March 15, 2011

Thinking Like a Lawyer Abroad: Putting Justice into Legal Reasoning

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Thinking Like a Lawyer Abroad: 
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by 
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Abstract

Americans are taking renewed interest in legal reasoning. Thinking Like a Lawyer: A New Introduction to Legal Reasoning by Frederick Schauer of Harvard Law School shows why. It demonstrates dissatisfaction with the methods that we have. According to Schauer, American methods force decision-makers “to do something other than the right thing.”

Now comes a book that offers Americans opportunities to take inter-systemic study of legal methods out of the laboratory and into a world where they have proven to work. According to Reinhard Zippelius in his newly published Introduction to German Legal Methods, statutory interpretation and other legal methods help legal decision makers to do the right thing and to resolve legal problems “in a just and equitable manner.”

This article presents four principal points of Zippelius’ book against the background of Schauer’s: I. law is a body of rules intended to produce justice; II. good rules are drafted to facilitate their effective application; III. rules are interpreted to produce just results; and, IV. rules are applied to determine rights and duties justly and accurately according to law. It suggests that these four themes are not foreign to American law.

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Rule-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* (2009)\(^1\)

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* (2008)\(^2\)

When law fails to function satisfactorily, typically we blame the law.\(^3\) But comparative lawyers know that the same rules may work well in one place but not in another.\(^4\) Law in books is not the same as law in action.\(^5\) Outcomes in different countries may be different because in one the law is observed, but in another it is not. Less frequently noted is that different outcomes may result from different forms of legal reasoning, that is, from different legal methods. Today there is renewed awareness in the United States of the importance of legal methods for legal decisions.\(^6\) Some of that interest is directed toward foreign legal methods.\(^7\)

Foreign legal systems offer even more insights than domestic comparisons among states and not just about statutory interpretation, but about legal reasoning generally. In foreign systems legal

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\(^1\) Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* 212 (2009) [hereafter Schauer].

\(^2\) Reinhold Zippelius, *Introduction to German Legal Methods* 13 (Kirk W. Junker & P. Matthew Roy, 2008) [hereafter Zippelius].


reasoning has moved out of the laboratory into practical daily application where they routinely resolve legal problems justly and equitably.

In the past critics of American legal reasoning who suggested that shortcomings in American law originate in shortcomings in legal methods had no convenient place to refer English-speaking readers for information about foreign alternatives. They had to ask readers to take their assertions on trust. While there are important inter-systemic studies of legal reasoning, foremost among them the five volume treatise of Professor Wolfgang Fikentscher of the University of Munich, much of that literature is not in the English language.

The paucity of English-language works on non-American legal reasoning is changing as globalization spawns series of books in English dedicated to comparative law. One such series is devoted to legal methods: the Carolina Academic Press’ *Comparative Legal Thinking Series*. The goal of the series as stated by the series editor, Professor Kirk W. Junker, is to permit English-speaking readers from common law countries to “attain the unique inside view of the civil law student.” They can experience for themselves how their counterparts abroad learn law. Moreover, they can learn variations of legal reasoning and legal methods, or more colloquially, variations of legal thinking.

The Comparative Legal Thinking Series presents foreign texts without critical comment. It does not provide background that readers of the foreign language original texts likely have and that American readers likely do not have. It makes no representation that any particular foreign legal thinking is better or worse than is American legal thinking. That is not to say that it adopts a relativist

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8 **Wolfgang Fikentscher, Die Methoden des Rechts in vergleichender Darstellung, 5 vols. (1975-1977).**


10 *Zippeius* at unnumbered page v.

11 In this article I use the three terms, “legal methods,” “legal reasoning” and “thinking like a lawyer,” interchangeably. This seems the practice both in the United States and in Germany. I prefer legal methods as the broadest term.
view: ‘you have your methods and we have ours.’ It simply leaves comparative judgments to readers themselves.

The first volume in the Comparative Legal Thinking Series is Reinhold Zippelius’ *Introduction to German Legal Methods* (2008). Zippelius’ book has been a standard work in German legal education for a generation. Meanwhile Harvard University Press published a new work on American legal methods: Frederick Schauer’s *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (2009). No scholar in contemporary America is more identified with rules and legal reasoning than is Professor Schauer.

Both Zippelius and Schauer limit their books to their own legal systems. Each mentions foreign legal systems only incidentally and exceptionally. That is not to be criticized (although it might be regretted); globalization has not yet advanced so far as to lead us to expect that every introduction to a legal topic is necessarily a comparative introduction.

