

# Robert Leflar, Judicial Process, and Choice of Law †

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## I. INTRODUCTION

This Symposium rightly honors Robert Leflar's immense contribution to the field of conflicts of law. He is most famous, of course, for his seminal work on "choice-influencing considerations"<sup>1</sup> and for his eminently useful treatise on conflicts.<sup>2</sup> His long career in conflicts scholarship spanned two-thirds of a century, and his personal influence and scholarship touched significantly all who write and practice in the area.

However, Leflar's contributions to the legal profession had another side not as well-known to conflicts scholars, but perhaps of greater importance and influence in the larger world. Robert Leflar wore many other legal hats. He was a law reformer *par excellence* and a teacher and colleague of judges. He was a professor, a law school Dean, and an appellate judge. He was, in short, someone deeply interested in both how the law worked and how it should work.

This paper explores the relation between those two sides of Robert Leflar. In particular, we explore how his "judicial process" side influenced his "conflicts" side, especially the choice-of-law part of the conflicts side. The thesis is simple: Leflar's

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1. Robert A. Leflar, *Choice-Influencing Considerations in Choice-of-Law*, 41 N.Y.U. L. REV. 267, 279 (1966) [hereinafter "*Choice-Influencing Considerations*"]. See also, Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584 (1966) [hereinafter "*More Choice-Influencing Considerations*"].

2. ROBERT A. LEFLAR, ET AL., *AMERICAN CONFLICTS LAW* (4th ed. 1986) [hereinafter "*The Treatise*"]. The first edition was published in 1959. Professors Robert Felix and Luther McDougal became co-authors for the fourth edition, published in 1986.

long association with law reform and judicial education led him to adopt a very pragmatic approach to judicial decision-making. That approach is reflected in his choice-of-law scholarship in a strong emphasis on creating a practical framework to guide judicial inquiry, rather than on devising an elegant but unworkable set of rules designed to cabin judicial discretion. Leflar, in other words, tried to identify those factors that judges should use and actually do use in deciding cases, and then urged that those concerns be used openly by judges. Doing so, Leflar believed, would both enhance predictability and make precedent more reliable.

Leflar's pragmatism also shows in his impatience with arcane choice-of-law theorizing, especially given all of the competing demands on a judge's time. As Leflar wrote in discussing various proposed methods of resolving choice-of-law cases, in what is perhaps the most quoted passage in his writing:

[A]nalysis of governmental interests, dominant contacts, most significant relationships, principles of preference, choice-influencing considerations, and (often but not always) preference for the forum's own law would all ordinarily lead to the same conclusion as to who should win the case. Only states like New York would be so bedeviled by opposing academic theories that, attempting analytical integrity, they would let results be much affected by shifting from one modern approach to another. Most courts do not have time, or take time, for such nice distinctions, though a few, after preliminary fumbblings, have adopted some one definite approach and have stuck with it.<sup>3</sup>

It is hard indeed to get more practical than that. Choose any academic theory you want, Leflar instructs the judges; they will all lead to the same result. Just tell your audience what you are doing and stick with it.

## II. LEFLAR AND THE JUDICIAL PROCESS

Before examining the effect of Leflar's experience with the judicial process on his conflicts scholarship, it is important to

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3. Robert A. Leflar, *Choice-of Law A Well-Watered Plateau*, 1977 LAW & CONTEMP. PROBS. 11-12 [hereinafter "A Well-Watered Plateau"].

consider that “other life,” at least in summary.<sup>4</sup> Fortunately, it is a relatively easy task to trace Leflar’s roots in the judicial process. Not only did he write numerous articles about many subjects,<sup>5</sup> including judicial decision-making, he also wrote a professional memoir, *One Life in the Law*,<sup>6</sup> which is both easily readable and highly informative. From these sources, Leflar’s judicial philosophy emerges clearly. In a nutshell, he was a great believer in the ability of common law judges to reach sensible results, if they are left free to do so and not constrained by artificial rules. The corollary to that freedom, he maintained, was responsibility—judges must state freely the true basis for their decisions in order to enhance predictability and accountability. The next few pages trace some of the influences on Leflar’s view of the judicial process.

