Remarks by an Embarrassed but Unrepentant Multilateralist

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I'd better admit it right at the outset: I am a multilateralist. I also admit that re-reading Friedrich Juenger's book after a decade has made me a more-than-ever embarrassed multilateralist because its critique of the traditional choice-of-law method is as trenchant as it is perceptive. Yet, I am unrepentant because despite Juenger's assault on traditional choice-of-law rules and despite his passionate argument for a substantivist alternative, I still consider a well-tempered multilateralism the lesser evil.

I. Three Clarifications

Choice of Law and Multistate Justice is a complex and rich book. It deserves much praise but also invites much criticism. Since praise is cheap, and since Fritz Juenger himself always enjoyed a good fight, I will act in his spirit and present some critical views. Yet, before I turn to the book's problems, a few clarifications are in order, lest my remarks be misunderstood.

To begin with, the book consists of three major elements, and I quarrel only with the last. First, there is its historical overview of the development of conflicts law (chapter 1). This essay is a fine and timeless contribution that deserves to be read by two kinds of people: every serious conflicts scholar (of whom there are few) and every lawyer suffering from the common illusion that the law is forever generating new insights (of whom there are many). Juenger delivers a powerful antidote particularly to the American infatuation with novelty, a weakness all too often based on a combination of historical ignorance and sheer hubris. Second, the book provides a merciless critique of the existing choice-of-law methods (chapters 2 and 3). Although Juenger paints an overly gloomy and one-sided picture, I find it undeniable that his critique of both unilateralism and multilateralism is ultimately correct, at least at its core: as others have noted before, it will forever remain unsatisfactory to resolve transboundary cases by picking one domestic law over the other, however chosen. After all, "conflicts law deals with multistate and supranational problems that — by

definition — transcend state sovereignty" (p. 136). Thus, as an adherent of multilateralism, I hang my head in shame. Third, the work arrives at a passionate argument in favor of a substantive approach (chapters 4 and 5). Here, Juenger's demands that in determining the applicable law in transboundary cases, judges should not merely seek (in Gerhard Kegel's words) "conflicts justice" through choice-of-law principles, but instead openly pursue "substantive justice" by picking or creating special substantive rules. It is this proposition that I find troublesome and will thus discuss in somewhat greater detail below.

Even Juenger's substantivist proposition is a combination of three elements and I will, again, address only one. First, it endorses alternative reference rules which allow courts to select the law favoring a particular result (*see, e.g.,* pp. 195-197). I will leave that aside because such rules are widely accepted today and because here, substantivism still operates within the traditional framework, i.e., through (a special type of) choice-of-law rules. Second, substantivism encompasses the idea that judges choose the rule they deem substantively preferable, i.e., more "just." I will leave that alone as well because this is essentially the "better law" approach first advocated by Magister Aldricus (*see* p. 12) and now associated with Robert Leflar's "choice-influencing considerations"; it was not Juenger's original idea, and he does not claim it as such. His original contribution in the book is a third form of substantivism: the proposal that courts should fashion new, special, substantive rules for transboundary cases. Here, Juenger stabs at the heart of conflicts law because such an international private law would render choice-of-law rules obsolete. This is the substantivism I find problematic.

Finally, even with regard to this, third, form of substantivism, I agree with Juenger in several respects. Most importantly, special super-rules for transboundary cases are an inherently sensible idea because such cases, especially international ones, are different from purely domestic problems and do create special needs. Where we already have such super-rules, for example in the form of international conventions, model principles, or trade customs, courts should by all means apply them and thus avoid choice-of-law issues. Unfortunately, such super-rules are still the exception. I also agree with Juenger that in extremely complex disputes, especially in multi-party, multi-jurisdiction case of the *Agent Orange* Litigation kind,[1] traditional choice-of-law analysis may simply break down. At this point, the

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[1] *See* In re Agent Orange Product Liability Litigation, 580 F. Supp. 690 (E.D.N.Y. 1984).

need to fashion a special and uniform solution may be justified by sheer necessity, other concerns notwithstanding.

II. Three Criticisms

It is one thing to welcome existing super-rules and to accept their creation under dire circumstances but quite another to propose that judges routinely fashion special substantive rules in transboundary cases. I have three basic problems with this proposal: I find it theoretically flawed, practically troublesome, and threatening to the core values even Juenger sought to promote.

