Robert D. Bacon[*]

Friedrich "Fritz" Juenger was convinced that I missed my calling, not once but several times, and of course he didn't hesitate to tell me so. But that didn't keep him from being a friend and a mentor for more than two decades.

Fritz's year as a visitor at King Hall, before becoming a permanent member of the faculty, coincided with my third year as a student. I took Fritz's Conflict of Laws course that year, having previously been exposed to the subject while working as a research assistant for Fritz's faculty colleague Carol Bruch, who had an office across the hall and also had conflicts in her teaching and research repertoire. Fritz concluded, with his customary logic, that my high ranking in his Conflict of Laws course and my additional exposure to the subject identified me as one of that relatively small number of future lawyers likely to recognize — much less know how to deal with — the multistate ramifications of a transaction. From this, it was only a minor logical leap for him to conclude that I ought to select an area of practice in which such transactions might cross my desk at least occasionally.

Against Fritz's advice, I followed my judicial clerkships not with high-end civil practice but by remaining in the judicial branch as a court administrator with little time for the substantive law. When I finally began practicing law, seven years after being admitted to the bar, it was a practice of appellate criminal law, a practice in which conflicts issues arise relatively infrequently.[1]

This led to my current practice, the post-conviction representation of death-sentenced prisoners. Fritz's European sensibilities were appalled by his adopted country's atavistic and barbaric retention of the death penalty, abandoned decades ago on the other side of the Atlantic. Not

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[1] One published opinion on choice of law does bear my name as counsel for the prevailing party. Pooley v. State, 705 P.2d 1293, 1302-03 (Alaska Ct. App. 1985) (using a governmental interests analysis, albeit not calling it that, to conclude that Alaska court need not suppress evidence obtained in California through police tactics permissible under California and federal law but not Alaska law).

the least of his — or my — objections to the death penalty was that so many of the best and the brightest of American lawyers are pinned down in society's efforts to decide which of our fellows to kill, devoting our professional lives to what Justice Blackmun called "tinker[ing] with the machinery of death."[2] Fritz understood that, in the absence of the death penalty, we could put our legal education and our energy to work in any number of other more productive ways, of which the conflict of laws was only one.

There are, curiously, echoes of Fritz's approach to the conflict of laws in my representation of prisoners in federal habeas corpus proceedings. Fritz and his generation of conflicts scholars rebelled against the strict rules of the First Restatement and the profound injustices that advocates of those rules were willing to tolerate. My colleagues and I litigate against black-letter rules of federal-state relations, created and applied in the name of interjurisdictional comity. They are rules designed not to achieve just results in individual cases, but designed to prevent litigation of the merits of individual cases, to prevent inquiry into where justice actually lies on the specific facts before the court.[3] Conflicts scholars would note one curiosity about the rules of federal deference to the state courts in habeas corpus litigation, however: Unlike the homing instinct so typical of the traditional conflicts arena, in habeas corpus the federal courts are overly eager to withdraw from the field and defer to the state courts, as to jurisdiction as well as choice of law. Notorious among practitioners in my specialty is the Supreme Court's opinion in *Coleman v. Thompson*.[4] Justice O'Connor's opinion for the Court begins, "This is a case about federalism."[5] Its holding is that Coleman, under a sentence of death imposed by the Virginia state courts, could receive no federal habeas corpus review of the merits of his claims of constitutional error, because, through no fault of his own, his attorney filed his state-court appeal three days out of time. The dissenters described the approach and the result as "patently unfair" and "the quintessence of inequity."[6]

Shortly before his death, Fritz wrote, "the judicial revolution in tort choice of law can be readily explained as a judicial reaction against a doctrine that inevitably produced undesirable results because it

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[2] Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

[3] *E.g.*, Coleman v. Thompson, 501 U.S. 722, 730-31 (1991); Teague v. Lane, 489 U.S. 288, 308 (1989).

[4] *Coleman*, 501 U.S. 722, 726 (1991).

[5] *Id.*

[6] *Id.* at 774 (Blackmun, J., dissenting).

imported substandard rules of decision."[7] Federal habeas corpus needs and awaits a similar revolution.[8]

As a teacher, Fritz was more candid than many about what he perceived to be right and wrong results. He taught us that choice of law was a tool that could and should be used to do justice. He believed that, although capable of abuse, the idea of the "better view" of the law was one appropriately to be taken into account in solving multijurisdictional problems, not one to be resisted as an inappropriate injection of ideology into some otherwise pure system of law. These are worthwhile lessons for all lawyers to learn and recall, whether the legal problems we deal with are multijurisdictional or not.

To law students searching for "black-letter rules" amidst the ambiguities of casebooks, Fritz provided refreshing candor, even if not reassurance: "Although it is printed in black letters, section 145 is not much of a rule since it fails to offer a definition of the central word 'significant.'"[9]

The European with his high academic standards and low tolerance for intellectual sloppiness tempered that rigor with a wonderful wit. A mutual friend spent a summer while in law school working at a small firm that represented mortgage lenders in consumer bankruptcies. When she returned to school in the fall and was asked by Fritz, her favorite professor, about her summer job, she told him she had spent the summer helping to take unemployed people's houses away from them. Fritz reassured her, "It is one of the great traditions of our profession that every lawyer must do a certain amount of *pro malo* work."

And perhaps it is. But his choice of metaphor suggests another lesson that we can take from Fritz. Just as what he taught his students and the profession about the conflict of laws may have relevance by analogy to issues which are not multijurisdictional, perhaps one of Fritz Juenger's legacies as teacher and scholar may be to suggest to us that our customary definition of *pro bono publico* may be too narrow. His career

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[7] Friedrich K. Juenger, *American Conflicts Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 89, 107 (2001).

[8] Institutional constraints on state courts, particularly those whose judges are elected, make it likely that their rules of decision will be substandard in comparison to those of the federal judiciary. *See* Harris v. Alabama, 513 U.S. 504, 519-20 (1995) (Stevens, J., dissenting); THE FEDERALIST NO. 81 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 BOSTON U. L. REV. 760 (1995).

[9] Friedrich Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 212 (1969). The reference is to Restatement (Second) of Conflict of Laws § 145 (1971) (applying the law of the state with the "most significant relationship").

was not in representation of the indigent or non-profit organizations, but the contributions of his scholarship and his teaching to the advancement of the public good are beyond question. He will be missed, but not forgotten, by the great number of us he has taught, influenced and befriended.