#### A. A Life in the Law

Throughout his career Leflar immersed himself deeply in the myriad workings of the law. He was, of course, for many years, a professor and Dean of the University of Arkansas School of Law. Later, he also became a professor at New York University Law School (while remaining a professor in Fayetteville). But Leflar transcended the ivory tower.<sup>7</sup> He served as the Arkansas representative on the National Conference of Commissioners for Uniform State Laws (“NCCUSL”) beginning in 1945, eventually becoming a NCCUSL “life mem-

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4. It is true, of course, that there is a chicken-and-egg problem. Did Leflar’s views on judicial process influence his views on choice-of-law or vice-versa? No doubt there was some traffic both ways, but we believe Leflar’s choice-of-law writings reflect his long pragmatic training in judicial process.

5. Leflar’s scholarship was both voluminous and multi-faceted. This paper only touches on some of his works, omitting some significant writing in torts and other areas, which a full examination of Leflar’s jurisprudence necessarily would include. Among Leflar’s work, for example, is a memorable article on the school desegregation cases, published just before the Supreme Court handed down the decision in *Brown v. Board of Education*, 344 U.S. 1 (1954). See Robert A. Leflar & Wylie H. Davis, *Segregation in the Public Schools*, 67 HARV. L. REV. 377 (1954). The article addressed, with a good deal of foresight, the implementation problems that would accompany a desegregation order.

6. ROBERT A. LEFLAR, *ONE LIFE IN THE LAW* (1985) [hereinafter “ONE LIFE”].

7. These were perhaps contrary influences to his development as a legal pragmatist. For reasons that certainly need no explanation, service as a law school professor is not likely to make one a realist. To anyone likely to read this article, we have no comment on the salutary effect, if any, of being a Dean of a law school.

ber.”<sup>8</sup> A fully engaged participant in NCCUSL’s work, he chaired the committee that drafted the Uniform Registration of Foreign Judgments Act,<sup>9</sup> and was active in drafting the many Uniform Acts dealing with conflicts problems that NCCUSL has adopted during the past half-century. Service as a NCCUSL Commissioner is likely to make one a pragmatist. After all, NCCUSL’s job is to turn out a product which can be sold to both legislatures and interested academic and practicing elites. A proposed Uniform Act long on theory but short on wisdom is not likely to have a long shelf life.<sup>10</sup>

Leflar also spent much time in law reform in Arkansas and elsewhere. Law reformers, at least those who persist, are pragmatic by nature. Leflar helped rewrite the criminal laws of Arkansas,<sup>11</sup> for example, and for a long time he directed a school for Arkansas legislators.<sup>12</sup> That latter task must have tried sorely even Leflar’s sturdy pragmatist soul. One of his most prominent law reform roles was his service as president of the Arkansas Constitutional Convention in 1968, where he helped to put together a proposed new Arkansas Constitution, and later watched the proposal die because of special interest pleadings and voter indifference.<sup>13</sup> The description of this experience in his memoirs suggests that it was quite painful; not only was a great deal of effort wasted, but the manner of the proposal’s death (voter indifference) must have been especially traumatic to a pragmatist like Leflar.<sup>14</sup>

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8. ONE LIFE, *supra* note 6, at 61-69.

9. *Id.* at 233-36.

10. The experience of one of the authors testifying before a NCCUSL committee considering the proposal that eventually became the Uniform Interstate Family Support Act confirms this. The committee was deeply concerned about how sympathetically trial court judges would view the suggested changes in interstate child support enforcement; any suggestion that a trial judge would likely deem unfavorable received little support from the Commissioners.

11. ONE LIFE, *supra* note 6, at 14.

12. *Id.* at 16.

13. *Id.* at 74-82.

14. This trying experience, a serious attempt at constitutional reform followed by the same defeat at the polls, took place again in the late 1970s. See ONE LIFE, *supra* note 6, at 20.

## B. Training Judges

Leflar deeply immersed himself in the everyday problems of judges. For example, he served on the blue ribbon committee that crafted and promulgated the Code of Judicial Conduct, a code eventually adopted in all fifty states.<sup>15</sup> Even more prominent, however, was his role in judicial education. For three decades, beginning in 1956, he directed the New York University Institute for Appellate Judges, which ran a series of seminars for appellate judges.<sup>16</sup> The seminars, as might be expected, had a highly practical curriculum. Leflar was not one to waste the valuable time of a group of judges with ruminations about the nature of justice. He had more serious goals in mind, as an outline of the topics covered in a "typical" seminar makes plain.<sup>17</sup> The seminars went beyond the usual updates and refreshing on new developments in substantive law and sought to train the judges in their bureaucratic capacity ("administration of justice") as well as in proper decision-making techniques. The typical seminar devoted little if any time to legal theory.