1. Theory: "Justice" as Personal Preference

If judges are to choose or create rules for transboundary dispute resolution that ensure "justice", they inevitably face the question how to make that decision. It is true that in some instances, standards may be found in emerging interstate or international norms, gleaned from widely shared trends, or derived from obvious functional needs. The three cases explored in the book provide examples of such instances. As Andreas Lowenfeld pointed out in his book review, however, "Juenger's choice of illustrations of justice versus injustice is too simple."[2] Cases in which there are clear indications where transboundary "justice" lies are relatively rare. Most of the time, there is no sufficient consensus, no clear trend, and no functional imperative. But how do we tell "justice" from "injustice" when the rules of the jurisdictions involved differ simply because they reflect different value judgments, tradeoffs or legislative policies? The problem here is not only that "value judgments are precarious[3] (that is true in purely domestic cases as well), but that in transboundary cases what law to prefer depends on whose values count.[4] If we choose between those of the involved jurisdictions, we are back to square one; if we let judges make an independent choice without reliable standards, we are at sea.

The book never tackles this fundamental problem. There is repeated talk about "just decisions" (p. 96), "substandard foreign law" (p. 110, 118) or "substandard rules" (p. 201), and especially about "superior tort rules" (p. 147) that should not be defeated by "noxious defenses" (p. 146). But Juenger never really explains how we know which decisions are "just", which rules are "substandard" or which defenses are "noxious." Perhaps we

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2 Andreas Lowenfeld, *Book Review*, 88 AM. J. INT'L LAW 184, 186 (1994).

3 Joachim Zekoll, *Book Review*, 69 TUL. L. REV. 1099, 1110 (1995).

4 *See id.*

could look for standards that are indeed so widely shared on an interstate or international level that judges could resort to them in good conscience, and Juenger touches on this idea on a few occasions (*see, e.g.,* p. 207). But he fails to elaborate how we find such standards, how clear they have to be in order to count, and why the choice of particular jurisdictions to deviate from them should not be entitled to respect.

Closer inspection reveals why Juenger never considered the definition of "justice" a major problem. Virtually throughout the book, he simply assumes that rules promoting recovery are superior to those preventing or limiting it, at least in tort cases (*see, e.g.,* pp. 95, 117-118, 149).[5] Of course, if one already knows that justice lies on the side of the plaintiff, choosing the right law, or fashioning a super-rule, for transboundary cases, is indeed quite simple. Ultimately, "justice" for Juenger is defined by personal preferences — be they his own (pro-recovery) bias or the preferences of the judges who thus have to fashion transboundary super-rules with no other yardstick than their own inclinations.

2. *Practice: A Reality Check on Judging Transboundary Litigation*

The book evinces its author's trust in the ability of judges actually to fashion super-rules which are not only "just" but also reflect the special needs arising in transboundary cases. Juenger claimed that "judges should not find it particularly difficult to use their critical facilities for the purpose of evaluating the merits of competing rules of decision" (p. 192) and that the special substantive rules they concoct will be "guaranteeing sound results in multistate cases" (p. 192). There are two reasons for my disagreement with these propositions.

One is that Juenger tends to focus on the decisions of a few high-profile judges who have created overarching super-rules. I worry, however, about the average trial or appellate judge faced with such a task. If all courts were staffed by Fulds, Storys, Traynors, and Weinsteins, I might feel better about letting them fashion special law as required by the case. In reality, however, most courts are staffed by judges with average capabilities, limited time and resources, and little experience in transboundary issues. If these judges cannot understand and properly apply traditional choice-of-law rules (as Juenger claims), frankly, I don't want them to make up new substantive

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[5] There is, as far as I can see, only one note of caution, i.e., when Juenger questions the "unlimited favor laesi" in the product liability choice-of-law rules proposed by Drobnig, p. 197..

law for transboundary cases without any guidance other than the elusive goals of "justice" or "sound results."

I also disagree with Juenger's view of the difficulty of the job. Looking at the American conflicts revolution, the book suggests that "[t]he large majority of cases reveals a simple clash between two rules of decision, one of which is clearly superior to the other" (p. 206). Most choice-of-law decisions we read are about "a very limited number of substantive issues . . . and the value judgments courts had to make were anything but difficult" (p. 205). That was arguably true in several high profile cases during the American conflicts revolution, but it is certainly not true on any broader scale. The range of substantive differences triggering conflicts issues all over the globe is undeniably vast and the value judgments courts face are often extremely difficult. Even if one believes with Juenger that guest statutes, liability caps, or immunity rules are clearly "noxious," one need only consider the conflicts issues that plague courts, especially European courts, in the family law context to recognize the complexity and sensitivity of the questions presented. Where the clash is, for example, between our Western ideas of domestic relations and competing, say, Islamic concepts, who has the temerity to claim that the choices involved are "anything but difficult"?

