South Carolina Law Review

Volume 31 | Issue 3 Article 4

1980

Leflar's Contributions to American Conflicts Law

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LEFLAR'S CONTRIBUTIONS TO AMERICAN CONFLICTS LAW

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It is a great pleasure to be on a panel honoring a colleague who is a distinguished professor of law in reality as well as in title. I have been looking forward to meeting Bob Leflar ever since I first heard of him in a roundabout way thirteen years ago. One of my students brought his rookie professor a clipping from *Time* magazine about a New Hampshire conflicts decision, a true rarity considering the attention the news media pay our discipline. In that case, *Clark v. Clark,*[1] the New Hampshire Supreme Court had refused to apply the Vermont Guest Act on the grounds that the statute was a "drag on the coattails of civilization."[2] Although I had just retired from practice, I still was not broken of the habit of judging law by practical standards, and it occurred to me that the decision made more sense than some of those I had been teaching. Upon reading the full report of *Clark v. Clark,* I noticed that its author, Chief Justice Kenison, relied heavily on Leflar's writing, which I thought was a fitting tribute by one fine legal mind to another.

New Hampshire was the first but not the last state to follow Leflar's teachings. *Clark,* apart from putting the conflicts law of New Hampshire on the right track, encouraged several other courts to opt for his choice-influencing considerations, among them the Supreme Court of Minnesota,[3] represented this evening by the Honorable John Todd who wrote the opinion in *Milkovich v. Saari.*[4]

One further extraterritorial effect of *Clark,* though documented,[5] is less well known. Chief Justice Kenison's scathing

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1. 107 N.H. 351, 222 A.2d 205 (1966).

2. *Id.* at 355, 222 A.2d at 209. The court apparently borrowed this colorful expression from Cheatham & Reese, *Choice of the Applicable Law,* 52 COLUM. L. REV. 959, 980 (1952), but ascribed it to Freund, *Chief Justice Stone and the Conflict of Laws,* 59 HARV. L. REV. 1210, 1216 (1946).

3. *See* Myers v. Government Employees Ins. Co., 302 Minn. 359, 225 N.W.2d 238 (1974); Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973).

4. 295 Minn. 155, 203 N.W.2d 408 (1973).

5. *See* 6 TRIAL 5 (April/May 1970); Juenger, Letter to the Editors, 118 U. PA. L. REV. 1141 (1970); Leflar, *Appellate Judicial Innovation,* 27 OKLA. L. REV. 321, 341 n.81 (1974).

remarks about the Vermont Guest Act helped induce the legislature of the Green Mountain State to repeal the statute, demonstrating that conflicts can serve as a vehicle for law reform not only at home but abroad, or at least next door. In fact, this example is probably not the only one for the benign propensities inherent in the choice-of-law process.[6]

Of course, it may not mean that much for a teacher to shape judicial action in what is, as Professor Herma Hill Kay has put it, "a field, not of laws, but of men."[7] A glance at any of the many overwritten and richly footnoted opinions amply confirms the continued validity of her observation. Reading these quasi-law review pieces, one senses that academicians are the true oracles of conflicts law.[8] There are good oracles and bad oracles, however,

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6. New York may have rendered a similar service to Ontario. Until Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), the New York courts fairly consistently refused to apply that province's Guest Statute, which barred the passenger's action even if the driver's conduct was grossly negligent. *See* Macey v. Rozbicki, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Bray v. Cox, 39 App. Div. 2d 299, 333 N.Y.S.2d 783 (1972); Kell v. Henderson, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (1966). *But see* Arbuthnot v. Allbright, 35 App. Div. 2d 315, 316 N.Y.S.2d 391 (1970). Perhaps some members of the provincial legislature had become aware of the treatment that law was accorded south of the border. This fact might explain why Ontario decided to substitute for its most peculiar enactment a somewhat lesser "drag on the coattails of civilization." By the time *Neumeier* was decided, section 132(3) of the Ontario Highway Traffic Act, ONT. REV. STAT. 1960, ch. 172, § 105, as amended by ONT. REV. STAT. 1966, ch. 64, § 20(2), did provide for liability in the event that the injury was caused by the driver's gross negligence. The amendment may in turn have inspired the New York Court of Appeals for once to apply the provincial Guest Statute.

