

# THINKING LIKE A LAWYER ABROAD: PUTTING JUSTICE INTO LEGAL REASONING

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## ABSTRACT

*Americans are taking new interest in legal reasoning. Thinking Like a Lawyer: A New Introduction to Legal Reasoning by Professor Frederick Schauer suggests why. According to Schauer, American legal methods often require decision-makers “to do something other than the right thing.”<sup>1</sup> There has got to be a better way.*

*Now comes a book that offers Americans opportunities to look into a world where legal methods help decision-makers do the right thing. According to Reinhard Zippelius in his newly translated Introduction to German Legal Methods, German legal methods help decision makers resolve legal problems “in a just and equitable manner.”<sup>2</sup>*

*This Article sets out what good legal methods do: help decide legal problems justly. It poses the puzzle: why does Schauer say legal methods challenge rather than support doing the right thing, when Zippelius does not? Relying on Schauer himself, the Article suggests an answer: neglect of legislation and law application and fixation on appellate law-making. It shows how German legal methods as described by Zippelius help decision makers to do the right thing.*

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1. FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 212 (2009)

2. REINHOLD ZIPPELIUS, INTRODUCTION TO GERMAN LEGAL METHODS 13 (Kirk W. Junker & P. Matthew Roy, 2008).

## INTRODUCTION

“[R]ule-based and precedent based decision making often require legal decision-makers to do something other than the right thing . . . .”

—Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*<sup>3</sup>

“The law must regulate human behavior in such a way that . . . the legal problems that arise in a society are resolved in a just and equitable manner.”

—Reinhold Zippelius,  
*Introduction to German Legal Methods*<sup>4</sup>

The American public should be distressed that in his new book, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, Professor Frederick Schauer teaches law students that American legal methods often require decision-makers “to do something other than the right thing.”<sup>5</sup> It should find disturbing that Schauer writes about legal reasoning without using the word justice. Should not thinking like a lawyer have something to do with realizing justice?

Elsewhere it does.

In Europe, Professor Reinhard Zippelius in his *Introduction to German Legal Methods*, first published in German in 1971 and now translated into English for the first time, teaches law students that legal reasoning helps decision-makers resolve legal problems “in a just and equitable manner.”<sup>6</sup>

3. SCHAUER, *supra* note 1, at 212.

4. ZIPPELIUS, *supra* note 2, at 13.

5. SCHAUER, *supra* note 1, at 212. No other scholar in the United States today is more identified with rules and legal reasoning than is Schauer. *See, e.g.*, Frederick Schauer, *Introduction to KARL N. LLEWELLYN, THE THEORY OF RULES* (Frederick Schauer ed., 2011); FREDERICK F. SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991). *See generally* Linda Meyer, *Editor’s Introduction to RULES AND REASONING: ARTICLES IN HONOUR OF FRED SCHAUER* (Linda Meyer ed., 1999) (introducing various essays analyzing and even critiquing Schauer’s legal reasoning methods). If the comments with which Harvard University Press introduced Schauer’s book are any indication, Schauer’s book may become an American standard. Professor Sanford F. Levinson describes it as “the best available introduction to legal reasoning.” Judge Richard A. Posner counts the book “as comprehensive, thorough, and sophisticated an introduction to legal reasoning as it is a lucid one. All the bases are covered . . . .” It lays out “the entire range of legal reasoning techniques.”

6. ZIPPELIUS, *supra* note 2, at 13.

The book's German original has been a standard student text for more than forty years.<sup>7</sup>

Although legal reasoning is not a topic of public debate in the United States, its failures are. American dissatisfaction with civil justice has been a recurrent theme in American history since the earliest days of the republic.<sup>8</sup> As the country developed a modern commercial system it tried and failed to develop a modern system of legal methods.<sup>9</sup> Today it limps along with third rate methods rooted in a pre-industrial past.<sup>10</sup>

There are many law reform organizations and many proposals for reform. Commonly they focus on specific niches of the American legal system, such as tort reform, representation for the poor, consumer protection, caps on malpractice recoveries, loser-pays, and limitations on punitive damages.

Law reform is a never-ending story because Americans implement substantive law reforms with dysfunctional methods. America has interest in reform and has ideas for reform, but does not have legal methods that could make those reforms work well.

Recently the law reform organization, The Common Good, announced a new initiative, "Start Over," that is directed to the legal system as a whole.<sup>11</sup> It deplores how Americans are "drowning in law."<sup>12</sup> They live in "fear of possible lawsuits."<sup>13</sup> Their hands are tied "by laws made by political leaders who are long dead."<sup>14</sup> Government is paralyzed because legislation tries to "calibrate correct choices in advance . . . [when] it is

7. The first edition appeared under the title *EINFÜHRUNG IN DIE JURISTISCHE METHODENLEHRE* (1st ed. 1971); the most recent is under the title *JURISTISCHE METHODENLEHRE: EINE EINFÜHRUNG* (10th ed. 2006). The other classic students' text is *KARL ENGISCH, EINFÜHRUNG IN DAS JURISTISCHE DENKEN* (1st ed. 1956; 10th ed. by Thomas Würtenberger & Dirk Otto, 2005). The classic academic text is *KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT* (1st ed. 1960; 6th ed. 1991; 4th condensed study ed. with Claus-Wilhelm Canaris, 2009). The global comparative work is *WOLFGANG FIKENTSCHER, METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG* (5 vols. 1975–1977).

8. See *JAMES R. MAXEINER, GYOOHO LEE & ARMIN WEBER, FAILURES OF AMERICAN CIVIL JUSTICE IN INTERNATIONAL PERSPECTIVE* 260–65 (2011) [hereinafter *MAXEINER, FAILURES*].

9. *Id.* at 263–65.

10. See *id.* at 260–65.

11. *About Common Good*, COMMON GOOD, <http://www.commongood.org/pages/about-us> (last visited May 2, 2012) ("Our Start Over campaign, launched in May 2011, aims to influence the 2012 election by organizing public support for structural overhaul of government and law. Only people, not rules, make things happen.")

12. *The Problem: Drowning in Law*, COMMON GOOD, <http://www.commongood.org/pages/the-problem> (last visited May 2, 2012).

13. *The Problem: Drowning in Law, Legal Fear*, COMMON GOOD, <http://www.commongood.org/pages/legal-fear> (last visited May 2, 2012).

14. *The Problem: Drowning in Law, Democracy by Dead People*, COMMON GOOD, <http://www.commongood.org/pages/democracy-by-dead-people> (last visited May 2, 2012).

beyond human capacity to foresee every possible circumstance . . . .”<sup>15</sup> Laws leave “no room for humans in charge to make essential choices;”<sup>16</sup> laws “have taken away people’s authority to assert good values.”<sup>17</sup> Start Over sees the failings in the system itself and not in any single substantive manifestation.

Start Over recognizes that incremental change is not enough. Where nineteenth century reformers chose to work “with old materials and after the old fashions,”<sup>18</sup> Start Over promotes real change. Starting over with something new is daring. America has over one million lawyers. They are invested in old ways of doing things. Yet few of them would deny that those old ways do not work well for most people. It is time that they do their part to fulfill the national pledge of “liberty and justice for all.”<sup>19</sup> Elsewhere in the world, there are legal systems that work better. American reformers need not imagine unproven methods; they can study methods proven to work.

This translation of Zippelius’ *Introduction to German Legal Methods* begins to make it possible for monolingual Americans to look at how one such system actually works.<sup>20</sup> The German system works well; it has long been admired around the world.<sup>21</sup>

15. *The Problem: Drowning in Law, Government Paralysis*, COMMON GOOD, <http://www.commongood.org/pages/government-paralysis> (last visited May 2, 2012).

16. *Id.*

17. *The Problem: Drowning in Law, Loss of Personal Responsibility*, COMMON GOOD, <http://www.commongood.org/pages/loss-of-personal-responsibility> (last visited May 2, 2012).

18. B.R. Curtis, N.J. Lord & R.A. Chapman, REPORT OF THE COMMISSIONERS APPOINTED TO REVISE AND REFORM THE PROCEEDINGS IN THE COURT OF JUSTICE IN THIS COMMONWEALTH (1851), reprinted in 2 A MEMOIR OF BENJAMIN ROBBINS CURTIS WITH SOME OF HIS PROFESSIONAL AND MISCELLANEOUS WRITING 149, 159 (Benjamin R. Curtis, Jr. ed., 1879); see also James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VAL. U. L. REV. 517, 541, 559–66 (2006) [hereinafter Maxeiner, *Legal Indeterminacy*].

19. See The Pledge of Allegiance, 4 U.S.C. § 4. The Pledge of Allegiance was first published in *National School Celebration of Columbus Day: The Official Programme*, THE YOUTH’S COMPANION, Sept. 8, 1892, at 446.

20. In the past Americans interested in legal methods outside the common law had few learning opportunities in English. Professor Kirk Junker is changing that in Carolina Academic Press’ new series *Comparative Legal Thinking Series*. Professor Junker’s goal is to enable English-speaking readers to “attain the unique inside view of the civil law student.” Another title already available in the series is ANTONIO LORDI & GUIDO ALPA, WHAT IS PRIVATE LAW? (2010). See also EVA STEINER, FRENCH LEGAL METHODS (2002) (description of French legal methods from English perspective).

21. See, e.g., MAXEINER, FAILURES, *supra* note 8, at 8–9; LAW—MADE IN GERMANY (2nd ed. 2012), available at <http://www.lawmadeingermany.de>; DAS DEUTSCHE ZIVILPROZEBRECHT UND SEINE AUSSTRAHLUNG AUF ANDERE RECHTSORDNUNGEN (Walther J. Habscheid ed., 1991); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); FREDERICK FRANK BLACHLY & MIRIAM EULALIE OATMAN, THE GOVERNMENT AND ADMINISTRATION OF GERMANY (Brookings Inst. 1928); Frederick William Maitland, *The Making of the German Civil Code in 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND* 484 (Fisher ed., 1911); Roscoe

In Part I, I set out what good legal methods do: help decide legal problems justly. In Part II I pose the puzzle: why does Schauer say legal methods challenge rather than support doing the right thing, when Zippelius does not? Relying on Schauer himself, I suggest an answer: neglect of legislation and law application and fixation on appellate law-making. In Part III I show how German legal methods as described by Zippelius help decision makers to do the right thing.

In this Article, my goal is to raise Americans' awareness of foreign legal methods using the book by Zippelius. I encourage Americans to not dismiss civil law methods, but to find in them ideas proven to work.<sup>22</sup> I am not, however, attempting a comparative study of legal methods.