As a teacher of judges, Leflar thought deeply about the judicial function. He also absorbed the lessons that his judge-pupils taught him about how they practiced their craft. This process was inescapable; Leflar enlisted many of the excellent judges who attended the seminars to help teach in the program. Frank Keniston of New Hampshire, Roger Traynor of California, and Walter Schaefer of Illinois were, according to Leflar's memoirs, a few of the participants that made especially valuable contributions to the Institute. It is easy to believe that Leflar learned much from them. Moreover, the traffic apparently went both ways. In *Clark v. Clark*,<sup>18</sup> for example, the New Hampshire Supreme Court adopted Leflar's choice-influencing con-

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15. *Id.* at 46-49.

16. He described the seminars this way:

Two of these seminars, lasting two weeks each, are held each summer. The Senior seminar is primarily for judges of state supreme courts and of the United States Courts of Appeals, the other is for judges of state intermediate appellate courts. Some twenty to twenty-five judges plus five or more faculty members, mostly appellate judges themselves, make up the membership of each seminar.

Robert A. Leflar, *The Multi-Judge Decisional Process*, 42 MD. L. REV. 722 (1983) [hereinafter "*Multi-Judges*"].

17. See ONE LIFE, *supra* note 6, at 25-37.

18. 222 A. 2d 205 (N.H. 1966).

siderations for resolving choice-of-law questions. The timing of that decision makes it clear that Chief Judge Kenison, the author of the opinion and one of the judicial teachers in the NYU seminars, had been in correspondence with Leflar concerning his soon to be published scholarship on choice-influencing considerations.<sup>19</sup>

Last, but by no means least, Leflar was an appellate judge himself, having served on the Arkansas Supreme Court in the late 1940s. Although he had little to say about that experience in his memoirs,<sup>20</sup> it is apparent from his later writings that his judicial career deeply impressed on him both the difficulty and importance of holding together as many members as possible of a multi-judge bench.<sup>21</sup> Again, that is a lesson about practicality and pragmatic advocacy—not theory.

### C. Leflar's Philosophy of Judging<sup>22</sup>

What sort of judicial philosophy did Leflar's judicial process career produce? The answer appears clearly in the title of his most significant statement on the issue. Anyone who writes an article entitled *Honest Judicial Opinions*<sup>23</sup> is wearing his heart on his sleeve. Leflar expressed his judicial philosophy quite often, and quite succinctly:

An opinion that breaks new ground is more honest if it sets out that fact clearly, and does not pretend that it is merely applying settled law. *Lawyers and other judges can be misled by that pretense.* [S]imply stated, neither precedent

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19. The authors are indebted to Professor Robert Felix for pointing out that the decision in *Clark* was issued late in 1966, and that the two choice-influencing considerations articles were published that same year. See *supra* note 1. In other words, unless Chief Judge Keniston was *really* current on his scholarship, some back-door connection between the professor and the judge must have taken place.

20. See ONE LIFE, *supra* note 6, at 16-17.

21. This is most easily seen in *Multi-Judges*, *supra* note 16, at 727-30.

22. Leflar's method of approaching judicial decision-making strongly resembles the "legal process" school of jurisprudence associated with Professors Henry Hart and Albert Sacks of Harvard Law School and their concept of "reasoned elaboration." See generally William L. Reynolds, *Legal Process and Choice-of-Law*, 56 MD. L. REV. 1371 (1997). The resemblance, however, must be coincidental—the result of great minds reaching the same conclusion independently. We can find no reference in Leflar's writings to either Hart and Sacks or "legal process"; and Leflar went to Harvard Law School long before a course in Legal Process was taught there.

23. Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721 (1979) [hereinafter "*Honest Opinions*"].

nor policy genuinely justifies a result except as its own basis affords the justification.<sup>24</sup>

Characteristically, this statement advances functional grounds for judicial candor, rather than normative ones. An opinion should be completely honest—that is, it should state its facts and reasoning openly—not because of some *a priori* conception of the judicial function, but because judicial sleight of hand misleads lawyers and other judges who must rely on the decision to predict future results.