If one can assume that legislators ever care how their enactments fare in foreign courts, New York might also be able to claim credit for civilizing the wrongful-death legislation of the Commonwealth of Massachusetts. In Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), the court of appeals refused to honor the Massachusetts statutory limitation on wrongful-death recovery, which at the time amounted to $15,000 per death. In Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968), the court declined to give effect to Maine's more generous ceiling of $20,000 (which, by the time the matter reached the court, had been repealed). Both opinions call such arbitrary limitations "absurd and unjust." Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d at 40, 172 N.E.2d at 528, 211 N.Y.S.2d at 136; Miller v. Miller, 22 N.Y.2d at 18, 237 N.E.2d at 880, 290 N.Y.S.2d at 739. *See also* Rosenthal v. Warren, 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973). Perhaps it was at least partially in response to this criticism that Massachusetts first successively increased and then repealed the ceiling on wrongful-death recovery. *See* MASS. GEN. LAWS ANN. ch. 229, § 2 and Comment—1973 (West Supp. 1979).

7. Kay, *Ehrenzweig's Proper Law and Proper Forum*, 18 OKLA. L. REV. 233, 233 (1965).

8. At least in part, the reasons for the preeminence accorded to scholarly opinion may be rooted in history. In the conflict of laws the judges never enjoyed the monopoly position

and I consider Leflar a good one. I keep his *American Conflicts Law,*[9] now in its third edition, within easy reach for frequent and fruitful consultation. I faithfully read his *Annual Surveys,*[10] an enterprise I hope he will not relinquish, as has been rumored, to student writers and editors. While I should be the last one to impugn their diligence and intelligence (in fact, one of the best conflicts articles I have read was written by Professor Westen when he was still in law school[11]), I fear that it may prove difficult to emulate the present surveyor's incisive mind, mature judgment, and lucid style. Let us hope that whoever may succeed him will at least share Leflar's aversion to what a Canadian observer called the "penchant for esoteric neologism"[12] that infests current conflicts writing.

I trust that few of those gathered here this evening would take issue with the proposition that Leflar is one of the truly great law teachers of our times. I wonder, however, whether many of you share my reasons for holding him in such high esteem. Clearly, his teachings, have not met with universal acceptance. *Clark v. Clark,* for instance, did not prompt all of the workers in the vineyard to drop their tools for a standing ovation. In fact, Hans Baade once called the comparison of the merits of competing substantive rules in making choice-of-law decisions "Kafkaesque."[13] Even at the risk of stirring up controversy, I would like to state briefly what I perceive to be our honoree's two

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of "depositaries of the laws; the living oracles." 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1765). Neither in England nor in the United States did the judiciary pretend to distill choice-of-law rules from ancient customs; both countries experienced a "reception . . . of continental maxims." J. WESTLAKE, A TREATISE IN PRIVATE INTERNATIONAL LAW 10 (6th ed. 1922). The founding father of American conflicts law readily acknowledged his indebtedness to European writers, though he noted that "[t]heir works . . . abound with theoretical distinctions, which serve little other purpose than to provoke idle discussions, and with metaphysical subtilties which perplex, if they do not confound, the inquirer." J. STORY, COMMENTARIES ON THE CONFLICTS OF LAWS 10 (7th ed. 1872). Given the increasing importance of "secondary authority" in general, *see* Leflar, *Sources of Judge-Made Law,* 24 OKLA. L. REV. 319, 323 (1971), the continued judicial deference to academic conflicts writing is hardly surprising.

9. R. LEFLAR, AMERICAN CONFLICTS LAW (3d ed. 1977).

10. *E.g.*, Leflar, *Conflict of Laws,* in 1979 ANN. SURVEY AM. L. 1.

11. Note, *False Conflicts,* 55 CALIF. L. REV. 74 (1967).

12. Smith, Book Review, 23 AM. J. COMP. L. 763 (1975).

13. Baade, *The Case of the Disinterested Two States:* Neumeier v. Kuehner, 1 HOFSTRA L. REV. 150, 166 (1973). *See also* Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process,* 46 TEX. L. REV. 141, 154-56 (1967).

most important contributions, if only to have him set me right.