3. Values: Certainty, Predictability, and Decisional Harmony

Finally, Juenger claimed that the judicial creation of transboundary substantive law "promotes certainty, predictability and decisional harmony" (p. 193) more effectively than orthodox choice-of-law methods. Of course, these are important values, and if Juenger's claim had merit, that might be enough reason to accept the theoretical shortcomings and practical concerns of his approach. The problem is that he never convincingly explains why and how this should be the case. And yet, it is far from obvious.

To be sure, Juenger is correct that traditional choice-of-law rules do not score very highly in their pursuit of these goals. But why should (mostly non-specialist) judges deciding (often complex) transboundary disputes in the caselaw tradition, i.e., one by one, do any better? While adjudicating common-law style has many advantages over judging under general rules, "certainty, predictability, and decisional harmony" are not among them. If anything, we should expect case-by-case adjudication under the banner of undefined "justice" to do worse in these regards, i.e., to decrease, rather than increase the predictability and uniformity of outcomes.

This is especially true in international litigation because the primary stabilizing element in a caselaw system, i.e., a body of accessible and

reliable precedent, is unlikely to develop in the foreseeable future. Not only would courts from different jurisdictions not be bound by each others' decisions, language barriers, differences in the world's legal traditions, and the lack of a common appellate tribunal would also leave us with virtually no hope to develop a substantial body of caselaw that could provide at least persuasive authority for the majority of cases. In other words, reliable guidance from prior decisions will be rare or non-existent. As a result, even a judge earnestly striving for predictability and decisional harmony would find it extremely difficult to promote, let alone guarantee, these values.

III. Of Checks and Balances

At the end of the day, Juenger is right that striving for substantive justice must be the ultimate goal even in conflicts cases. Yet, that proposition simply poses again the fundamental question whether to reach such justice via choice-of-law rules that pick one domestic law over the other according to (one hopes) plausible criteria or whether to pursue it directly by having judges pick, or create, substantive law for transboundary cases that seems "just" to them in the individual case.

Our primary tools for determining the law applicable in transboundary disputes should be plausible, predictable, and increasingly uniform multilateral choice-of-law rules. I believe this not because I cannot countenance the idea that substantivism would essentially eliminate our subject (my career is not built on it, and I have lots of other things about which to teach and write); not because I cherish the technical intricacies and arcane terminology of many choice-of-law regimes (I consider them both amusing and potentially harmful); and certainly not because I deny any of the problems with choice-of-law rules in practice that Juenger's book lays bare in so admirable a fashion. It is because I believe that the different jurisdictions' choices deserve, in principle, equal respect and because multilateral choice-of-law rules best ensure that respect, their imperfection notwithstanding.

That said, I also believe that there is a place for substantivism in conflicts law. Aiming for substantive justice is not only inevitable but also desirable. It is not, as Otto Kahn-Freund put it, "a human weakness,"[6] but a proper and noble endeavor. Yet, since the road to hell is paved with good intentions, the search for substantive "justice" should be part of a larger choice-of-law process in which multilateral conflicts rules and substantive

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6 Otto Kahn-Freund, *General Course*, 143 COLLECTED COURSES 139 (1974-III), p. 466.

concerns coexist in healthy tension. Well-drafted choice-of-law rules produce substantively acceptable results in the majority of cases. It does not bother me that every so often this will require using the virtually inevitable play in the joints, provided that courts do not hide the ball. In some cases, doing "justice" as one sees it, will even require breaking away from the choice-of-law result because a result is required by the forum's mandatory norms or unacceptable according to its public policy. I do not find that objectionable either, as long as courts openly admit it and provide us with good reasons.[7] Thus, like law and equity in the common law systems, and like the detailed rules and general clauses in the civilian codes, multilateral choice-of-law rules and substantivism should check, balance, and complement each other. In other words, substantive "justice" in conflicts law is a necessary consideration but it is not a trustworthy freestanding method.

Perhaps ironically, Juenger's book confirms my multilaterist convictions more than any other piece of conflicts scholarship I know. This is not because his arguments against traditional choice-of-law methods and for a substantivist approach are so weak but because they are so strong. He not only brings the problems of established choice-of-law rules into frighteningly sharp relief but also makes the best case for substantivism I have seen so far. If *Choice of Law and Multistate Justice* cannot convert me, probably nothing will.

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[7] The well-known case of *Paul v. National Life*, 352 S.E. 2d 550 (W.Va. 1986) strikes me as a good example. The court declares guest statutes a violation of West Virginia's public policy and explains that this policy is long-standing and shows that this it is illustrated by many previous decisions.