Leflar fully recognized that there are constraints on judicial candor. Group decision-making sometimes prevents a judge from writing the truest explanation of the decision; a multi-judge panel necessarily requires some compromise. Further, judges must work within the limits of what society will permit them to do. “Law,” Leflar wrote, “is effective only so far as there is popular acceptance of it. Judges . . . are aware of that fact and, to varying degrees, are governed by it.”<sup>25</sup> Judges, and their opinions, must be evaluated realistically. He noted of Cardozo, for example, that the “tradition” in Cardozo’s days

was that judicial decisions must be grounded on “legal” considerations altogether, and Cardozo could not completely escape from that tradition. But perhaps he did not really wish to escape from it. He recognized a practical necessity for tying forward-looking opinions into the precedential past in order to make them acceptable to other judges, the bar, and even to a tradition-minded public. Cardozo did what he could in his era, and believed he was doing it in the right way.<sup>26</sup>

Leflar similarly recognized that Chief Justice Traynor, despite his “preference for the honesty of real reasons . . . at times felt compelled to write opinions in the language of precedential technicality.”<sup>27</sup> Traynor’s strength, according to Leflar, was that

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24. *Id.* at 723 (emphasis added).

25. *Id.* at 739.

26. *Id.* at 724 (emphasis in original). This emphasis on the need to maintain historical continuity as part of a judge’s task was a recurrent theme in Leflar’s work: “It is also part of law’s function to maintain the society’s historic and traditional continuity with its past, and it’s the writer of appellate opinions who in our system is principally responsible for maintaining this continuity.” Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 811 (1961).

27. *Honest Opinions*, *supra* note 23, at 726.

he "sought to disassociate his own predilections . . . by showing how the results fitted neatly into the regular framework of the law . . . . In a sense, he sought to cover up his realistic honesty; yet it showed through."<sup>28</sup> Nevertheless, Leflar admired the judge who gave the true reason for the decision: "It was characteristic of Holmes' way of thinking that the logic could be admittedly less than perfect so long as the real reason for the opinion could be identified."<sup>29</sup> Leflar gave similar praise to the work of other judges, including Traynor, Schaefer, and Kenison: "Without integrity," he wrote, "there is no likelihood of greatness."<sup>30</sup>

Not surprisingly, Leflar also was a stickler for openness in judicial procedures, and again, his emphasis was functional. He believed that public confidence in the judicial process would increase if courts would publish the details of their decision-making procedures.

In several courts these [appellate] procedures, having first been definitely agreed upon, are published in pamphlets available to the bar and the general public. This enables judges, the bar, and interested citizens, including litigants, to know what the procedures are, which can add to any court's effectiveness by assuring public confidence in the court's collegial responsibility and integrity. The public can know, through the published procedures, that the court does operate as a court and not as a collection of one-judge decision-makers.<sup>31</sup>

Once again, judicial honesty and clarity help to insure public confidence; as a result, the publication of a court's procedural rules makes the court more effective.

It should be obvious by now that Leflar had great faith in the ability of judges to do the right thing when left alone. Although he wrote in his memoirs that legislatures were better at certain types of law reform,<sup>32</sup> it is doubtful that he believed strongly in that old bromide. Thus, in a remarkable (and over-

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28. *Id.* at 727.

29. *Id.* at 725-35.

30. *Id.* at 729.

31. *Multi-Judges*, *supra* note 16, at 730-31.

32. *ONE LIFE*, *supra* note 6, at 97-100.

looked) article published in 1968,<sup>33</sup> Leflar asked whether judges or legislators had done a better job of handling the switch from contributory to comparative negligence. In a conclusion that he himself found surprising, he contended that judges, rather than legislators, could better make the adjustment in compensation regimes required by the adoption of a comparative negligence rule.<sup>34</sup>

The elements of Leflar's jurisprudence are easy to summarize. A judge should express the real basis for the decision as clearly as possible, given the constraints of time and compromise among the judges. The expression of true reasons leads to enhanced predictability, accountability, and public acceptance of the work of the court. Moreover, judges are hard pressed for time and lack the ability to keep current on jurisprudential trends. They should ignore these fads and follow their judicial instincts; absent artificial limitations, judges who do so will reach the right result.

### III. LEFLAR AND CHOICE OF LAW

Best known in the conflicts world for his treatise on conflicts and his development of the choice-influencing considerations, Leflar's conflicts writings reflect a strong emphasis on reaching practical results and an almost complete disdain for theory—exactly what we would expect from his background and his scholarship on judicial decision-making. Although Leflar's views on choice-of-law, for example, like those on judicial process, were mostly published late in his career,<sup>35</sup> they were apparently present from the beginning. In Leflar's very first article on choice of law, published when he was thirty-one, he ad-

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33. Robert A. Leflar, *Comment on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or the Legislature Decide?* 21 VAND. L. REV. 918 (1968).