The first of these contributions is a negative one, namely his stand against the themes that preoccupy contemporary scholarship. I refer to the two recurring fashions in conflicts law, one of which calls for the resolution of all multistate problems by localizing legal relationships, and the other for divining the spatial dimension of substantive rules. These ideologies, equally implausible, have shown a truly amazing resilience, condemning each new generation of conflicts scholars to repeat history. The thought that it is possible to locate the "seat" or "center of gravity" of a tort or a contract dates back at least to Savigny;[14] the idea that it is possible to discover the territorial reach of rules by recourse to the processes of construction and interpretation first appeared in medieval literature.[15] Parading in the modern garb of obscurantist terminology, however, these notions still cast a spell to which even our reputedly pragmatic judiciary seems to have succumbed.

Mildly but firmly Leflar has pointed out the structural infirmities he perceives in the modern conflicts edifices that have been erected on the shaky old foundations. About the most-significant-relationship approach he remarked:

> It . . . lacks an exactly defined content . . . . The components of gravity, for the test's purposes, could be changed from case to case. That may be the formula's chief virtue, but it is at the same time its weakness. The formula by itself affords no real basis for decision in the hard cases because it does not identify the considerations which move courts . . . .[16]

About the school that would derive solutions to multistate problems from an interpretation of conflicting substantive rules he had this to say:

> The term "governmental interest" does not and cannot include within itself all the considerations that ought to be taken into account in the choice-of-law process. Especially when forum

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14. *See* 8 F. VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 108 (1849).

According to Savigny, "the whole problem [of choice of law] comes to be—*To discover for every legal relation . . . that legal territory to which, in its proper nature, it belongs or is subject (in which it has its seat).*" F. VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS 133 (2d ed. W. Guthrie trans. 1880) (emphasis in original).

15. *See* Juenger, *Lessons Comparison Might Teach*, 23 AM. J. COMP. L. 742, 744-45 (1975) (with further references).

16. R. LEFLAR, *supra* note 9, at 184-85 (3d ed. 1977).

> preference is added as a dilemma-escape device, it leaves out the traditionally important demand for predictability of results (uniformity regardless of forum) which is urgent for some types of transactions, it leaves out that regard for interstate and international orderliness which is as important in an organization of federated states as it is between nations, and it leaves out almost all concern for the functions of law in society generally . . . .[17]

Others, equally critical, have been less moderate and restrained. Thus, Currie commented on the most-significant-relationship approach as follows: "The 'contacts' are totted up and a highly subjective fiat is issued to the effect that one group of contacts or the other is the more significant. The reasons for the conclusion are too elusive for objective evaluation."[18] Yntema, in turn, characterized the calculus of governmental interests as "a vague and perverse idea, suggesting that laws are made for bureaucracy."[19]

In contrast to these acerbic critics, Leflar manages to view the present conflicts scenery with serenity, detachment, and even optimism. His most recent article likens the vista to a "well-watered plateau high above the sinkhole it once occupied,"[20] and he professes only mild amusement about the efforts of academic writers to stir "the ashes of recent controversy."[21] His charity also extends to the judiciary. In fact, he seems quite pleased with the new eclecticism reigning in the courts, where judges "fumble" and "lump"[22] together the discordant themes of current conflicts methodology. Even his complaint about the formidable bulk of conflicts writing takes a fairly moderate form: he simply puts "literature" in quotation marks.[23]

However understated his criticism, Leflar does not hide his views. He has made it quite clear what he thinks about such current fashions as the discriminatory treatment of nonresi-

17. *Id.* at 186.

18. Currie, *Comments on* Babcock v. Jackson, *A Recent Development in Conflict of Laws,* 63 COLUM. L. REV. 1212, 1233 (1963).

19. Yntema, *Basic Issues in Conflicts Law,* 12 AM. J. COMP. L. 474, 482 (1963). Yntema was equally critical of the seat-of-the-relationship idea. To him the "supposition that it is necessary to locate invisible entities" was "bizarre." Yntema, *The Historic Bases of Private International Law,* 2 AM. J. COMP. L. 297, 311 (1953).

20. Leflar, *Choice of Law: A Well-Watered Plateau,* 41 LAW & CONTEMP. PROB. 10, 26 (Spring 1977).

21. *Id.* at 10.