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Pound, *The Causes of the Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. Rep. 395, 397 (1906) (describing "the wonderful mechanism of modern German judicial administration"). For an exhaustive listing of contemporary Anglo-American reactions to the foundational German laws from the last quarter of the nineteenth century, see MARCIS DITTMANN, *DAS BÜRGERLICHE GESETZBUCH AUS SICHT DES COMMON LAW: DAS BGB UND ANDERE KODIFIKATIONEN DER KAISERZEIT IM URTEIL ZEITGENÖSSISCHER ENGLISCHER UND ANGLO-AMERIKANISCHER JURISTEN* (2001).

22. Justice Scalia, are you listening? See *Ethics in America: 8. Truth on Trial*, recorded February 13, 1988 (PBS television broadcast Feb. 13, 1988) (hosting Justice Antonin Scalia as a panelist), available at <http://www.learner.org/resources/series81.html?pop=yes&pid=198>. On the panel, Justice Scalia argued:

The only alternative [to the adversary system] is to go to the inquisitorial system and have an investigating judge. And then you are going to win or lose depending on how good a judge you happen to have gotten. At least when you pick your lawyer, you know that if he's bad, it's your fault.

*Id.* at 53:30.

## I.

## Justice—Civil Justice.



JUSTICE is the measuring out to each individual what is his due, according to the inflexible rule of right. Justice is frequently personified, and represented as holding a pair of balanced scales, thus indicating its disposition to estimate things by the true and even standard of right.

*Political or civil justice*, is the measuring out what a man may claim according to the laws of the land. If the laws are founded in absolute justice, then political or legal justice coincides with absolute justice.

*The Young American* (popular schoolbook 1843)<sup>23</sup>

It is elementary learning that law seeks justice. In the middle of the nineteenth century Americans learned this from civics textbooks such as the one illustrated here.<sup>24</sup> “To establish justice,” it taught, “is indeed the great object of all good government.”<sup>25</sup> It cited the preamble of our Constitution, to “establish justice,” as the object of the nation, second only to creating a more perfect union itself.<sup>26</sup> It instructed students that civil

23. S.G. GOODRICH, *THE YOUNG AMERICAN: OR BOOK OF GOVERNMENT AND LAW; SHOWING THEIR HISTORY, NATURE AND NECESSITY* 23 (3d ed. 1843).

24. See DANIEL ROSELLE, *SAMUEL GRISWOLD GOODRICH, CREATOR OF PETER PARLEY, A STUDY OF HIS LIFE AND WORK* 1 (1968). Goodrich was phenomenally successful as a writer of books for youths; he authored the Peter Parley books. See *id.*

25. GOODRICH, *supra* note 23, at 174.

26. *Id.* at 173 (quoting U.S. CONST. pmb.).

justice consists of applying law to facts, i.e., “measuring out what a man may claim according to the laws of the land.”<sup>27</sup>

Laws are general rules that govern society. Sometimes these rules determine outcomes. Other times they grant people authority to determine outcomes on their own. Legal methods are the way that legal systems apply general rules of substantive law to specific cases. Sometimes they direct what outcomes will be. Other times, however, they structure how decision-makers acting on their own authority are to determine outcomes.

Legal methods take law from the initial formulation of rules in legislatures or elsewhere through to the final application of rules to individual cases. A complete program of legal methods addresses the *legal system*, *lawmaking*, *law-finding*, and *law-applying*.<sup>28</sup> As used in this Article, a *legal system* is a national organization of law. *Lawmaking* includes legislation, but also judicial or administrative lawmaking. *Law-finding* encompasses the interpretation of statutes and precedents; it determines the specific rules that decide particular cases. *Law-applying* takes those rules and applies them to facts to decide concrete cases. *Law-applying* presupposes a way of *fact-finding*. Taken together, legal methods should facilitate bringing rules and facts together to reach just results.

Schoolbook learning teaches that legal systems only approximate justice. There is tension between justice and law. This tension is at the heart of Schauer’s observation that legal reasoning requires application of rules notwithstanding that in particular cases the results may not be the best possible decisions. In Schauer’s world, legal methods exist to take decisions away from decision-makers to bind them to decide in accordance with less than optimal rules. In Zippelius’ world, legal methods exist to empower decision-makers to reach decisions on their own authority that are as fair and just as possible, even if in some instances rules do not comply with this demand and the legal question cannot be solved justly.<sup>29</sup>

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27. *Id.* at 23.

28. See Maxeiner, *Legal Indeterminacy*, *supra* note 18, at 521–27; James R. Maxeiner: *Legal Certainty: A European Alternative to American Legal Indeterminacy?*, 16 *TULANE J. OF INT’L & COMP. L.* 541 (2007) [hereinafter *Legal Certainty*]; cf. Stefan Vogenauer, *Sources of Law and Legal Method in Comparative Law*, *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 869 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (“[A] legal method typically answers the following questions: (1) What is the style of lawmaking? (2) Who applies and interprets the law? (3) Which factors are taken into account in the application and interpretation of the law? (4) How are these factors ranked?”).

29. ZIPPELIUS, *supra* note 2, at 14.

II. LESS THAN THE BEST? SCHAUER'S *THINKING LIKE A LAWYER*

1996 Internet Newsletter Publication<sup>30</sup>

Mild rule skepticism is endemic among American jurists. Many, perhaps most, contemporary American jurists, accept the aphorism that “we are all realists now.”<sup>31</sup> By that, they mean, “we are sophisticated professionals; we know that legal decisions have little to do with legal rules.”<sup>32</sup> Schauer considers this common saying “almost certainly false.”<sup>33</sup> In his book, he seeks “to present a sympathetic treatment of the formal side of legal thinking, and thus at least slightly to go against the grain of much of twentieth- and twenty-first-century American legal thought.”<sup>34</sup> He tells readers: “[r]ules actually do occupy a large part of law and legal reasoning.”<sup>35</sup> He implores them: “[l]aw may not be all about rules, but it is certainly a lot about rules . . . .”<sup>36</sup>

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30. “Splash and Grab,” SCHNEWS (May 17, 1996), <http://www.schnews.org.uk/archive/news74.htm>.

31. Stephen A. Smith, *Taking Law Seriously*, 50 U. TORONTO L.J. 241, 247 (2000) (“The slogan ‘we are all realists now’ is so well-accepted in North America (in particular in the United States) that an unstated working assumption of most legal academics is that judicial explanations of a judgment tell us little if anything about why a case was decided as it was.”).

32. *Id.*

33. SCHAUER, *supra* note 1, at 144.

34. *Id.* at xii.

35. *Id.* at 13.

36. *Id.*; cf. James R. Maxeiner, *Imagining Judges that Apply Law: How They Might Do It*, 111 PENN STATE L. REV. 469 (2009) [hereinafter Maxeiner, *Imagining Judges that Apply Law*].

Schauer, however, is half-hearted in his defense of legal reasoning; he seems to be infected by rule skepticism himself. He acknowledges widespread—and perhaps his own—uncertainty when he devotes his first chapter to the question “Is there legal reasoning?”<sup>37</sup> Law may be a lot about rules, but Schauer considers the popular conception that law is “a collection of rules written down in a master rulebook” to be “highly misleading.”<sup>38</sup> To the contrary, he says that “straightforward application of existing rules [is] “far removed from the realities of actual practice.”<sup>39</sup> He sees that general rules produce poor results in particular cases.<sup>40</sup> Instead of seeing legal methods as opportunities to mediate between rules and facts in order to bring better results in particular cases—as solutions in law applying—he sees legal reasoning as the problem itself.

For Schauer, legal thinking requires a choice between a decision according to law and doing the right thing. Already on the dust jacket of Schauer’s book we read that legal reasoning is about “following a rule even when it does not produce the best result.” By page 7 Schauer has told us that “every one of the dominant characteristics of legal reasoning and legal argument can be seen as a route toward reaching a decision *other than* the best all-things considered decision for the matter at hand.” A Greek chorus repeats the thought throughout his book.<sup>41</sup>

Schauer says that legal reasoning produces less than the best results because of law’s *generality*:

Although disputes, in court and out, involve particular people with particular problems engaged in particular controversies, the law tends to treat the particulars it confronts as members of larger categories. Rather than attempting to reach the best result for each controversy in a wholly particularist and contextual way, law’s goal is often to make sure that the outcome for *all* or at least most of the particulars in a given category is the right one.<sup>42</sup>

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37. SCHAUER, *supra* note 1, at 1. Nor is he alone; other American authors feel the same. *See, e.g.*, STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING, at xiii–xvi (1st ed. 1985). The 2007 edition does not include this preface.

38. SCHAUER *supra* note 1, at 103.

39. *Id.* at 13.

40. *See, e.g., id.* at 26, 120.

41. It appears over a dozen times. *See, e.g., id.* at 8, 9, 10, 11, 30, 31, 32, 36, 41, 43, 61, 62, 64, and 68.

42. *Id.* at 8. *See also* Frederick Schauer, *The Generality of Law*, 107 W. VA. L. REV. 217, 227–31 (2004) (discussing the inherent generality of rules); FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 300 (2003) (“Yet not only is generality not, in general, unjust, but justice itself may involve considerable components of generality. . . . The good society is one in which generality is not

At book's end, perhaps exhausted, Schauer tenders a melancholy apology for rules:

At the heart of much of law's use of its characteristic reasoning devices is its acceptance of the fact that the best decision is not always the best *legal* decision. In operating in this fashion, law does not intend to be perverse. It does, however, intend to take institutional values especially seriously, and it does *that* in the hope that in the long run we may be better off with the right institutions than we are when everyone simply tries to make the best decision.<sup>43</sup>

The same issues arise in other legal systems based on rules.<sup>44</sup> The puzzle is to explain why Schauer sees American legal methods as often leading to other than the best decisions while Zippelius does not see similar consequences for German legal methods.

Schauer himself, in a recent article, *The Failure of the Common Law*, points us in the direction of an explanation. There he contrasts “the central role of the judge in the lawmaking process” in common law countries with “the kind of highly precise canonical statement of the law much more commonly associated with the civil law . . . .”<sup>45</sup> He poses a puzzle whose solution illuminates ours: “why, even in common law countries, the civil law model seems so much in the ascendancy, and the common law model seems so much in decline.”<sup>46</sup>

In *The Failure of the Common Law*, Schauer describes the vision of the common law model as starting from broad and vague directives which are developed over time by those who are called upon to decide actual controversies when they arise.<sup>47</sup> The laws so made may be avoided or modified when the best resolution of the case so requires. The “constraints of precedent [are] understood as secondary to the continuous efforts of decision makers to reach the best results for the largest number of cases . . . .”<sup>48</sup>

Schauer describes the vision of the civil law to be “rules set forth in advance in an accessible and precise canonical text which is expected to

only inescapable, but is also necessary for justice itself.”).