34. *Id.* at 931.

35. Leflar poured out a steady stream of scholarship throughout his life. The great majority of it, however, published before he was in his 50s, concentrated on aspects of Arkansas law. The remarkable outpouring of scholarship that began in 1959 established Leflar's reputation as a national scholar. It is interesting to speculate whether Leflar's long immersion in Arkansas law, followed by a spurt of national scholarship at a time when most academics are winding down, made Leflar a more practical writer.

dressed a seemingly dull but important topic—the notion that a court could refuse to enforce another state’s “penal” laws.<sup>36</sup>

Rather than formulate a grand theory to cover all types of “penal” claims, Leflar carefully examined each type of penal claim and asked whether it made any sense for a court to refuse to enforce it. He was quite aware that his probing for policy reasons, rather than relying on established doctrine, was unusual in conflicts scholarship and, therefore, required a bit of justification: “One trouble about a rule of law which everyone takes for granted is that no judge ever bothers to state the reasons for it.” Leflar certainly was ahead of his time. Not only did that statement reflect cutting edge judicial process (legal realism was then in its infancy), it far outstripped the then current choice-of-law thinking, which was still lost in the Dark Ages, where it would remain for another quarter-century.<sup>37</sup>

### A. The Treatise

Leflar’s treatise, his most comprehensive work in the conflicts field, reflects his judicial philosophy. Not only is it amazingly clear, but it is not larded up with theoretical musings and imaginary intellectual voyages. It does not require a grasp of jurisprudential theory to be understood. Instead, Leflar took each subject in turn, examined it carefully, considered the key precedent, and explained how the law in the area should work in order to achieve sound policy goals in a practical way. Even today, when a number of excellent conflicts treatises are available,<sup>38</sup> the lucidity of Leflar’s work is remarkable. In 1959, when the first edition of the treatise was published, lucid conflicts writings were indeed scarce. It is no wonder Leflar’s treatise

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36. Robert A. Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193 (1932). There are a lot of possibilities as to what constitutes a “penal” law; these possibilities range from traditional criminal law through taxes, administrative enforcement, and even the award of punitive damages.

37. In his two years on the Arkansas Supreme Court, Leflar wrote only one opinion on choice of law, *Pruitt Truck & Implement Co. v. Ferguson*, 216 Ark. 848, 227 S.W.2d 944 (1950). *Pruitt* was a somewhat disappointingly straightforward application of the *lex loci* rules. On the other hand, the facts of the case compelled the same result whether reached under modern or vested-rights analysis.

38. Modesty, along with the fear of offending by omission, precludes our giving any examples.

tise rapidly became, and remains, a favorite with bench and bar alike.

### 1. Choice-Influencing Considerations: The Historical Context

Even more than his treatise, it is Leflar's writing on choice-influencing considerations that remains his lasting legacy to choice-of-law, theory, and practice. The two basic articles explaining Leflar's views were written in 1966, and they were revolutionary.

To understand why that was so, it is necessary to consider the state of choice-of-law scholarship at the time. In short, choice of law in the mid-1960s was a mess.<sup>39</sup> Less than a decade earlier, Brainerd Currie had upset the apple cart of the Vested Rights Old Believers, the conviction that a system of territorial choice-of-law rules would eliminate judicial discretion and lead to perfect predictability of result. In so doing, Currie also exposed the lies that judges were forced to tell in choice-of-law cases in order to achieve justice in choice-of-law cases, while adhering to the forms of existing legal doctrine. At the same time, New York, while attempting to modernize its choice-of-law methodology, was undergoing the serious (and well-publicized) embarrassment of chronic inconsistency in guest statute cases; and drafts of the Restatement (Second) of Conflicts of Laws were floating around, espousing its very curious amalgam of presumptive rules and a "most significant relationship" test.<sup>40</sup>

Another part of the problem was Currie's own dogmatism—especially with regard to true conflicts. Like many revolutionaries, he did not know what to do with the forces he had unleashed.<sup>41</sup> He had brought Legal Realism into the staid world of conflicts, and he had announced a single great precept: In a false conflict case, the court should apply the law of the only

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39. For a quick review of this history, see Reynolds, *supra* note 22, at 1380-89.