22. *Id.*

23. *Id.* at 11.

dents,[24] the balkanization of conflicts law,[25] and the recourse to cover-up devices.[26] With all due allowance for overburdened appellate judges who cannot conceivably cope with the never-ending stream of published material,[27] he censures in no uncertain terms what he considers a peculiarly ethnocentric New York brand of conflicts jurisprudence,[28] a phenomenon that would indeed be strangely out of place in a self-proclaimed "international clearing house and market place."[29]

Leflar has been equally outspoken against the kind of parochialism that elevates any local rule, even one that at best expresses "minor morals of expediency" or "debatable questions of internal policy,"[30] to the status of a governmental policy demanding vindication at the expense of saner and more decent principles imported from abroad.[31]

I come to Leflar's second contribution, namely his insistence that comparison of the intrinsic merits of conflicting rules should play a role in the adjudication of multistate transactions. He apparently likes the "modern" approaches because all of them permit a court, up to a point, to do justice by preferring, as

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24. *Id.* at 19-21.

25. R. LEFLAR, *supra* note 9, at 207-08, 210-12.

26. Leflar, *supra* note 20, at 26.

27. *Id.* at 11.

28. *Id.* at 19-20.

29. Intercontinental Planning, Ltd. v. Daystrom, Inc., 24 N.Y.2d 372, 384, 248 N.E.2d 576, 583, 300 N.Y.S.2d 817, 827 (1969).

One might, however, question Leflar's assessment of New York conflicts justice. As regards the New York federal courts, Judge Oakes' opinion in Rosenthal v. Warren, 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973), may not have been inspired so much by the "self-centered nature of the New York position," Leflar, *supra* note 20, at 20, than by the perceived superiority of forum law. *See* 475 F.2d at 445-46 (Massachusetts limitation on wrongful-death recovery considered "absurd and unjust"). It seems reasonably clear that the court did not mean to accord a privilege to New Yorkers. Thus, the majority opinion suggests that, in the converse situation of a Massachusetts victim perishing in a New York hospital under the scalpel of a New York surgeon, the Massachusetts limitation on wrongful-death recovery would be equally inapplicable. *See* 475 F.2d at 445 n.8. Such an alternative reference to the sounder rule of law should delight Professor Leflar. *See also* Rosenthal v. Warren, 374 F. Supp. 522, 524-26 (S.D.N.Y. 1974).

Secondly, it may no longer be accurate to count New York among the states that have "moved away from lex loci delicti and similar old rules." Leflar, *supra* note 20, at 21. *See* Cousins v. Instrument Flyers, Inc., 44 N.Y.2d 698, 376 N.E.2d 914, 405 N.Y.S.2d 441 (1978); Towley v. King Arthur Rings, Inc., 40 N.Y.2d 129, 351 N.E.2d 728, 386 N.Y.S.2d 80 (1976); notes 46-49 *infra* and accompanying text.

30. Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 YALE L.J. 656, 662 (1918).

31. *See* R. LEFLAR, *supra* note 9, at 210-12.

between conflicting rules, the one that makes more sense.[32] This is of course particularly true of governmental interest analysis. That approach is characterized by a powerful homing trend that, in 99 out of 100 cases, leads to the application of forum law. Though it may seem strange, such blatant jingoism often produces commonsensical results. A particularly striking illustration of this propensity is *Hurtado v. Superior Court.*[33] In *Hurtado* the California Supreme Court first disclaimed any interest in the welfare of Mexican plaintiffs whose breadwinner was killed, as every conflicts buff will recall, in a California car accident.[34] The court then proceeded, however, to present the widow and orphans with a much more generous recovery than the pittance authorized by the law of Zacatecas, their home state.[35] One may well doubt whether *Hurtado* is likely to further the asserted policy to promote safe driving on the California highways, but it clearly does enhance the protection of interstate accident victims.

The reason why an analysis ostensibly geared to sovereignty has such benign effects is easy enough to grasp: adroit forum-shopping assures that litigation will be conducted in a jurisdiction whose law favors the plaintiff.[36] So far so good, but Leflar would ask, what of judicial candor?[37] Although he seems quite sanguine about the current eclecticism, I am not so sure he really does condone relegating conflicts theory to the status it seems to have attained in practice, *i.e.,* to serve as a convenient source for elaborate verbal justifications needed to buttress foregone conclusions, or worse yet, as a smokescreen camouflaging the primitive

32. *See generally* Juenger, *Choice of Law in Interstate Torts,* 118 U. PA. L. REV. 202, 222-28 (1969).

33. 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974).

34. *Id.* at 583, 522 P.2d at 672, 114 Cal. Rptr. at 112.

35. *See id.* at 578 n.1, 522 P.2d at 668 n.1, 114 Cal. Rptr. at 108 n.1.