43. SCHAUER, *supra* note 1, at 233.

44. *See, e.g.*, ZIPPELIUS, *supra* note 2, at xi (“The function of the law in offering solutions capable of attaining consensus to questions of justice can also, however, come into conflict with the strict obligation of the law.”).

45. Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765, 765 (2004) [hereinafter Schauer, *The Failure of Common Law*].

46. *Id.* at 772.

47. *Id.* at 770.

48. *Id.*

provide a clear, even if not necessarily optimal in every case, resolution of the vast majority of legal questions and human controversies.”<sup>49</sup> The hope is that subsequent judicial involvement will be minimal.<sup>50</sup>

As we shall see in Part III that Schauer’s purposely simplified vision of the civil law is only part of the story. It is true that statutes, particularly codes, are to provide in advance general answers that fit most situations. It is true that in those cases, judicial involvement is minimal. But it is also recognized that statutes cannot anticipate every eventuality. Then law is not expected to prescribe answers, but to assist decision makers in finding solutions to problems. The law does not bind decision makers to non-optimal decisions; rather it empowers them to decide on their own to reach the best possible decisions.

Schauer solves his puzzle with four explanations. First, common law decisionmaking empowers a group of people (i.e., judges) to make socially important and largely unconstrained decisions.<sup>51</sup> Second, common law lawmaking occurs in what may be unrepresentative cases.<sup>52</sup> Third, common law judges recognize the costs of excess flexibility and control themselves.<sup>53</sup> Fourth, as societies grow, the importance of the guidance function of law becomes greater than the dispute resolution function.<sup>54</sup>

Schauer’s explanations have two common threads: concentration on judges as lawmakers in litigation (the first three explanations) and insufficient attention to those bound trying to follow the law (the fourth explanation). More than two decades ago, he identified and said of these threads, “Only in America.”<sup>55</sup>

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49. *Id.* at 772.

50. *Id.*

51. *Id.* at 777.

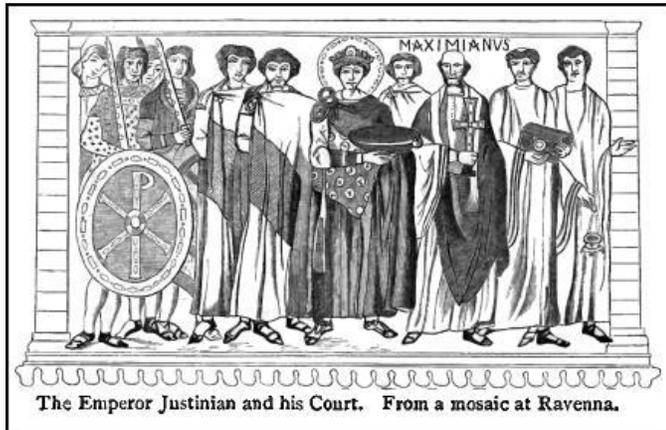
52. *Id.* at 778.

53. *Id.* at 779.

54. *Id.* at 781.

55. Frederick Schauer, *Judging in a Corner*, 61 S. CAL. L. REV. 1717, 1717 (1988). “Only in America,” is the first sentence of the article. Schauer continued: “Although judges and judging occupy an important place in the institutionalized legal systems of most modern cultures, only in the United States could theories of law be so commonly conflated with theories of appellate adjudication.” To much the same effect, see H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 969 (1977).

III. JUSTICE THROUGH METHODS:<sup>56</sup> ZIPPELIUS'S *GERMAN LEGAL METHODS*



57

*Ius est ars boni et aequi.*

“The law is the art of good order and justice.”

*Digests of Justinian*, 1st book, 1st section, 1st paragraph<sup>58</sup>

*We the people* of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Preamble to the U.S. Constitution<sup>59</sup>

Zippelius sees the tension that Schauer sees between rules and doing the right thing, but Zippelius does not see law’s rules and their application as perverting best decisions. To the contrary, Zippelius presents law as

56. The header is borrowed from the title of a book about Karl Engisch, one of the best known German legal-methods scholars of the generation prior to Zippelius. See ANDREAS MASCHKE, *GERECHTIGKEIT DURCH METHODE: ZU KARL ENGISCHS THEORIE DES JURISTISCHEN DENKENS* (1993).

57. 2 JAMES ROBINSON PLANCHÉ, *A CYCLOPÆDIA OF COSTUME OR DICTIONARY OF DRESS* 28 (1878).

58. DIG. 1.1.1 (Ulpian, Inst., 1). The English translation is from ZIPPELIUS, *supra* note 2, at 13 and is based on the similar German translation of the tenth German edition of Zippelius’s book, “Das Recht ist die Kunst der guten Ordnung und der Billigkeit.” Alan Watson translates the maxim differently: “the law is the art of goodness and fairness.” 1 *DIGEST OF JUSTINIAN I* (Alan Watson ed., rev. ed. 2009). The difference in translation underscores the point that, for Zippelius, law is connected with good order.

59. U.S. CONST. pmbi.

promoting a “solution to questions of justice.”<sup>60</sup> Doing justice is a “task” of legal methods.<sup>61</sup>

Although justice is the principal task of law, it is not the only one. Zippelius quotes from the beginning of *Justinian’s Digests*: “Law is the art of good order *and* justice.”<sup>62</sup> In addition to doing justice, law has the task of meeting requirements of legal certainty and, optimally, of adequately satisfying societal interests or what Americans call, policy.<sup>63</sup>

When they can, legislatures “predetermine” questions of justice and policy.<sup>64</sup> They do so in statutes that permit those subject to law to know what law requires and to comply with it. When legislatures cannot predetermine answers—and that is the case in many matters subject to law—what they should do is rationally structure decisions. They can give decision makers room to decide on their own authority. Legislatures may circumscribe decision makers’ authority by requiring specific substantive criteria, by excluding certain concrete conclusions, by requiring particular procedures and by demanding formal justification for decisions. Yet in all these instances, law structures decisions without claiming to command particular decisions. When law cannot answer definitively *what* should be decided, it can answer *who* should decide using *which criteria* subject to *which process*. In short, as Zippelius states, “the interpretation and development of the law are indeed capable of being rationally structured; however, they are not completely capable of being rationally determined.”<sup>65</sup>

The world of American law that Schauer describes is two-dimensional. It presents a decision-maker with a single binary choice: between following a rule and doing the right thing. It is the world peculiarly that of the American appellate judge, who is presented with facts determined below and a legal issue posed by an appellant. The judge makes law

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60. ZIPPELIUS, *supra* note 2, at 13.

61. *Id.* at 14.

62. *Id.* (emphasis added). He continues: “It’s no accident that this maxim finds itself at the beginning of the greatest and most influential work of jurisprudence.”

63. Zippelius variously speaks of “competing interests” and “societal interests.” Policy is a fair translation. See JAMES R. MAXEINER, *POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW: A COMPARATIVE STUDY* 12 (1986), *also available as* JAMES R. MAXEINER, *RECHTSPOLITIK UND METHODEN IM DEUTSCHEN UND AMERIKANISCHEN KARTELLRECHT: EINE VERGLEICHENDE BETRACHTUNG* (1986) [hereinafter MAXEINER, *POLICY AND METHODS*]. Although the term “legal certainty” has fallen out of favor in American law, its meaning today is still readily understood. See Maxeiner, *Legal Indeterminacy*, *supra* note 18, at 517–19.

64. See ZIPPELIUS, *supra* note 2, at 16.

65. *Id.* at xii.

intended to bind lower courts. To reach the best result in the one hard case may require the judge to make bad law for future cases.

The world that Zippelius describes is multi-dimensional. In many cases, what the law requires is clear. The only issue is a factual one: do the instant facts fall under the statutory requirements? If they do, whether the result is the best result is not an issue because the legislature has mandated the result. In many instances, however, the result may not be clear. More than one statute may compete for application. A single statute may leave leeway in determining whether it applies. A statute may authorize the decision maker to make a value judgment based on justice or on policy. A statute may grant discretion as to which legal consequences are to apply. In all of these instances, German legal methods help decision-makers reach better results, meaning results that are both correct under the law and that comport with general notions of justice or with sound policy. Although decision-makers may not make decisions that contradict the law, legal methods permit them, indeed direct them, to use these methods to reach better results than they might otherwise reach.<sup>66</sup> In the world of Zippelius, legal methods support, rather than hinder, compliance with law and doing justice in individual cases.

In four principal chapters Zippelius explains how German legal methods are used to legislate clear law or to facilitate the reaching of correct and, hopefully, the best results when law is not clear. In the remainder of this Article, I state what I hold to be among the most important of his lessons for Americans interested in improving their own legal methods.<sup>67</sup>

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66. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] art. 20(1), May 23, 1949, BGBl. I, (Ger.); *see also* MAXEINER, FAILURES, *supra* note 8, at 22 (describing the role of statutes in German law). Should the legislature feel a law should be put out of force, it then is directed to the Federal Constitutional Court to seek that result. GG art. 93(1), ¶ 2; *see also* Maxeiner, *Legal Certainty*, *supra* note 28, at 597–98 (discussing the process to determine unclear laws).

67. Zippelius gives his own succinct summary for Germans in his Foreword:

Pursuant to the principles of separation of powers and legal certainty, it follows that the law sets general norms that are binding upon administration and adjudication. Accordingly, administrative and judicial bodies must determine as a matter of principle, and according to rules of interpretation, what the intent of these norms are; and, in so doing, they must abide by that intent. At the same time, however, consideration must also be given to the principal function of the law in providing just solutions to problems. Therefore, statutory interpretation (interpretation of laws) must strive for fair solutions in line with what is linguistically and logically possible. The function of the law in offering solutions capable of attaining consensus to questions of justice can also, however, come into conflict with the strict obligation of the law. That happens when the statute, as interpreted according to the rules of the art, apparently does not satisfy its function in serving justice. When, in such a case, the grounds for doing justice outweigh the grounds for separation of powers and legal certainty—

## A. *Concept and Function of the Law*<sup>68</sup>

### 1. *Law Consists of Rules*

Law controls human behavior.<sup>69</sup> It motivates how people decide. The law “does not describe facts, but prescribes conduct.”<sup>70</sup>

Law consists of rules. Its rules “are instruments that bring order to daily life.”<sup>71</sup> Rules are enforced by the state. Rules should be based on general consensus if they are effectively to direct life. Zippelius teaches that “voluntary compliance with norms, societal constraints or even the mere threat of procedural enforcement are normally sufficient to allow the legal order to function as a general orientation scheme.”<sup>72</sup> Compulsion is not always needed.

