The Natural

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For more than a quarter of a century, I sat at Fritz Juenger's elbow. True, there was a wall between us. We both arrived at King Hall in the summer of 1975, and were assigned adjacent offices. Fritz was a distinguished visitor, who joined our faculty on a permanent basis the following year. I was the greenest of greenhorns, separated from student status only by three years of employment as a migrant law clerk. Of course I looked up to Fritz, who was a natural as a law teacher. He was a kind and generous mentor as I sought to find my feet in the classroom and the academy. But we were more than master and apprentice. We became, almost instantly, fast friends. We had a playful relationship from the start, but as our careers progressed that playfulness served in a jocular way to express a deep and mutual respect for each other's work, and especially for the writing that gave voice to our work. We each turned to the other for help in testing ideas, and in seeking to find just the right words to use in a difficult passage.

Fritz's neighbor on the other side of his office was Edgar Bodenheimer. Edgar, who died in 1991, was a world-renowned philosopher of law.[1] More than a mentor, Edgar was my guiding light. As colleague and coauthor Edgar inspired me to take a serious interest in the philosophy of adjudication. Fritz and Edgar were good friends, and so Fritz found himself bracketed between two friendly philosophers who would occasionally push him to do what he liked least — to engage in conceptual discourse rather than pragmatic criticism. The republication of *Choice of Law and Multistate Justice* prompts me to offer a few words about Fritz's philosophy of law.

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[1] *See* John B. Oakley, *Bodenheimer, Edgar (1908-1991), in* 1 THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA 86 (C. Gray ed. 1999); Carol Bruch, Daniel Dykstra, Friedrich K. Juenger, & John B. Oakley, *In Memoriam Edgar Bodenheimer, 1908-1991*, 39 AM. J. COMP. L. 657 (1991).

It is risky, but I hope not an affront to his memory, to seek to hang a philosophical label on a man who devoted his career to arguing against theoretical constructs in the choice of law. I think it worth the risk, however, because it offers some insight into the nature of a man loved by almost everyone who knew him. I'll begin with the conventional trifurcation of philosophies of law: legal positivism, legal realism, and natural law.

Legal positivists deny that there is any necessary conceptual connection between the truth of propositions of law and the truth of propositions of morality. The truth of propositions of law is determined by their validity, and while there is controversy within legal positivism about the proper test for the validity of a rule of law, there is general agreement that legal validity is determined by an essentially empirical standard. The validity of a law is a matter of fact — perhaps a political fact, such as sovereignty, or a psychological fact, such as acceptance of certain lawmaking conventions by the people they govern or the officials who govern them. What is distinctive about legal positivism is that when this factual test is satisfied — when law has been posited by the specified person or institution or process deemed to have the authority formally to make law — the law is valid no matter how vicious it may be as a matter of morality. Of course there may be a contingent connection between law and morality. Most laws in a functional society will serve moral purposes. But legal positivism insists that moral virtue is not a conceptual necessity for the validity of a law. A law that satisfies the right formal, factual test is legally valid even if morally abhorrent.

Legal realists are skeptical that any formal test can or should determine the legality of official conduct. Law, for the realists, is a metaphor for the myriad complex expressions of effective power in a modern society. Law is thus essentially a myth. What matters is not prescription but enforcement. Those with the power to "make law," that is, to legislate rules and render judgments that will be enforced by official coercion, are constrained by practical politics but not by formal rules. Our standard for judging such officials should be the consequences of their actions. Good legislators and judges act to advance sound social policy. If they act to advance selfish or short-sighted goals, they may be criticized as socially irresponsible or even immoral. But they may not be criticized as having acted illegally. Legal realists generally avow that official power should be exercised pragmatically, in pursuit of the common good.

At one time "natural law" appealed primarily to standards beyond human politics, divinely ordained or to be inferred from a study of the natural world, as criterion for the validity of laws enacted by human processes. More modernly, however, natural law has become something of an umbrella category for theories of law that are neither purely formal, like legal positivism, nor debunking of the very concept of law, like legal realism.[2] Natural lawyers take law seriously, and think it meaningful to appeal to the legality or illegality of particular acts in supporting or criticizing official conduct. But for natural lawyers law is not an autonomous, strictly empirical discipline. What counts as law *may* require moral judgment, not as a standard of criticism of the law but by a process of moral elaboration internal to the law. There is much debate about how pervasive moral reasoning should be as an element of legal reasoning, and what moral standards function as conditions of legal validity — the umbrella of natural-law theory is large and tent-like — but all who cluster under it share the view that to some extent morality and law are conceptually connected. They agree that propositions of law are not inherently false, as legal realists avow, and that conditioning propositions of law on moral judgments is not incoherent, as legal positivists contend. In short, natural lawyers agree that what the law requires entails reference, at least in some circumstances, to what justice requires. And that, in such circumstances, justice is part of law.