40. Leflar served as one of the Advisors to the Restatement (Second) of Conflicts. His choice-influencing considerations bear some resemblance, of course, to the list of factors, found in § 6 of that work, which the Second Restatement encouraged courts to examine in making choice-of-law decisions. Obviously, there was some relationship, albeit unknown today.

41. Of course, Currie's untimely death in 1965 prevented him from further elaboration on his discoveries.

state whose policy could be advanced by the application of its law. When it came to the proper resolution of true conflicts, however, Currie seemed unable to escape from the awful decision to use forum preference as a tie-breaker. Currie believed that only a forum preference could be used to resolve true conflicts because that resolution otherwise required choices among values and policies of different sovereignties which courts were unqualified to make.<sup>42</sup>

## 2. Legal Realism and the "Considerations"

The then-current state of choice-of-law theory did not sit well with Leflar, the Realist. The traditionalists and Currie both placed artificial restraints on the judges' ability to reach good results via clearly articulated reasons. The restraints were different, of course. For the traditionalist it was the rigid jurisdiction-selecting rules of the First Restatement, and for Currie it was the supposed inability of courts to use policy judgments to resolve true-conflict cases. On the other hand, other approaches (the "center of gravity" method of the early New York cases and the "most significant contacts" method of the Second Restatement's early drafts) freed the judges from artificial constraints, but failed to provide the predictability required in conflict cases.

Into this mix, Leflar threw his two choice-influencing considerations articles, which announced a methodology that seemed to solve the rigidity-unpredictability dilemma posed by the currently available choice-of-law systems. Like the free-form grouping-of-contacts systems, it freed judges from artificial constraints. However, unlike those systems, it supplied judges with a set of criteria to guide their choice-of-law decision. Further, the guiding principles were not drawn from the metaphysics of vested rights or some ill-advised political theory about what courts could and could not do in a democracy. Rather, they came from the actual considerations that judges had always used, regardless of articulated methodology, to solve

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42. Leflar built on the work of others, and he carefully acknowledged his debts; to Cheatham and Reese; to the drafters of the Second Restatement (of whom he was one); to Currie (although the references seem a bit half-hearted); and above all to David Cavers, whom Leflar obviously admired, for his profound insight that "the choice of governing law should be a choice between the law as laws, and not between states without regard to this, for the content of their laws." *ONE LIFE*, *supra* note 6, at 212.

conflicts cases. Thus, Leflar maintained that the “major considerations that should influence choice of law have always been present and operative in the cases.”<sup>43</sup> Ever the Realist, Leflar observed what courts did, not what they said, in choice-of-law cases, and distilled the considerations that actually controlled the courts’ decisions.

Like most conflicts scholars, Leflar knew that judges had long reached the “right” result in choice-of-law cases by being less than candid about their reasoning process. Judges, in other words, achieved justice in individual cases at the expense of honesty. What Leflar sought to do with the choice-influencing considerations was to bring the process into the open by distilling from the opinions those considerations that convince the judges that a result was “right.” Those considerations then could be listed and elaborated on to form a choice-of-law methodology to guide judges in future cases. Supplied with an officially sanctioned conflicts methodology that was simply a list of the considerations that they had actually employed to solve conflicts cases, judges could be expected to write honest opinions indicating which of the considerations had motivated their decision in the present case.

“Wiser judicial opinions and more thoughtful analysis . . . may be expected if the considerations are given proper weight.”<sup>44</sup> Leflar’s point was to be useful: “No American judge, trial or appellate, has read anything like all of the specialized writings on choice of law that a specialized Conflicts teacher must be familiar with.”<sup>45</sup> Their theme was simple. Leflar suggested that judges should and do decide choice-of-law cases by examining a set of five “considerations.” Those five considerations, listed in no particular order, as Leflar himself made clear,<sup>46</sup> require that a court faced with a “true” conflict consider:

- (1) predictability of results;
- (2) maintenance of the interstate and international order;

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43. *Choice-Influencing Considerations*, *supra* note 1, at 267.

44. *Id.* at 304.

45. *A Well-Watered Plateau*, *supra* note 3, at 11.

46. *More Choice-Influencing Considerations*, *supra* note 1, at 1586-87. The point is important; academic commentary has focused overwhelmingly on the “better law” consideration, even though, as Leflar pointed out often enough, that was only one factor among five.