Voluntary compliance presupposes that those subject to law know what the law requires. Self-application of law is a feature common to successful legal systems.

Law is about obligations and it is about authorizations. According to Zippelius, “The law . . . consists of obligations to do something or refrain from doing something, as well as rules regulating the creation, modification and termination of behavioral norms or individual rights.”<sup>73</sup> When we think of law, we think first of obligations, such as stop at a red light. But its authorizations are no less important: *e.g.*, a traffic officer may stop a motorist that the officer observes is not complying with traffic rules.

Authorizations take over when rules cannot direct solutions. Legislatures cannot anticipate all eventualities; they cannot rationally pre-determine what all outcomes will be. What they can do is to structure authority and its exercise. Then they do not try to calibrate all choices in advance. They let government officials or individuals subject to law make essential choices. Usually, when legislatures give others leeway in

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which speak for strict adherence to the wording of the statute—then supplementing or correcting the statute is necessary.

With all this, the limits of methodical efforts become clear. Considerations structured according to interpretation and rules of legal development boil down in the end to nothing more than dissoluble values and areas of leeway in decision-making. In short, the interpretation and development of the law are indeed capable of being rationally structured; however they are not completely capable of being rationally determined.

ZIPPELIUS, *supra* note 2, at xi–xii (citations omitted).

68. *Id.* at 3.

69. *Id.* at 4.

70. *Id.* at 5.

71. *Id.* at 17.

72. *Id.* at 12.

73. *Id.* at 11.

deciding, they do not leave decision-makers free to decide without limitation. Usually they require specific criteria or specific procedures for those choices.

Zippelius says the organization of authority is the “backbone” of a legal system’s rational structure.<sup>74</sup> What he requires of a legal system is that “the various institutional authorities must be arranged and ordered in such a way that the norms and decisions they promulgate contribute to consistent (conflict-free) and well-functioning behavioral organization.” German practice pays close attention to this requirement. It coordinates federal and state legislation; it prefers decentralization through local administration to decentralization through local legislation. Coordination is easier when fewer bodies are allowed to make rules.<sup>75</sup>

## 2. *The Primary Purpose of Law Is Justice*

The primary task of law, Zippelius teaches, is “bringing about just solutions to the problems that arise between people.”<sup>76</sup> That means that law “must regulate human behavior in such a way that necessities and encumbrances are distributed equitably, conflicting interests fairly balanced [and] actions worthy of criminal liability justly punished . . . .”<sup>77</sup> In the legislature, the people through their representatives decide what is just and take affirmative steps to establish justice for all. The questions they answer may be mundane ones, such as, when must sellers be compelled to take back faulty products? Or they may determine issues fundamental for a fair society, like when should free disposition of property be limited in order to protect the weaker in society?<sup>78</sup>

Justice is not, however, the only task of law. “In addition to the task of doing justice, there are the requirements of legal certainty, and optimally and adequately satisfying competing interests.”<sup>79</sup> These latter tasks may not involve justice. They may serve only a function of giving order. For an example Zippelius gives the rule that on a highway, the right lane is the

74. *Id.* at 6.

75. See Maxeiner, *Legal Certainty*, *supra* note 28, at 562–67. The same challenges now arise in the European Union in the requirements of a single European market consistent with demands of decentralization through the principle of subsidiarity.

76. ZIPPELIUS, *supra* note 2, at 15.

77. *Id.* at 13.

78. *Id.* at 14.

79. *Id.*

travel lane and the left lane the passing lane.<sup>80</sup> He describes this and similar rules as “value-indifferent legal norms.”<sup>81</sup>

Justice, legal certainty, and societal interests, Zippelius teaches, “stand in a complex relationship: they can complement or they can run contrary to each other.”<sup>82</sup> Law serves societal interests, but law should create a just social order.<sup>83</sup> Rules seek legal certainty, but legal certainty serves justice by inhibiting arbitrary unequal treatment.<sup>84</sup> Rules in their generality may neglect the particularities of individual cases.<sup>85</sup> Legal certainty and justice may come into conflict.<sup>86</sup> In cases of conflict, rules that serve only interests of order are entitled to less weight than are rules that serve justice.<sup>87</sup> Resolving the conflict is a significant part of the work of legal methods.

### 3. *Rules are Legislatively and Democratically Legitimated*

Legislation is the dominant form of law. Zippelius teaches that “[t]oday, as societal relations are regulated largely through legislation, questions of justice arise predominantly in this area.”<sup>88</sup> The legislature mediates among the demands of justice, legal certainty, and policy. Legislation should seek, teaches Zippelius, “to create a just behavioral order that sensibly weighs the interests of community participants against one another.”<sup>89</sup>

Those who apply the law are bound to the solution of the legislature and to decisional criteria determined by it. In the former case, the legislature has “pre-determined” justice and all people are bound by it.<sup>90</sup>

80. *Id.* at 15.

81. *Id.* at 16.

82. *Id.* at 14. Gustav Radbruch, leading German legal philosopher of the first half of the twentieth century, and Minister of Justice under Gustav Stresemann, is the person perhaps best associated with this concept. See Gustav Radbruch, *Legal Philosophy* § 9, in 4 THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN 109 (20th Century Legal Philosophy Series, Kurt Wilk trans., 1950), (“Legal certainty demands positivity, yet positive law claims to be valid without regard to its justice or expediency [i.e., public policy] . . . .”); see also MAXEINER, POLICY AND METHODS, *supra* note 63, at 10–14.

83. ZIPPELIUS, *supra* note 2, at 14–15.

84. *Id.*

85. *Id.* at 14.

86. *Id.*

87. *Id.* at 14–15.

88. *Id.* at 15. While rules are predominately statutory, Zippelius allows for judge-made law in other systems. In his own system he allows for judicial legal development to make rules more precise a choice that has been left open and to fill in gaps. He allows for judge-made rules in other systems

89. *Id.* at 15.

90. *Id.* at 16 (“Accordingly, even questions of justice are predetermined by the legislature.”).

That binding, however, assumes that the issue is unambiguously decided in the case at hand.

When the legislature has not decided an issue, or when that decision in an individual case is not unambiguously determined, then legal methods help in finding the best solution. That does not mean that decision-makers look to their individual consciences. Legitimacy demands otherwise.

Practical legitimacy requires that “questions of justice are decided according to concepts of justice that are capable of majority consensus, rather than very individual ideas and concepts.”<sup>91</sup> Zippelius gives three grounds for this view: the “*democratic notion*,” “*equal treatment*” and “*legal certainty*.”<sup>92</sup> A democratic society permits broad participation in society and expects judges to follow prevalent beliefs.<sup>93</sup> Equal treatment requires that judges use standards that enjoy broad consensus in society and are not dependent on particular judges.<sup>94</sup> Legal certainty requires following the same course or, an American might say, valuing precedent.<sup>95</sup>

Determining what is a concept of justice capable of majority consensus is a difficult standard to apply. Consensus should not be equated with the ostensible opinion of the majority, since these views often are determined by matters other than conscience. Where legal terms leave leeway in regard to their meaning, decision-makers can and should give preference to interpretations that lead to more just solutions.<sup>96</sup>

Looking to democratic legitimation, Zippelius answers two general issues necessary to understand legislation. Zippelius teaches that statutes should be understood *objectively*, that is, according to “the intention of the statute itself.”<sup>97</sup> An *objective interpretation* seeks an understanding “familiar to the mindset of a wide number of people.”<sup>98</sup> Relying on his theory of the state, Zippelius rejects the idea that statutes should be interpreted *subjectively*, i.e., according to the intention of those who drafted them.<sup>99</sup> A *subjective interpretation* sees statutes as binding statements that have their bases in the individual wills of those who took part in the legislative process. In a tyrannical state, such as Germany was between 1933 and 1945, that is the will of the leader (“*Willen des*

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91. *Id.* at 23.

92. *Id.* at 25.

93. *Id.* at 24.

94. *Id.*

95. *Id.* at 23.

96. *Id.* at 16.

97. *Id.* at 30.

98. *Id.* at 32.

99. *Id.* at 32. Zippelius is known for his many publications on the philosophy of the state. *See, e.g.*, REINHOLD ZIPPELIUS, GESCHICHTE DER STAATSIDEEN (10th ed. 2003).

*Führers*”).<sup>100</sup> In a democratic state, such as Germany is today, a subjective interpretation is practically excluded. Those who adopt a statute are numerous. Their individual wills are difficult to determine and are unlikely to be in harmony with one another.<sup>101</sup>

Zippelius teaches that statutes should be interpreted according to ideas of the present (“living interpretation”) and not according to ideas controlling at the time they were adopted (“interpretation at the time of inception”).<sup>102</sup> He argues that “[t]he basis of legitimacy of law to be applied today does not lie in the past; it lies in the present. . . . For the present it does not matter under whose authority the statute was enacted, but rather under whose authority it lives on today.”<sup>103</sup> For that reason German ministries of justice are responsible for removing from the statute books obsolete laws. Some newer German laws as adopted automatically expire.<sup>104</sup>

The concept and function of law among Americans is little different from that among Germans. The school book writer referenced above could have been quoting *Justinian’s Digest* when he wrote: “*Civil Government* is that system of laws, whether written or printed or transmitted by custom, which is established to secure and promote *justice and order*.”<sup>105</sup> We the people of the United States declare in the Preamble of our Constitution that our State exists “to establish justice [and to] insure domestic tranquility.”<sup>106</sup>

Justice Scalia reminds Americans, that the rule of law is a law of rules.<sup>107</sup> Legislation has been dominant in the United States in practice, if not in law professors’ theories, for over a century. Common law with little legislation, says Scalia “is now barely extant.”<sup>108</sup> Schauer concedes that “[t]his image of the common law has no real-world instantiations.”<sup>109</sup>

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100. ZIPPELIUS, *supra* note 2, at 31.

101. *Id.* at 33.

102. *Id.* at 34.

103. *Id.* at 34, 35. While considerations of legitimacy and of justice demand a living interpretation, Zippelius teaches that considerations of separation of powers (and we might add, of legal certainty), require that “a change in meaning must not only keep itself within the possible meanings of the text of a legal norm, but also, where possible, within that very range of meaning that the purpose of the legislation leaves open for honing in on.” *Id.* at 36.

104. OECD, BETTER REGULATION IN EUROPE: GERMANY, 114–15 (2010), available at [http://www.oecd.org/document/63/0,3746,en\\_2649\\_34141\\_45048895\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/63/0,3746,en_2649_34141_45048895_1_1_1_1,00.html).