36. Not invariably, of course. Even experienced counsel with full awareness of the advantages offered by a choice of courts may lack the acumen or inclination to sue abroad. At least according to Cavers, attorneys are more willing and able to cross the courthouse square than to forum-shop across state lines. Cavers, *Change in Choice-of-Law Thinking and its Bearing on the* Klaxon *Problem,* ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 154, 159 (Tent. Draft No. 1, 1963).

The current unsettled state of conflicts law poses an intriguing question: Should inept forum-shopping, or failure to forum shop, render counsel liable for malpractice? For a suggestion to this effect by Dean Griswold, see D. CAVERS, THE CHOICE-OF-LAW PROCESS 20, 22-23 (1965).

37. *See* Leflar, *supra* note 20, at 26. *See also* R. LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 131 (1976).

desire to avoid foreign-law issues.[38] Such subterfuge does not come cheap. The cost is not only a loss of intellectual integrity in appellate opinions but also uncertainty that inevitably produces confusion in the lower courts, the federal bench, and the bar.[39] "Fumbling" and "lumping" will not always do the trick, in particular where the various modern conflicts approaches point in different directions.[40] Ultimately, the moment of truth arrives, at which a court must choose between candor and resignation.

The New York Court of Appeals, the first state court to embark on the conflicts revolution, had to learn this lesson the hard way. In *Babcock v. Jackson*[41] it cheerfully embraced almost all of the theories proffered by academicians, including Ehrenzweig's *lex stabuli.*[42] As Currie remarked about the court's lumping technique, "the majority opinion contains items of comfort for almost every critic of the traditional system."[43] At that time Leflar accurately, although somewhat understatedly, predicted that "[t]he new rule fits these facts perfectly but, as more complex cases arise, a great deal of ingenuity will be required to adapt it to them. Undoubtedly the results will vary with the courts and with the facts."[44] What actually happened, as new fact situations came before the court, was that it "hopped frenetically from theory to theory like an overheated jumping bean."[45] It is no wonder that the erstwhile forefront of the conflicts revolution was left in disarray. Apparently, by now the New York Court of Appeals, "so bedeviled by opposing academic theories"[46] has chosen resignation. Its latest opinion in *Cousins v. Instrument Flyers, Inc.*[47] states that "*lex loci delicti* remains the general rule in tort cases

38. Occasionally, however, courts candidly concede this motivation. *See In re* Paris Air Crash of March 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1975).

39. Sometimes even state supreme courts get confused. For judicial reaction to the "conflicts maze," see Erwin v. Thomas, 264 Ore. 454, 506 P.2d 494 (1973).

40. *See, e.g.*, Draper v. Airco, Inc., 580 F.2d 91 (3d Cir. 1978); Melville v. American Home Assurance Co., 443 F. Supp. 1064 (E.D. Pa. 1977), *rev'd*, 584 F.2d 1306 (3d Cir. 1978).

41. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

42. *See* Ehrenzweig, *Comments on* Babcock v. Jackson, 63 COLUM. L. REV. 1212, 1243, 1246-47 (1963).

43. *Id.* at 1233-34.

44. *Id.* at 1247.

45. Currie, *Comments on* Reich v. Purcell, 15 U.C.L.A. L. REV. 551, 595, 605 (1968).

46. Leflar, *supra* note 20, at 11. *See* Neumeier v. Kuehner, 31 N.Y.2d 121, 130, 286 N.E.2d 454, 459, 335 N.Y.S.2d 64, 72 (1972) (Breitel, C.J., concurring).

47. 44 N.Y.2d 698, 376 N.E.2d 914, 405 N.Y.S.2d 441 (1978).

to be displaced only in extraordinary circumstances . . . ."[48] Perhaps the best one can say about *Cousins* is that the court has finally learned to spell the Latin phrase.[49]

The frustrating but instructive New York experience demonstrates the importance of intellectual honesty. There can be little doubt that most of the earlier conflicts decisions of the New York Court of Appeals, from *Babcock* until *Tooker v. Lopez,*[50] were strongly result-oriented. Much confusion could have been avoided if the court had been frank instead of hiding its true reasons behind doctrinal facades that crumbled as soon as a new fact pattern compelled reconsideration. Jurisdictions that, like New Hampshire and Minnesota, adopted Leflar's choice-influencing considerations, have had fewer problems. California as well seems to be on the right track. That state has adopted interest analysis as modified by a wondrous "comparative impairment" doctrine,[51] which is said to preclude any inquiry into the quality of conflicting policies.[52] Still, the California Supreme Court, in *Offshore Rental Co. v. Continental Oil Co.,*[53] recently permitted a "prevalent and progressive" foreign law to override what it believed to be an "unusual and outmoded" local policy.[54] Although the opinion by Justice Tobriner does not cite Leflar,[55]