- (3) ease of application of the law chosen;
- (4) advancement of the forum's governmental interests; and
- (5) the application of better law.<sup>47</sup>

Leflar believed that judges had always considered these factors, but that they had been reluctant to state openly that they were doing so, because the Vested Rights Theory provided no acceptable method for deploying the considerations. Judges applied the five considerations identified by Leflar because they made sense, not because they had been held to do so. And, indeed, judicial use of the considerations was often implicit and not mentioned as such. Nevertheless, the considerations often played a key role in judicial thinking. By identifying and explaining what before had been done only as a matter of intuition, Leflar helped to encourage judges to trust their instincts and to display their thinking openly for the benefit of others. To quote Leflar:

Results in cases will not often be changed by setting out in opinions real choice-influencing considerations instead of mechanical rules. This is because the real reasons have probably been there all along, whether they were stated or not. Understanding of the decisions, by students, by lawyers and by other judges will, however, be immeasurably facilitated if the relevant considerations are clearly identified and openly employed. In addition, results will occasionally be different.<sup>48</sup>

That approach to choice of law should be familiar to anyone who has made it this far, for it exemplifies Leflar's general view of judicial analysis: it requires an examination of what judges actually do in practice as well as what they say they do, and it gives litigants and lower court judges alike an idea of *how* cases will be decided. Not only does that candor enhance predictability in result, it also tells attorneys what ideas to advance for judicial evaluation, making it easier for the parties to help the court understand the issues.

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47. Applications of these considerations are discussed in greater detail by some of the other contributors to this Symposium.

48. *More Choice-Influencing Considerations*, *supra* note 1, at 1585-86.

Leflar elaborated the considerations in good common law fashion by using a lengthy set of examples derived from well-known cases and designed to illustrate how the considerations apply, and better yet, when they should *not* be applied. Although Leflar recognized that some critics might believe that his system delegated too much “flexibility” to the judges, he believed such a system to be *good*, not bad.<sup>49</sup>

However, Leflar recognized that there must be some limits to judicial flexibility. Unfettered discretion is also bad. Leflar wrote, “The common law system works better when reasons are clearly identified and correlated than when they run wild. That justifies methodism, but without any pretense that everlasting truth is being revealed.”<sup>50</sup> Hence, the identification of choice-influencing considerations should guide, but never control, judicial decision-making.

### 3. The Role of Legislation

Leflar’s writings make little or no mention of statutory solutions to choice-of-law problems. It is clear that he believed that legislators had no special contribution to this most practical of litigation difficulties. On the other hand, when judges proved obstinate when it came to reaching sensible solutions, he was more than willing to enlist legislative assistance. Statutes of limitation provide the example. Even after modern, policy based methods of resolving true conflicts had won wide acceptance, courts continued to insist on treating limitations problems in the old way, as a “procedural” problem involving the routine application of forum law. Leflar, therefore, was instrumental in drafting and encouraging the adoption of the Uniform Limitations Act,<sup>51</sup> which brought the solutions of limitations problems into the modern, policy-based choice-of-law era.

In short, Leflar’s views on choice-of-law easily can be traced directly back to his judicial process theories: openness, candor, and careful explanation are the keys to proper development of the area. The justifications he advances for his ap-

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49. *Choice-Influencing Considerations*, *supra* note 1, at 326. He also believed that some areas, such as cases involving land title, generally would retain rigid rules. *Id.* Most assuredly, Leflar was not rigidly doctrinaire.

50. *Id.* at 325.

51. 12 U.L.A. 296 (1997) (adopted in six states).

proach are functional—follow my program and better opinions, better arguments, and better briefs will result—as well as justice in the individual case before the court.

### B. A Puzzle

Leflar's five choice-influencing considerations contain one significant puzzle, an apparent anomaly. Leflar's exposition of the considerations contains no hint of either theory or parochialism. Rather, his tight focus is on the methods judges should use in reaching the right result in individual cases. Why then did he include "governmental interests of the forum" as one of his considerations? After all, that consideration certainly has the potential to bring parochialism and home court advantage front and center in the judicial mind.