105. GOODRICH, *supra* note 23, at 42 (first emphasis in the original; second emphasis added).

106. CONST. pmb1.

107. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1175 (1989).

108. Antonin Scalia, *Review of Steven D. Smith’s Law’s Quandary*, 55 CATH. U.L. REV. 687, 689 (2006) [hereinafter *Review*].

109. SCHAUER, *supra* note 1, at 105. Yet American jurists, Schauer included, persist in teaching,

Voluntary compliance presupposes that those subject to the law know what the law requires. The common law cannot do that. It has been dubbed “the sublime of incomprehensibility.”<sup>110</sup> Were Americans to take rulemaking seriously, they would consistently adopt statutes that people—or at least people’s lawyers—could understand with reasonable certainty. Scalia reminds us that Americans are not there yet. To the contrary, he challenges legislators not to accept a multiplication of imprecise laws and fuzzy legislation.<sup>111</sup>

In our preoccupation with adjudication and lawmaking through adjudication we have failed to establish reliable techniques for making better laws. Our lack of attention to the organizing side of law has left us with scores of competing laws that do not mesh with one another. We have long known of the importance of coordination for laws, but have done little to act on that knowledge.<sup>112</sup>

American practice lacks a backbone of institutional coordination. It foregoes opportunities to structure decision-making to permit decision-makers to search for best solutions for this case. It is premised on the assumption that each legislature has provided the right answer to a legal problem beforehand. Each appellate court finds itself choosing, as Schauer notes, between a solution it sees as mandated by present law and a solution it deems better for the majority of future cases.

Case law lacks opportunity and legitimacy to provide needed rules. Schauer notes that it can only deal with cases presented to it and these cases may not be representative. Case law, he notes, is made by judges who do not have legitimacy to make rules generally. When case law goes beyond filling the interstices of precedent or statute, it goes too far. Similarly Scalia rejects robust case law. Government, he says, draws its authority from the consent of the governed. A democracy is “quite incompatible with the making (or the ‘finding’) of law by judges . . . .”<sup>113</sup>

to the near exclusion of modern legal methods, a legal method that is not of this world. Perhaps out of nostalgia they seek to resuscitate *A Common Law for the Age of Statutes*. See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

110. JAMES KIRKE PAULDING, *The Perfection of Reason*, in *THE MERRY TALES OF THE THREE WISE MEN OF GOTHAM* 105, 128 (2d ed., 1839).

111. *Sykes v. United States*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2267 (2011).

112. See ERNST FREUND, *STANDARDS OF AMERICAN LEGISLATION: AN ESTIMATE OF RESTRICTIVE AND CONSTRUCTIVE FACTORS* 225 (1917) [hereinafter FREUND, *STANDARDS*] (referring to “correlation” of laws); see also Ernst Freund, *Prolegomena to a Science of Legislation*, 13 *ILL. L. REV.* 264, 268 (1918) [hereinafter Freund, *Prolegomena*] (urging advancement of systematic legislation).

113. Scalia, *Review*, *supra* note 108, at 689. Much to the same effect, see Hart, *supra* note 55, at 971 (finding the robust form of case law sometimes asserted in America to be “particularly hard to

*B. Legal Rules Consist of Syllogisms that Work Together*

Zippelius teaches that legal rules are logical syllogisms that work together. They are made up of major premises (law), minor premises (facts), and conclusions (legal consequences).<sup>114</sup> Their application is deductive.<sup>115</sup> He stresses the importance of minding a strict relationship between the particular factual attributes required by a rule and the legal consequence that it prescribes. All of the individual factual attributes of a rule must be present for the legal consequence to apply; if only one is missing, the legal consequence does not attach.<sup>116</sup>

The strict relationship between factual requisites and legal consequences has great importance for legal certainty guidance and for legal process efficiency.<sup>117</sup> Once it is clear that a single required factual attribute is not present, there is no need to be concerned whether that particular rule applies.<sup>118</sup> There is no need to look for other factual attributes of that rule.<sup>119</sup> If that is the only rule that comes into consideration, legal process can end.<sup>120</sup>

Syllogisms are how legislation orders decision-making. It assigns decisions to particular persons; it may allow those charged with deciding room for judgment as whether the law applies or it may grant them discretion in what action to take if they determine that the law does apply.

Syllogisms may be simple, such as “all men are mortal, Socrates is a man, so Socrates is mortal.” Or they may be complex: they may require that factual requisites be taken from a number of individual provisions and

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justify in a democracy”). This idea is not new to America. *See, e.g.*, WILLIAM PALEY, *THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 378 (7th ed., 1st Am. ed. Philadelphia, 1788) (“The first maxim of a free state is, that the laws be made by one set of men, and administered by another; in other words, that the legislative and judicial characters be kept separate.”). For *Paley’s* importance in America and in early American law, see Wilson Smith, *William Paley’s Theological Utilitarianism in America*, 11 WM. & MARY Q. (3d SERIES) 402 (1954). Schauer implicitly acknowledges the point when he explains that the failure of the common law results from public discomfort with empowering judges to make decisions about deeply contested social ideas and judicial discomfort in accepting it.

114. *See* ZIPPELIUS, *supra* note 2, at 39–43.

115. *See id.*

116. ZIPPELIUS, *supra* note 2, at 43, 110 (“Rules are norms that are either applied or not applied in a particular case.”).

117. Unless specifically authorized by the rule, there is no room for balancing tests that are commonly utilized by American courts. *See, e.g.*, James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT’L L. 109, 119, 174 (2003) [hereinafter Maxeiner, *Standard-Terms Contracting*].

118. ZIPPELIUS, *supra* note 2, at 43.

119. *Id.*

120. The same idea is present in American motions to dismiss cases either on pleadings or dismissal on summary judgment.

joined together. Zippelius terms incorporation by reference use of supplementary provisions. Supplementary provisions simplify by increasing legal certainty not only in lawmaking, but in application, including in self-application, of law. At first glance, this might seem counterintuitive: would it not be easier to read in one place all the necessary requisites of a rule? Often, however, more than one rule may apply to a given factual complex. By using supplementary provisions, the same requisite can apply throughout all cases. In Germany, statutes have “general parts” that regulate questions common to more than one of the substantive matters they address. Conflicts of rules are reduced. Without incorporation by reference, in every rule it would be necessary to build in all the different exceptions and modifications one might think of.

Good legislation avoids conflicts among legal rules. Not only should it, Zippelius teaches that good order demands that it *must*. He writes: “If norms regulating behavior are to provide legal tranquility and a guarantee of helping the citizen orient his or her behavior, then they may not contradict [an]other; in fact they must complement one another.” He gives half a dozen examples of how the German legal system writes rules to avoid conflicts.<sup>121</sup> It is a simple point: self-application of law is impossible when law demands contradictory behavior.

Syllogisms are at the heart of American law.<sup>122</sup> Justice Scalia advises lawyers who want to persuade judges: “Think syllogistically.”<sup>123</sup> Judges instruct jurors to apply law syllogistically to facts jurors find. Law schools teach students the syllogistic elements of causes of action; bar examiners examine on those syllogisms; lawyers bring lawsuits on the basis of elements of causes of action.

121. I list six legal norms that are familiar to Americans:

- (a) The law avoids a conflict by explicitly excluding its application in certain instances where otherwise there would be conflict.
- (b) The law avoids a conflict by permitting multiple norms to apply cumulatively.
- (c) The conflict is resolved by applying only one norm through a choice based on a rule of specialty, i.e., the more specific provision applies.
- (d) The conflict is resolved by applying the higher level norm (e.g., the Constitution over statute, federal statute over state statute, etc.).
- (e) The conflict is resolved by applying the statute adopted later in time.
- (f) The apparent conflict is resolved by interpreting statutes to avoid a conflict.

See ZIPPELIUS, *supra* note 2, at 51–57.

122. See, e.g., KENNETH J. VANDEVELDE, THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING 2, 19–20, 67–70 (1996).

123. ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 41 (2008).

What ails American legal methods is not an absence of syllogisms, but presence of too many poor ones that do not fit together well. American syllogisms are expected to be simple. Simple syllogisms can ignore important variations of life. A complex syllogism is a generalization that does not ignore features that justify a departure from the general rule.<sup>124</sup> Complex syllogisms, however, demand lawmakers who can write them and law-appliers who can apply them.

American syllogisms are simple so that lay jurors can apply them. Although jurors are instructed in syllogisms, no reasonable lawyer believes that most jurors are able to and do follow instructions closely in any but the simplest of cases. To deal with these infirmities trial lawyers long ago shifted their attentions from syllogisms to what they call the “theory of the case.”<sup>125</sup>

Creating complex syllogisms practically compels complex lawmaking procedures that are not standard in the United States. While writing an isolated syllogism is within the capability of a competent lawyer, writing a syllogism that fits well with all of the other syllogisms in the legal system is a challenge that often is beyond the capability of any one person. A single legislator is no more able to write suitable laws than is a single judge. For over a century elsewhere in the world, responsibility for the drafting of laws has been located outside of the legislature itself. An institution, commonly a ministry of justice, is supposed to see to it that new syllogisms coordinate well with old ones. All of this has long been known in the United States, if little appreciated.<sup>126</sup> Both the American Law Institute and the Uniform Laws Commission are efforts to deal with the problem. They lack neither skill in drafting nor process to develop such syllogisms. What these national and similar state institutions lack is political clout to get the laws that they propose enacted.

### *C. Statutes are Interpreted to Solve Legal Problems*

Statutes and other legal rules put ideas into words. Words make ideas communicable and give them fixed form. The words of statutes serve legal certainty. They guide people in how to act; they control those charged with carrying out statutes. Words are, however, ambiguous; they may refer to

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124. *Contra The Failure of the Common Law*, *supra* note 45, at 778 (“[T]he generalizations that best suit large classes of particulars are generalizations that ignore feature—even relevant ones—of particular cases.”).

125. MAXEINER, *FAILURES*, *supra* note 8, at 131.

126. FREUND, *STANDARDS*, *supra* note 112, at 225; Freund, *Prolegomena*, at 268.

more than one concept.<sup>127</sup> Understanding a statute means associating correct concepts with statutes' words. People cannot apply rules—to themselves—or to others, if they do not know which concepts apply in the context of concrete cases.