So where do we place Fritz along this spectrum? It can be said with certainty that Fritz Juenger was not a legal positivist. He was unsparing in his contempt for the famous case of *Erie Railroad Company v. Tompkins*,[3] which he associated with the primacy of legal positivism in American legal thought.[4] But I think his antipathy to legal positivism had deeper roots than his condemnation of the *Erie* Court's celebration of form over substance. Fritz endured World War II as a child in Nazi Germany, and brought with him to his adopted country two searing memories. First, of forms of law gone mad. Second, of exposure to power so great that it needed no justification. Both memories were rooted in an early life as witness to dictatorship. The first left him deeply suspicious of those who looked for law in procedural formality rather than substantive consequences. But this

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2 *See* John B. Oakley, *Foreword: Conceptions of Natural Law Within the Philosophy of Adjudication—Metaphorical, Metaphysical, and Metatheoretical*, 26 U.C. DAVIS L. REV. 509 (1993).

3 304 U.S. 64 (1938).

4 *See infra* page 163.

was the fruit of vicarious suffering. Unlike Edgar, Fritz was not persecuted by the country of his birth. The second memory, however, was branded into his consciousness by personal suffering. He was the target and victim of a ruthless campaign of air bombardment of civilians, in which his house and his family were destroyed literally before his eyes. That may have been illegal, if it was not truly necessary. It may have been lawless, an example of the violence possible in a Hobbesian state of nature unbounded by law. But surely he did not view it as lawful simply because the bombers won the war. His entire career reflected a belief that the point of law, and the purpose of being a lawyer, was to demand justification for the coercive exercise of official power.

Was this demand for justification external to law? Fritz would certainly have agreed that judges should be pragmatic, and so his likely classification would seem to be as a legal realist. When he did invoke theoretical labels, it was to endorse a teleological approach to the conflict of laws — judges faced with a choice of law should choose from among the available alternatives the substantively best rule of law.[5] In modern legal philosophy, however, a teleological approach implies not only a purposive, outcome-oriented approach to resolving legal controversy, but also a particular commitment to the purposes that ought to govern legal decision-making. Teleology, the pursuit of the good, is opposed to deontology, the pursuit of the right. Thus teleology in law affirms using official power — law or at least the appearance of law — to pursue aggregate social welfare, and denies that this utilitarian ambition should be qualified by concern for duties or rights that respect individual dignity or autonomy at the expense of aggregate social welfare.

I don't think Fritz was teleologically inclined in this conventional sense. It might be good to have rules of law that make the trains run on time, but Fritz was always concerned with protecting bystanders along the tracks. He was never sympathetic to reducing duties of care in order to cut insurance costs. He may have been pragmatic, but he was a caring pragmatist always sympathetic to the fall guys of the modern industrial state. When he invoked the concept of justice, he invoked ideas of rights to protection and compensation as a matter of fairness and dignity and humanity.

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[5] *See id.* at 191-199 (proposing replacement of orthodox choice-of-law doctrines with a "teleological" or "substantive law" approach).

And so I conclude that Fritz Juenger was not only a natural *as* a lawyer. He was, philosophically speaking, a natural lawyer. The title of his book, *Choice of Law and Multistate Justice*, did not mix apples and oranges. Natural lawyers like Fritz, and like Edgar Bodenheimer, refuse to divorce justice and law. They see them as related concepts. When Fritz argued for judges to do justice, he argued for them to do justice *as a matter of law.*

This helps to explain why Fritz had such fascination with choice of law, where judges must decide cases in a twilight zone not only of conflicting rules and standards, but of conflicting systems of rules. Here, much more frequently than in the adjudication of purely domestic disputes, the connection between propositions of law and propositions of justice is exposed and visible. Given a choice between conflicting legal propositions, Fritz argued with unrelenting passion, why not choose the proposition of law that produced the most just outcome? Moreover, Fritz argued that this was not just an attractive option or the best available alternative. Fritz believed that it was intrinsically the duty of a judge to do justice within the constraints of the law — particularly loose constraints when multistate actors and transactions require a choice of law, making paramount the duty to promote multistate justice.