We suggest a practical answer to the puzzle. Leflar, the Realist, recognized that judges will always try to follow a strong forum interest, and if they are told that consideration of forum interest is not legitimate, they will still do it, but silently, without telling anyone what they are doing. Leflar did not want to discourage courts from speaking openly about a factor they would consider covertly. Paradoxically, bringing advancement of forum interests out from under the rug allowed Leflar to advance arguments for discounting the factor in most cases. Having reassured judges that they could consider and openly discuss forum interests, Leflar was free to argue that "ordinarily differences in common-law rules between states do not represent deep and genuine differences in social policy."<sup>52</sup> In other words, few differences in the law reflect a real "governmental interest." See how sneaky Leflar was? Because it is impossible to refute an argument that judges are forbidden to make, he encouraged open discussion of the forum's interests in order to provide the opportunity to minimize it as a concern in almost all cases.

## IV. CONCLUSION: CROSS POLLINATION

Earlier, we suggested that Leflar's views on choice of law and the judicial process might have been a two-way street, that each might have influenced the other. The last section of this

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52. *Choice-Influencing Considerations*, *supra* note 1, at 294.

article examines the lessons that such cross-traffic provides, both for choice of law and for the judicial process.

The legal and academic history of choice-of-law provides a profound lesson for students of judicial process. The Vested Rights Theory, rejected by Leflar and almost everyone else today, forbade judges to tell us what they were really doing: in other words the Vested Rights Theory required judges to lie, cheat, and steal in order to achieve justice. Choice-of-law practice became replete with "escape devices" and the like.<sup>53</sup> The lesson, of course, is that a tight, rule-based system is doomed to failure from the start. This lesson, of course, is not unique to choice-of-law. Other examples of rigid rules that encouraged judicial dissembling include the classical doctrines of consideration in contracts and contributory negligence in torts. On the other hand, the relatively flexible provisions of Article 2 of the Uniform Commercial Code have been successful in producing decisions that are both honest and just. Flexibility allows judges to do the right thing, and it should be chosen over rigidly controlled judicial discretion.<sup>54</sup>

In short: Never go back to rules. Judges delight in doing justice, and most of them will try to do justice no matter what the stated rules may appear to require. Academics, especially choice-of-law professors, perhaps because they lack anything else to do, try to devise elaborate rules to control judicial discretion. Leflar noted among conflicts scholars the "almost irresistible temptation for theorizing,"<sup>55</sup> but ended with a strong caution:

The courts, once they have identified a desirable result supported by good reasons, might as well phrase their opinions in terms of those good reasons, and forgo the theorizing. Especially if it turns out that conflicts law includes some brooding omnipresence in the sky, real reasons had better be set out to support them.<sup>56</sup>

Thus, attempts to devise new rules to permit judges to resolve choice-of-law with minimal exercises of judicial discretion, such as the ill-advised American Law Institute Project on

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53. See Reynolds, *supra* note 22, at 1376-80.

54. *Choice-Influencing Considerations*, *supra* note 1, at 325.

55. Robert A. Leflar, *The Nature of Conflicts Law*, 81 COLUM. L. REV. 1080, 1095 (1981).

56. *Id.*

Complex Litigation,<sup>57</sup> are doomed to failure from the start. There should be no codification of choice-of-law rules<sup>58</sup> and no resort to new forms of characterization to serve as a magic wand, as New York has tried with its attempt to distinguish between “loss-allocating” and “conduct-regulating” rules.<sup>59</sup>

It is much better, therefore, to *guide* judicial discretion than to eliminate it. It is much better for a judge to state the real reasons for the opinions so that other judges and litigants will not have to lie: candor and explanation above all else.

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57. See ALI COMPLEX LITIGATION PROJECT § 6.01-6.04 (setting forth a mechanism for resolving choice-of-law in complex litigation). The ALI makes factors such as the place of contracting, place of injury, and the parties' domicile critical elements in resolving choice-of-law cases. The ALI Project is trenchantly criticized in Louise Weinberg, *Mass Torts and the Neutral Forum: A Critical Analysis of the ALI's Proposed Choice-of-Law Rule*, 52 ALB. L. REV. 807 (1993).

58. A few years ago, Louisiana did just that. For a sympathetic view of the Louisiana choice-of-law codification experiment, see Symeon Symeonides, *Louisiana's New Choice-of-Law for Torts Conflicts: An Exegesis*, 66 TUL. L. REV. 677 (1992).

59. In *Cooney v. Osgoode Machinery, Inc.*, 612 N.E. 2d 277 (N.Y. 1993), the court attempted to use the distinction mentioned in the text as an aid to resolving true conflicts. Because the distinction is wholly artificial, its adoption has caused a great deal of confusion. That confusion should have come as a surprise to no one.