Zippelius explains that words that describe facts seldom carry the same meaning for everyone. A given word has a “range of meanings.”<sup>128</sup> That does not make the word wholly uncertain. The limit of the range of meanings of the word limits the range of interpretations of statutes using the word. For example, a statute that applies only to cats might be interpreted to apply to tigers but cannot, consistent with the meaning of its words, apply to dogs.<sup>129</sup> Within the range, there may be many possible meanings; it is the task of interpretation to identify the correct meaning.<sup>130</sup>

To identify which meaning yields the correct interpretation Zippelius uses the four “classical” interpretative criteria of German law: “grammatical,” “logical,” “historical” and “systemic.”<sup>131</sup> We need not expound on these criteria here; Zippelius explains them lucidly.<sup>132</sup>

From the standpoint of legal certainty and predictability, a range of meanings is a drawback. Zippelius argues, however, that such latitude is often an advantage: it gives law flexibility. “This range of meaning allows these general legal words to adapt to the wide and diverse range of legal problems and circumstances of life that the law seeks to regulate, as well as to the changing prevalent social-ethical views.”<sup>133</sup> Legislatures do this deliberately when they use what are known as general clauses.<sup>134</sup>

The classical criteria of interpretation, while they facilitate finding the correct interpretation, do not give license to go outside the range of possible meanings of a statute's words. Zippelius explains: “All further

127. ZIPPELIUS, *supra* note 2, at 28. Anyone who has studied a foreign language knows this.

128. *Id.* at 62–66.

129. See FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 50 (2009) (a tiger may be a cat, but not a dog); SCHAUER, *supra* note 2, at 155 (a cat or bat is not a dog). For H.L.A. Hart's famous discussion of interpretation, see *American Jurisprudence Through English Eyes*, *supra* note 55.

130. ZIPPELIUS, *supra* note 2, at 67.

131. *Id.* at 60. Zimmermann likewise puts forward four classical interpretive criteria of German law, also drawn from Savigny, but with somewhat different designations. See Reinhard Zimmermann, *Statuta Sunt Stricte Interpretanda? Statutes and the Common Law: A Continental Perspective*, 56 *CAMBRIDGE L.J.* 315, 320 (1997) (“(1) the literal meaning of the words or the grammatical structure of a sentence, (2) the legislative history, (3) the systematic context and (4) the design, or purpose, of a legal rule.” (citing 1 FRIEDRICH CARL VON SAVIGNY, *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* 206 (1840) (translated as *SYSTEM OF THE ROMAN LAW* (William Holloway trans., 1979) (1867))).

132. ZIPPELIUS, *supra* note 2, at 59–62.

133. *Id.* at 66.

134. For example, requirements for good faith in contract performance.

efforts at interpretation proceed on the basis of a word's possible meaning. These efforts are carried out within a range of meaning that is permissible according to linguistic usage (possibly circumscribed by legal definitions).<sup>135</sup> To go outside the range of possible meanings creates a legitimacy problem;<sup>136</sup> it is to take over the function reserved to the legislature.<sup>137</sup> The text then, is not *the* end, but it is *an* end.

Zippelius teaches that interpretation is argumentative. That is, from among a range of possible meanings, all of which are more or less representable, one must be selected.<sup>138</sup> "When interpretive arguments conflict, there is no strictly rational hierarchy between them."<sup>139</sup> "In choosing a particular meaning, it is necessary to justify the choice—that is, provide reasons for choosing it."<sup>140</sup> The most important criterion is "[w]hich of the possible 'justifiable' interpretations, according to the rules of the art, lead to the most just solution?"<sup>141</sup> Interpretation is thus case "result-oriented."<sup>142</sup> It is not creation of new rules for future cases.

In Germany court interpretations of statutes, like court decisions generally, are not binding (no doctrine of "statutory precedent"). At the first instance level, judges are to orient interpretation on the legislative language. Their judgments are to address issues of statutory interpretation only to the extent necessary to decide cases before them.

That is not to say that judges ignore precedential values. Judges in the first instance pay attention to appellate court interpretations of statutes if only because they do not like to be reversed. At all levels judges interpret statutes aware of possible general applicability. Zippelius explains: "Since an interpretation capable of generalization is sought here, there is a focus on results by way of categorization that goes beyond the circumstances of the individual case. However, even here the dependence of a legal decision on the particular facts is clear."<sup>143</sup> As a result:

interpretations and gap-fillers, once chosen by courts, attain a certain binding character; this follows from the principles of *equal*

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135. *Id.* at 67.

136. *Id.* at 96.

137. *Cf. id.* at 72.

138. Zippelius quotes the Federal Constitutional Court: "Interpretation . . . has the attributes of a discourse, in which even methodically unobjectionable work yields no absolutely correct statements welcomed without doubt or reservation by all experts." *Id.* at 67 (citation omitted).

139. *Id.* at 86.

140. *Id.* at 67.

141. *Id.* at 86.

142. *See id.* at 84.

143. *Id.* at 84.

*treatment and legal certainty*. . . . [O]nce an interpretation or gap-filler is chosen, and it is justified with the latitudes allowed hermeneutically, it may not be overruled without good reason.<sup>144</sup>

Interpretation does not always reach just solutions.<sup>145</sup> This does not invariably require that judges give up seeking just and fair solutions. Sometimes interpretation fails because the law provides no answer. In such cases statutes require supplementation, either through future legislation or through judicial gap-filling of existing law.<sup>146</sup> In filling in gaps, it is appropriate to consider societal goals, system consistency and justice.<sup>147</sup> Gap-filling to achieve material justice, raises the question whether supplementation should be done politically, for the future by the legislature, or according to existing law, by judges. Zippelius warns that [b]y supplementing the law, the judge is functioning in a manner reserved for the legislature under a system of separation of powers. The legislature is in a better position than a court to tackle questions of legal supplementation—considerations that are often highly political in nature—and it does so with more democratic legitimacy, particularly with respect to the necessary debate and conversation with the public.<sup>148</sup>

Other times, a statute fails to achieve justice because the answer it provides is unacceptable. The statute needs correction. Correcting statutes is more controversial than filling gaps. It is easier from the standpoint of legitimacy for courts to act when the legal text provides no answer than when it provides a bad answer. Article 20(3) of the German Constitution challenges judges to be alert to a need to correct the legislature in the interest of justice. It provides: “Legislation is subject to the constitutional order; the executive and the judiciary are bound by law and justice.”<sup>149</sup> Nevertheless, on grounds of separation of powers and legal certainty, departing from a law’s text is justified only by “overwhelming reasons of

144. *Id.* at 110–11. The binding nature is not, he says, that which the “strict doctrine of ‘stare decisis’” of Anglo-American law asserts over inferior courts, but rather that which common law appellate courts apply to their own decisions: “not departing from like decisions without very good reasons.” *Id.* at 112 (citing D. NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 227 (1978)).

145. ZIPPELIUS, *supra* note 2, at 17. (“fail to reach a just solution that satisfies a certain sense of the law;” in the German original, “nicht zu einer gerechten, das Rechtsgefühl befriedigenden Lösung führen”).

146. *Id.* at 17.

147. *Id.* at 97.

148. *Id.* at 91.

149. GG art. 20(3); AXEL TSCHENTSCHER, *THE BASIC LAW (GRUNDGESETZ): THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 28 (2d ed. 2008).

justice.”<sup>150</sup> Then there are but two possibilities. If the text leaves open the possibility that the particular problem was not considered, the court may decide the issue. If, on the other hand, the text clearly applies, the court may not put the statute out of force. What the court can and should do, is to refer the case to the Federal Constitutional Court, which has the exclusive authority to invalidate law.<sup>151</sup>

Zippelius’ description of interpreting statutes is deceptively familiar for Americans: “Interpreting a statute means ascertaining the meaning of the words found within a legal text, namely the facts, values, and prescriptive ideas that these words seek to describe.”<sup>152</sup> He adds “[w]e wouldn’t be far off in our result today if . . . we were to formulate the view, according to which the goal of interpretation is to determine what the ideas of the legislator were . . . .”<sup>153</sup> That could be the beginning of an American book on statutory interpretation; indeed, it practically is.<sup>154</sup> His discussion of the four classical interpretative criteria of German law could be a discussion of what are known in America as canons of statutory interpretation.<sup>155</sup>

There is, however, one little noted but critical difference between German and American practices of statutory interpretation. This difference helps answer our puzzle of why legal methods in America seem to work against just decisions but facilitate them in Germany.

In Germany, statutory interpretation is primarily an aid in law-applying. It helps those subject to the law, and those who must apply law to others to understand the factual requisites the law requires and correctly to classify behavior within an existing system. For Zippelius, “continued legal development” through statutory interpretation is secondary “to finding the appropriate interpretation or gap-fillers for the individual case.”<sup>156</sup> Appellate decisions interpreting statutes are not strictly binding on lower courts, which may, for good reasons stated, depart from them.<sup>157</sup> In every case, decision-makers start from statutory texts.

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150. ZIPPELIUS, *supra* note 2, at 113.

151. *Id.* at 92 (referencing decisions of the Federal Constitutional Court).

152. *Id.* at 59.

153. *Id.* at 60.

154. See HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 1 (2d ed. 1911) (“Interpretation, as applied to written law, is the art or process of discovering and expounding the intended signification of the language used, that is, the meaning which the authors of the law designed it to convey to others.”).

155. Cf. CROSS, *supra* note 129.

156. ZIPPELIUS at 111. For continued legal development generally, see MATTHIAS KLATT, MAKING THE LAW EXPLICIT: THE NORMATIVITY OF LEGAL ARGUMENTATION (2008), being a translation with additional material of his THEORIE DER WORTLAUTGRENZE. SEMANTISCHE NORMATIVITÄT IN DER JURISTISCHEN ARGUMENTATION (2004)

157. ZIPPELIUS, *supra* note 2, at 108, 110–12. In one of his few comparative comments, here

In the United States, on the other hand, statutory interpretation is part of lawmaking.<sup>158</sup> It is used by courts of last resort to declare what the law requires and to control what lower courts later do. For Schauer, making decisions in individual cases amounts to making prospective rules; those rules should reach “the best results for the largest number of cases.”<sup>159</sup> Appellate decisions interpreting statutes *are* binding on lower courts, who may not deviate from them. The doctrine is known as “statutory precedent.” So strongly is it held that commonly lower courts in applying statutes begin their process of reasoning from a higher court’s precedent interpreting a statute rather than from the statute itself.<sup>160</sup>

Remarkable about this difference is that it produces results that are contrary to American prejudices about Continental civil law. Americans think of Continental civil law as providing detailed solutions that foreclose judicial flexibility.<sup>161</sup> In fact, often it is just the reverse. The German system comes off as flexible and concerned with equitable outcomes in individual cases, while it is the American system that is rigid and rule-bound. It is American judges who, must choose between the rule-bound decision and the “right” decision.