48. *Id.* at 699, 376 N.E.2d at 915, 405 N.Y.S.2d at 442. The authoritative value of this statement is considerably diminished by the court's application of New York law despite the fact that the accident happened in Pennsylvania. Still, lower New York courts feel bound by it. *See* Himes v. Stalker, 416 N.Y.S.2d 986 (1979); Rakaric v. The Croatian Club, 182 N.Y.L.J. 13 (Sept. 14, 1979). *But cf.* Manfredonia v. American Airlines, ___ App. Div. 2d ___, 416 N.Y.S.2d 286 (1979).

49. For earlier misspellings see Neumeier v. Kuehner, 31 N.Y.2d 121, 129, 130, 132, 286 N.E.2d 454, 458, 459, 460, 335 N.Y.S.2d 64, 71, 73, 74 (1972); Tooker v. Lopez, 24 N.Y.2d 569, 576, 578, 586, 587, 595, 249 N.E.2d 394, 395, 398, 400, 404, 405, 410, 301 N.Y.S.2d 519, 524, 527, 533, 534, 541 (1969) (*"lex loci delictus"*).

50. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

51. *See* Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976), *cert. denied,* 429 U.S. 859 (1977). This peculiar California brand of interest analysis has recently withstood a constitutional challenge. *See* Nevada v. Hall, 440 U.S. 410 (1978). Concerning the comparative impairment doctrine, see Baxter, *Choice of Law and the Federal System,* 16 STAN. L. REV. 1 (1963); Horowitz, *The Law of Choice of Law in California—A Restatement,* 21 U.C.L.A. L. REV. 719, 723, 748-58 (1974).

52. *See* Bernhard v. Harrah's Club, 16 Cal. 3d 313, 320-21, 546 P.2d 719, 723-24, 128 Cal. Rptr. 215, 219-20 (1977).

53. 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978).

54. *Id.* at 168, 583 P.2d at 728, 148 Cal. Rptr. at 874.

55. The opinion does cite, however, the brilliant article by Paul Freund which anticipated almost every conflicts thought currently discussed, including the better-law idea. *See* Freund, *supra* note 2, at 1214-16, 1224.

it breathes his spirit and follows his teachings: for once the better sister-state law was applied with the result that a nonresident foreign defendant prevailed against a local plaintiff.[56]

As *Offshore Rental* and numerous other cases indicate, Leflar qualifies as an oracle of conflicts law also in the sense that his writings have a markedly high predictive value. It is easy to see why. Like good judges anywhere he uses commonsense as his guide. When I say commonsense I do not mean mere visceral reactions, but a sound instinct for what is right and what is wrong, honed by experience and reflection as well as by meticulous effort. Of course, it helps if one is able to bring to bear the accumulated insights of a rich and wide-ranging career as a professor of law and jurisprudence, a prolific author, a former state supreme court justice, a teacher of appellate judges, and as someone concerned with law reform throughout his professional life. A career of such distinction is bound to develop a perspective that enables one to see the trees as well as the forest.

Leflar's conflicts philosophy, it seems to me, is quite simple although by no means simplistic. One of tonight's panelists, Professor Rosenberg, described its essence well when he remarked that the conflicts "game is not played so [scholars] can flex their jurisprudential muscles, but in order to better the human condition through law."[57] That philosophy has a tradition which dates back to the very beginnings of our discipline, but it needs someone like Leflar in times when there seems to be no more to conflicts law than the sound and fury of ever-changing fads.

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56. Thus the true "governmental interests . . . were those of a justice-dispensing court in a modern American state, a repository of justice not only for the benefit of home-state domiciliaries but for all litigants who come before the court, even residents of distant states, and even as against local persons." Leflar, *supra* note 20, at 19.

57. Rosenberg, *Comments on* Reich v. Purcell, 15 U.C.L.A. L. Rev. 551, 641, 644 (1968).