how important each question will be. The time allocations assume that you'll reserve thirty minutes at the beginning to read the whole thing, thirty minutes for lunch, and thirty minutes at the end for proofreading, all of which I encourage you to do. I'd also encourage you to spend up to one-third of your time on each question just sketching out the answers with pencil and paper before starting to type. If you just dive in, you'll get lost halfway.
- (2) *Organize your answers clearly.* You don't need to follow any particular format with rigor (IRAC, etc.), but it greatly helps to identify an applicable legal standard before applying it. Stating conclusions clearly will also be helpful to me when grading. Mentioning individual rules, statutes, or cases can sometimes serve as useful shorthand, but chapter-and-verse citations are a waste of your time. In the words of the now-repealed Federal Rule of Civil Procedure 84, the model answers available on the course website "illustrate the simplicity and brevity that these [instructions] contemplate."
- (3) *State the substance accurately.* If a particular legal standard hasn't received any substantial attention either in the book or in my lectures, it's unlikely to be tested. That said, the exam is open-book and could require close parsing of a provision we haven't addressed at length—or, indeed, at all.
- (4) *Apply the doctrine as it stands today.* As noted on the syllabus, the exam doesn't ask things like "how would this case have been decided in 1872?" It only tests on the law as it is understood in the courts of the United States as of the date of the exam, including any recent developments or statutes.
- (5) *Unless you're given specific details to the contrary, you may assume:* that every party is properly served; that every pleading is properly pleaded; that all filings are timely; that every motion, brief, or response presents the best available arguments for its position; and so on. Don't try to invent new and helpful facts or law not mentioned in the exam.
- (6) *With respect to conflict of laws in particular, unless you're given specific details to the contrary, you may assume:* that each state uses the conflicts principles listed in the chart in the Coursepack; that states relying on the Second Restatement have adopted any rules the textbook describes as belonging to the 1988 revised version thereof; and that each state's long-arm statute extends its personal jurisdiction as far as the U.S. Constitution allows.

- (7) *If there are issues that seem inconclusive or that require more information, you should say so.* Some of them may be intentional! Likewise, not every issue suggested by the fact pattern is necessarily relevant to the question asked; discussing irrelevancies will only cost you time.
- (8) **This one is very important:** *When listing reasons why a particular result would be legally correct, don't give just one; give as many as are correct, even if just one of them would be enough to win or lose on that issue. Don't assume that I'll know you know the basics; show me that you do!*

GRADING

Answers will be graded on your understanding and analysis, as well as on clarity of exposition. Individual questions will be curved, to reward those who do well on harder questions, and then the exam as a whole will be curved. Final grades will be calculated in compliance with the syllabus and with Harvard's grading policies, both written and customary.

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Good luck!

— START OF EXAM —

Q.1: “Of Herbs and Sued Rabbit” (54 pts, ≈3.5 hr, ≈1600 words)

John McGregor lives on a farm in Burrillville, R.I., near the joint border of Connecticut, Massachusetts, and Rhode Island. Noticing that his farm had been overrun by rabbits, McGregor searched online for a means of driving them away. He found a website called “Herbs of Northeast America,” which costs GBP£10 to access. McGregor paid with his dollar-denominated credit card, entering his home address in Rhode Island for billing. The website described milkweed herbs as useful in driving away rabbits, so he planted a large number of milkweed seeds around the garden’s exterior.

Unfortunately, milkweed is an invasive species. The plants soon spread to neighboring gardens and lawns, including that of Paula da Silva of Thompson, Conn. And while whorled milkweed (*Asclepias verticillata*) is unattractive to rabbits, common milkweed (*Asclepias syriaca*) is highly edible. The rabbit population exploded, and McGregor’s vegetable crop was destroyed, along with da Silva’s prize-winning crocuses.



Fig. 1. The eastern cottontail rabbit, *Sylvilagus floridanus*. (Walter Sigmund, CC-BY-2.5)

Fig. 2. An eastern cottontail enjoying produce (artist’s conception). (Public domain)

While driving to McGregor’s farm to complain about her flowers, da Silva was distracted by a family of gamboling rabbits just past her driveway and crashed into a tree, severely damaging her car and resulting in a long

hospital stay. Given Connecticut’s famously plaintiff-friendly tort laws, she plans to sue McGregor for millions in compensatory and punitive damages, as well as for an injunction requiring him to dig up his garden and to trap any rabbits nearby. She also plans to name as defendants Herblore plc, the British operator of the website, as well as Hornblower Enterprises Ltd, its parent company. (Herblore is almost bankrupt, except for a small checking account with the Rhode Island Trust Co.’s Burrillville branch; Hornblower’s assets are all in British banks.)

McGregor plans to defend the lawsuits and to assert crossclaims against the British companies, seeking contribution for their misleading him about milkweed. He plans to assert claims of breach of contract, breach of the implied warranties of merchantability and fitness for a particular purpose, and common-law negligence. While the First Amendment generally forbids the government to impose liability on a merely negligent provider of information to the public, most other nations have no such protections. (Paragraph 107 of the website’s terms of service—which McGregor chose not to read before clicking “I Agree”—states that “we make no warranties regarding the accuracy of this information,” that “this agreement shall be governed by the laws of the United Kingdom,” and that “all related claims shall be litigated in the High Court of Justice in London.”)

Without knowing more about the internal laws of the various jurisdictions, **assess the potential fora in which these claims might be asserted, the choice-of-law decisions these courts might make if they reach the merits, and the likelihood of successfully enforcing any resulting judgments.** (You may assume that the United Kingdom still follows European Union rules on choice of law; and if there are other facts or law that you’d need to know, or something you’re not sure of, just say so.)

Q.2: “Domicile” (*46 pts, ≈3 hr, ≈1400 words*)

The following three questions address the concept of domicile of natural persons. **Answer *all three* of the following, and explain your answers.**

- (a) What role does domicile play in the field of conflict of laws?
- (b) In which areas, if any, should conflict of laws rely on domicile to a greater or lesser extent?
- (c) In which areas, if any, should the concept of domicile be replaced by one of “habitual residence” for a particular period (say, six months)?

(Reminder: Your exam answers, in total, should not exceed 3000 words.)

— END OF EXAM —