The doctrine of statutory precedent is sometimes seen as judges taking over a lawmaking function more properly belonging to the legislature. The doctrine gives the appellate court the last word on a statute until the legislature acts again. In effect, the appellate court becomes “a political competitor with the legislator in the creation of law.”<sup>162</sup>

Although some American judges enjoy the power that statutory precedent gives them, it is likely that their motives in adopting it were more benign. It is one way, Schauer would say, for judges to control

Zippelius distinguishes German practice from common law *stare decisis*. *Id.*

158. It is not uncommon for legislative compromise to leave important issues for decision by courts later.

159. Schauer, *The Failure of Common Law*, *supra* note 45, at 770, 779.

160. See Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 231 (1999). *But see* SCHAUER at 158 (“[T]he words of a statute are almost always the starting point . . .”).

161. Schauer himself speaks of a “highly precise canonical statement of the law.” See text at note 45 *supra*.

162. See Strauss, *supra* note 160, at 244–45. Zippelius, were he confronted with the doctrine, almost surely would find it “assuming a function reserved to the legislature—the institution, under a state system of separation of powers, that is more competent than the courts to make such legal and political decisions.” ZIPPELIUS, *supra* note 2, at 72 (condemning judicial definition of undefined statutory terms beyond that necessary to decide the case or to make changes in the law). He continues: “Legislative and parliamentary bodies typically have at their disposal better sources of information, and as such, they make decisions through the necessary debate and consultation of the public, in accordance with the democratic controls necessary for all political decision-making processes.” *Id.*

themselves.<sup>163</sup> It is at the same time extension of a conventional elderly doctrine, precedent, to an area that now in the present is the focus of judicial activity. The doctrine of statutory precedent responds to a need of American litigating lawyers for certainty in preparing their cases. American procedure systems assign to lawyers principal responsibility for preparing cases for decision: it is up to the lawyers to present evidence material to the issues defined by a cause of action. If statutory language is unclear, lawyers want clear judicial guidance *before* they investigate the case and present it to the court.<sup>164</sup> Statutory precedent gives them that guidance even if it forecloses interpretations that might be more likely to produce justice in individual cases. This same need explains why in America, instead of flexible standards of interpretation such as the classic interpretative criteria applied argumentatively, we have been inclined to treat interpretation itself as rule-based. In our history we have seen canons of construction, a Uniform Statute and Rule Construction Act, a proposed Restatement of Statutory Interpretation,<sup>165</sup> and a proposed Federal Rule of Statutory Interpretation.<sup>166</sup>

American appellate procedure magnifies the effects of the doctrine of statutory precedent. In America findings of fact in first instance normally bind appellate courts. They have little opportunity to revise them. They do have control over law. Their decisions about law change law. When faced with a decision below that they find unjust, if they cannot find a way to reverse proceedings and return the case for reconsideration, they are tempted to change the law to get the right result. Hence, we say, “hard cases make bad law.”

Much the same effect is apparent even in the first instance. There, the passivity of the trial court judge with respect to facts leaves development of facts to the lawyers themselves. While it might be true that further factual explanation would eliminate or ameliorate issues of statutory interpretation, the judicial ethic of passivity makes exploration of those facts difficult.

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163. Schauer, *The Failure of Common Law*, *supra* note 45, at 779.

164. See Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 641, 644 (1989). This is not a critical issue in Germany since issues remain open until the last oral hearing. See MAXEINER, *FAILURES*, *supra* note 8, at 182–83.

165. Gary E. O’Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 333, 335 (2003).

166. See generally Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002) (discussing different strategies to structure statutory interpretation in the form of rules).

In Germany, on the other hand, appellate procedure encourages courts to find the best possible decisions. The first appeal is focused—as is the initial proceeding—on the best answer for this case. If it finds the decision below unjust it may take further evidence. It then concludes on the basis of this evidence that the law should be applied differently or that a different law applies.

In the United States, discussions of statutory interpretation are less about how lower courts should decide cases and more about whether appellate courts can be controlled in their development of law. “Central to the analysis,” it is said, “is the concern that judges will be willful and outcome oriented in their decisions. This means that they choose the result that they prefer and then manipulate the legal materials to support that result.”<sup>167</sup> The result that is feared, is not the equitable result in the individual case, but the legislative result for future cases.

In other words, statutory interpretation in the United States is principally an issue of binding and controlling courts. In Germany, on the other hand, statutory interpretation is principally an issue of guiding decision makers at all levels to optimal solutions of legal problems.

#### *D. Applying Law Brings Facts and Law Together*

Application of law to facts requires that law and facts be brought together. The vehicle is the legal syllogism: the law is the major premise, facts are the minor premise, and the legal consequences follow. Zippelius teaches that applying the syllogism is the easy part. The part that can be difficult is the discovery and definition of applicable law and the determination of material facts. He advises colorfully: “legal decisions will be found playing a musical ensemble of premise searching, premise restricting, and premise establishment as well as formal logical thinking.”<sup>168</sup>

The problem that Zippelius addresses and that German legal methods deal with is the interdependency of law and facts. Until one knows the applicable rules, one does not know which facts are material. But until one knows the facts, one does not know which rules are applicable. Settle the applicable rules too soon, and facts may be overlooked which would change results were other rules applied. Fail to settle the applicable rules

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167. CROSS, *supra* note 129, at ix.

168. ZIPPELIUS, *supra* note 2, at 117. Zippelius quotes the German philosopher Schopenhauer: “to find the premises is the difficulty, and there we leave logic behind us.” *Id.*

soon enough and the process may detour to find facts that are not material under the rules actually applied.

In most cases of daily life, the interdependency of law and fact is not a problem. Which rules apply is clear, the party subject to them knows the facts and applies the rules to him or herself. As matters get more complex, or the applicable rules less certain, the party subject to them may need legal counsel. If other parties are involved, and if they have different views of applicable law or material fact, and negotiation, mediation or litigation may become necessary to bring law and facts together. Self-application is facilitated by clear rules that require easily ascertainable facts.

When parties differ on results, “[t]he court applies legal norms as rules to established facts.”<sup>169</sup> The establishment of the facts is for the parties. The court knows the law (*iura novit curia*); the parties know the facts. Once the parties have established the facts, the court can determine their rights (*da mihi factum, dabo tibi ius*—give me the facts; I will give you right). The process is interactive and interdependent. Parties and courts cooperate.<sup>170</sup>

Bringing law and facts together begins with the exchange of pleadings and occurs in nearly every case. The court meets with the parties and discusses which legal rules may govern the case, their material elements and which of those elements are in dispute. Where different rules are considered, the court may make a preliminary choice among them. The judge directs proceedings to those matters material to decision and in dispute. Zippelius describes how this works:

The changing allocation between norm and factual behavior usually takes place in a ‘back and forth wandering glance’ (Engisch) among many of the steps of an advanced selection, which means that in continually eliminating irrelevant norms, application possibilities and facts, one begins with mostly just an approximate allocation from the larger area of test worthy norms, applicable alternatives and circumstances of fact that are considered.<sup>171</sup>

There is no presentation of a case. Instead, “it may be necessary to pose questions in a series of stages, feeling one’s way toward the relevant catalogue of norms, whereby at each step we consider and compare the facts of the case to the legal consequence.”<sup>172</sup>

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169. *Id.* at 124.

170. See MAXEINER, FAILURES, *supra* note 8, at 177–78.

171. ZIPPELIUS, *supra* note 2, at 121–22.

172. *Id.* at 119–20.

In American parlance, what the German judge is doing is narrowing issues. The judge is searching to find and define the relevant legal norms that he or she is to apply to the facts to be established. For each possible rule, the judge determines which elements of the rule are *material* to the case and which are in *dispute* between the parties. Unlike the American process issue-narrowing in Germany is on-going and continues until the very end of the process. There is no need ever to settle on one or more issues as determinative. The court is never to decide any issue without the parties knowing that that decision is imminent and having an opportunity to take a position on it. When the applicability of all potential norms is determined, the court gives its decision and, within a short time, justifies it in a formal judgment.

Because the court determines issues of proof, there are no rules of evidence such as Americans know. German courts take evidence and give it such probative value as they believe that it deserves. This is what American judges often do in bench trials. Zippelius writes of “The *Judicial* Establishment of Facts in Particular.”<sup>173</sup> He tells us how “[t]he judge decides whether the required degree of probability exists, basically in *free consideration of evidence*.”<sup>174</sup>

German legal methods avoid many of the risks of contest-oriented legal process. Cases should not fail because advocates overlook applicable rules or essential elements to rules. Opportunities to mislead decision-makers or leave decision-makers with unanswered questions are reduced when decision-makers and advocates work together in bringing law and fact together.

German legal methods affirmatively provide avenues for decision makers to find their way to just decisions. They are not compelled to make binary choices between unjust legal decisions and best results. If an outcome seems wrong, they can get a better understanding of the facts by asking the parties to present more information. That may call for a different outcome under the same rule, under a different rule or under a general clause.<sup>175</sup>

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173. *Id.* at 126 (emphasis added).

174. *Id.* at 129.

175. The American Cappalli criticizes this practice as “massaging the facts.” RICHARD B. CAPPALLI, *THE AMERICAN COMMON LAW METHOD* 188 (1997). He prefers the common law approach that permits courts to “move the rules toward the facts.” *Id.* at 187.

### 1. Room for Judgment in Finding Factual Prerequisites

Carefully crafted rules are not always sufficient to reach just decisions. To facilitate just decisions in individual cases where statutes cannot preprogram them, statutes extend to decision-makers both room for judgment and discretion.

Room for judgment occurs when a statute uses a term with an indefinite meaning. Zippelius gives as an example of room for judgment the term “forest.” Is a “small, free-standing, natural pine woods with approximately 50 half-grown trees” a forest?”<sup>176</sup> Suppose the requisite element for a crime of arson is setting fire to a forest. Classifying this stand of trees as a forest is for Zippelius preeminently a question of interpreting the statute and not one of subsuming the facts under the statute. In so doing, that interpretation then gives “meaning for future cases.”<sup>177</sup> In other words, the specific case “gives the impetus to weigh and to make precise the range of the meaning of the norm—with regard to the submitted facts of behavior.”<sup>178</sup> This is yet another example of the interdependency of law and facts: giving the norm substance “takes place with reference to the extant reality of life in a ‘back and forth wandering glance’ between the norm and those facts of behavior relevant to the norm (§ 14 II).”<sup>179</sup> The legislature has left the combining of the different norms, i.e., whether this sort of group of trees falls with the range of the definition of forest, to “institutional legal thinking.”<sup>180</sup>

A general clause is one that depends on an indefinite legal concept as the operative provision. German statutes use general clauses to take into account the many sides of life that do not lend themselves to definition in clearly defined concepts. By using general clauses, legislation need not be fragmentary, but can be gap free.<sup>181</sup>

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176. ZIPPELIUS, *supra* note 2, at 131. Note that in this subchapter Zippelius discusses indefinite terms that are descriptive, such as “forest.” Elsewhere he has already discussed indefinite terms that include a valuing element, e.g., “negligently.”

177. *Id.*

178. *Id.* at 132.

179. *Id.*

180. *Id.* at 133 (citations omitted).

181. KARL ENGISCH, EINFÜHRUNG IN DAS JURISTISCHE DENKEN 124. German indefinite legal concepts are best known in the United States through two general clauses of the German Civil Code, sections 138 and 242, which have become parts of American law through adoption in the Uniform Commercial Code (U.C.C.). BÜRGERLICHES GESETZBUCH [BGB] [Civil Code] Aug. 18, 1896, RGBL 195, as amended, §§ 138, 242. Section 138’s U.C.C. counterpart is section 2-302, which permits nonenforcement of “unconscionable” contracts or terms. U.C.C. § 2-302 (2004). Section 242 requires performance of contracts in “good faith,” BGB § 242; its U.C.C. counterpart is section 1-304 (formerly

General clauses do not permit judges to decide what they think is “fair” or in the “general welfare.”<sup>182</sup> Instead, case groups develop in an almost common-law manner.<sup>183</sup> Only where there are no prior decisions do judges have some freedom in reaching new solutions.<sup>184</sup> Sometimes the legislature notes the development of these case groups and enacts them into law or introduces its own groups of cases.

When such indefinite concepts are used, there may be no “one meaning to be made from general persuasive reasons.” There thus becomes a range of “justifiable decisions,” although “some interpretations are more justifiable than others.” Zippelius prefers those interpretations that “can be comprehensibly grounded upon (if not compelled by) rational arguments rather than proven through general persuasive arguments.”<sup>185</sup>

## 2. *Discretion in Directing Legal Consequences*

Sometimes statutes deliberately do not bind decision-makers to one correct decision, but grant them discretion to reach their own decisions based on their own responsibility and independent choice. It is used to permit a purposeful and just decision in the individual case. A common view in Germany holds that discretion is appropriate only on the legal-consequences side of the legal norm. That is, discretion in choice of legal consequences (e.g., five or ten years imprisonment) is appropriate, but not in determination of the prerequisites for action (e.g., whether defendant committed the crime of arson). This distinction marks a difference between indefinite legal concepts and discretion: the former leaves room for judgment in the prerequisites of action, while the latter provides for freedom of action.

Administrative authorities are allowed to make policy-oriented decisions upon their own responsibility; they may choose on the basis of current and local interests among several possibilities. This freedom is acceptable because administrative authorities are politically accountable. Administrative authorities are nonetheless obligated to exercise their freedom of choice in the public interest. Relaxation of binding to statute

section 1-203). U.C.C. § 1-304. For the origin of section 2-302, see Maxeiner, *Standard-Terms Contracting*, *supra* note 117, at 116–17.

182. See Franz Wieacker, *Zur rechtstheoretischen Präzisierung des § 242 BGB*, in 2 AUSGEWÄHLTE SCHRIFTEN 195, 203 (1983).

183. See Maxeiner, *Standard-Terms Contracting*, *supra* note 117, at 152–56.

184. Wieacker, *supra* note 182, at 203. Wieacker also notes that section 242 looks to issues of individual justice and not to general welfare (policy). *Id.* at 196.

185. *Id.* at 135.

for judicial decisions, on the other hand, is preferably limited to situations where necessary to permit judges to do justice in individual cases. Judges are not politically accountable; they are guaranteed independence to permit them to do justice.<sup>186</sup> The German legal system uses rules in this way to depoliticize certain decisions. It attempts to separate legal questions from political ones. A legal question should be subject to resolution without having to value.<sup>187</sup>

### 3. *Reasoned Explanations*

In lawsuits, judges are required to give reasoned explanations for their judgments. These judgments must deal with all possibly relevant laws and party assertions. They have a prescribed form. Zippelius explains that reasoned opinions help make up for shortcomings of statutes. As we just saw, legislation cannot always predetermine solutions. Both legal and factual premises may be uncertain. Sometimes legislation deliberately grants law appliers a certain room for judgment as to whether a rule applies (e.g., what constitutes “good faith”) or discretion in ordering the legal consequences of an applicable rule (e.g., whether to order imprisonment or not). In all of these cases, choices of interpretation and fact-finding possibilities do not always direct decision-makers to a single correct solution. Yet, Zippelius stresses, that does not mean that all justifiable decisions are alike. Some findings of fact, determinations of law and applications of laws to facts are more justifiable than others.

Reasoned opinions enhance the quality of legal decisions. In the first instance, they provide foundations for review of decisions made. Just the knowledge that such a review is possible impels decision makers to self-control. It requires them to base their decisions, or at least the justifications for their decisions, on approved reasons (e.g., the statutory requirements) and not on unapproved ones (e.g., bias and prejudice). It pushes them toward more careful handling of the materials of decision, the fact and law finding, and law applying.

The judgment also controls the judge. If the judge fails to subsume the facts of the case under the applicable law properly, the judge’s decision is subject to correction on appeal. The judgment demonstrates whether the judge understood the losing party’s position; through its impersonal and colorless nature, it demonstrates the judge’s neutrality.

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186. In America, the federal court judges are also appointed by elected officials, as opposed to elected by the public.

187. MAXEINER, *POLICY AND METHODS*, *supra* note 63, at 15–16.

The obligations to give reasons for decisions is a general requirement of German law. The specifically judicial format is taught to all German lawyers.<sup>188</sup>

Were American trials a common occurrence, they would frequently present decision makers with choices that propelled them toward a choice between rules and best results. While bringing law and fact together is the essence of applying law, American legal methods are based on separating law from facts. This is done to allow judges to decide questions of law and juries to decide questions of fact. Whether it is for judges or for juries to apply law to facts has long been a hotly debated issue.

Historically, American pleading has sought to steer between the Scylla and Charybdis but, instead, has crashed on the rocks of Scylla or been swept into the whirlpool of Charybdis. On the one hand, in common law pleading, the parties would agree to make a single issue—of fact or of law—determinative. As any first year law student knows, rarely is there only one issue in dispute. When the parties got it wrong, injustice would result. On the other hand, in modern day notice pleading, often the parties never get to an issue and the jury—if there is a jury trial—is sent out to decide the case. In theory, jurors decide according to law, but no one knows in practice since jurors do not explain why they decide as they do. Jurors have freedom—greater or lesser depending upon whether the case is criminal or civil—to decide as they wish, which may be contrary to law. The jury might decide as it thinks best were it not for rules of evidence that, as Schauer notes, “keep even relevant evidence away from a frequently distrusted jury.”<sup>189</sup>

In fact, trials have vanished in America. Settlements take into account the likely decisions of decision makers, but consider even more important the costs of getting there and the risks of worst-case outcomes. The costs of getting there can be extraordinarily high, because the inefficiencies of American procedure are many, and because control of those procedures rests in the hands of the lawyers. American lawyers, unlike the judges who control them in Germany, may have no interest in keeping those procedures in bounds. The risks of worst-case outcomes is high because American laws are uncertain and uncoordinated, decision-makers are uncertain and uncoordinated, and most decisions are rendered without reasoned explanations. How is one to predict how a case will come out when one is unsure which laws apply, one is uncertain which officials will

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188. MAXEINER, FAILURES, *supra* note 8, at 226–29.

189. SCHAUER, *supra* note 1, at 210.

decide, one is unsure what they will be able to decree, but one does know that those decisions will be, as jury verdicts and many other legal decisions, unexplained?

Giving reasons does not have the same centrality in present-day America as it does in Germany. Imprisoned by the assumption that juries decide without giving reasons, Schauer opines that “[a]t times judges or courts do not give reasons because doing so would be inefficient or impossible as a practical matter.”<sup>190</sup> In another work, he goes further and suggests that “[p]erhaps at times it is better not to give reasons than to give them.”<sup>191</sup>

Schauer argues as he does because of America’s fixation on appellate court decisions as law-making. In giving reasons, Schauer sees a court announcing “what is in effect a rule (or a principle, standard, norm, or maxim) more general than the decision itself. To provide a reason in a particular case is to transcend the very particularity of that case.”<sup>192</sup> In Schauer’s view, a court in giving a reason in a particular case is committing to the reason as a rule in future cases. That is why, he says, “we do not always require legal decision makers to give reasons for their decisions.”<sup>193</sup> It is also why, however, courts reach the wrong result in the real case because of their fear that reaching the right result in that case will jeopardize results in future cases.<sup>194</sup>

In German legal methods, giving reasons is principally an act of law application. It is an explanation to the parties why the court decided this particular case in the way it did.<sup>195</sup> It is not an exercise in lawmaking for future, hypothetical cases.

## CONCLUSION

American legal methods often lead to something other than the right decision because American law does not clearly establish who is responsible for which decision with what consequences. That failing leads to Schauer’s conclusion that “[r]ather than attempting to reach the best result for each controversy in a wholly particularistic and contextual way,

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190. *Id.* at 175.

191. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 634 (1995) [hereinafter Schauer, *Giving Reasons*].

192. SCHAUER, *supra* note 1 at 176–77.

193. *Id.* at 180.

194. Schauer, *Giving Reasons*, *supra* note 191, at 655–56.

195. See Maxeiner, *Imagining Judges that Apply Law*, *supra* note 36, at 474–75.

law's goal is often to make sure that the outcome for *all* or at least most of the particulars in a given category is the right one."<sup>196</sup>

German legal methods provide rules that individuals can follow. They assign responsibility for decisions. They allow legislatures to set goals and principles and to require procedures and written justifications that frame decision makers' choices. They do not allow the dead to rule the living. They impose boundaries on lawsuits. They provide rules that allow decision makers to reach better decisions in particular cases most of the time.

German legal methods as described in Zippelius' book could inspire American law reform. Indeed, they are already mirrored in much of the Start Over initiative of the Common Good organization. The solution of the Start Over initiative is to "Restore Responsibility." It states "[t]he key tests for effective law are whether: 1) regulators have flexibility to make sensible choices; 2) there are clear lines of accountability; and 3) compliance by those expected to abide by the law is practical."<sup>197</sup>

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196. SCHAUER, *supra* note 1, at 8.

197. *Radically Simplify Law*, COMMON GOOD, <http://www.commongood.org/pages/radically-simplify-law> (last visited May 2, 2012).