My purpose in this article is to help American readers compare legal methods. I would like them to consider whether our legal methods might be improved by learning from foreign examples. I think that they could. I wish that we would consider how we might work to reform our legal methods. I would like us to consider foreign legal methods as sources of inspiration for improving our own methods. I have no illusion that the United States will adopt foreign methods wholesale. I do wish that we included foreign methods in our own discussions. We should remember the

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12 Also available in the series is ANTONIO LORDI & GUIDO ALPA, WHAT IS PRIVATE LAW? (2010). See also EVA STEINER, FRENCH LEGAL METHODS (2002) (introduction by foreign scholar).

13 See, e.g., FREDERICK F. SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); RULES AND REASONING: ARTICLES IN HONOUR OF FRED SCHAUER (Larry J. Alexander, Brian Bix & Philip Bobbitt, eds., 1999). Judging from the comments with which Harvard University Press introduced Schauer’s book, it 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.”

youthful words of Caleb Cushing, later Attorney General and one-time nominee for Chief Justice of the United States: “it is by comparison of our rules and practice with those of foreigners, that we become fully sensible of what is defective or excellent, and therefore of what is to be cherished and upheld, or to be disapproved and abolished in our institutions.”

In Part I of this article I set out what I believe legal methods should do: help decide legal problems accurately, according to law, and optimally, bearing in mind competing considerations of justice and public policy. In Part II I use Schauer’s book to point out a general malaise of American legal methods. In Part III I analyze Zippelius’ book for American readers to point out opportunities that it suggests for learning from one foreign system.

I intend this article for Americans new to comparative legal methods. I assume some knowledge of American legal methods, but little knowledge of foreign legal systems in general or foreign legal methods in particular.

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I.

LEGAL METHODS: GETTING TO RIGHT DECISIONS

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 1844)\(^{17}\)

Law should facilitate justice. In modern legal systems law consists of general rules that are applied to individual cases.\(^{18}\) Most times most people apply most rules to themselves.\(^{19}\) Sometimes

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judges, police or other persons are authorized to apply rules to others.

Legal methods are the way that legal systems apply general rules to specific cases. They guide individuals applying law to themselves and direct and control officials and private persons authorized to apply law to others.

Legal methods take rules from formulation in the legislature or elsewhere through to final application to individual cases. A complete program addresses lawmaking, law-finding, and law-applying. As used in this article, Lawmaking includes legislation, but also judicial or administrative lawmaking. Law-finding encompasses interpretation of statutes and precedents; it amounts to determination of the specific rules that might determine a particular case. Law-applying takes those found rules and uses them to decide concrete cases to facts already found. Law-applying presupposes a way of fact-finding. Taken together legal methods should facilitate bringing rules and facts together.

Legal methods implement a formal Rule of Law. It is a formal Rule of Law in that it is concerned with the application of rules and not with the content of the rules themselves.21


21 See Maxeiner, Legal Indeterminacy, supra note 20, at 521-522. Used in a broad and substantive sense, the Rule of Law is a contested concept that means different things to different people. The very success of the term Rule of Law has made it a rallying cry for reform in societies generally. In popular use it often incorporates ideals of a liberal and democratic state, such as democracy, constitutionalism, human rights and a free-market economy. The Rule of Law is also used in a more narrow and formal sense that leaves out the substantive content of liberal democracy and focuses on the principles that direct and limit the making and application of substantive law generally. By defining Rule of Law in this formal way, the concept is largely freed of a political content. In this sense, the Rule of Law can apply both in a democratic and in an authoritarian state. A formal theory is also more focused than a substantive one and consequently easier to work for and to defend. While a substantive theory might make for a better political rallying cry, a formal Rule of Law can serve as a legal prin-
The Rule of Law, says Justice Scalia, is a law of rules. We might put that in another way: a substantive Rule of Law depends as well on fulfillment of a formal Rule of Law.

In fulfilling a Rule of Law legal methods should provide clear rules that do not conflict with one another. Legal methods should identify who is authorized to apply those rules with what consequences. Legal methods should furnish ways for those decision makers to determine which rules determine particular cases. Legal methods should establish mechanisms for determining facts of individual cases. Legal methods should enable logical application of found rules to established facts to resolve legal questions. Legal methods should provide for explaining why cases are determined the way they are. Legal methods should lead to the same results no matter who is applying the law. Legal methods that do these things guide those subject to law and protect them from those charged with applying law to others. They fulfill a formal Rule of Law.

Legal methods are where theory meets practice. Were substantive law perfect and were its implementation unproblematic, legal methods might be concerned only with the formal implementation of the substantive law. Legal methods could be concerned only with providing legal certainty. We are not there yet. Fulfillment of a formal Rule of Law is not enough for modern legal systems that seek to realize a substantive Rule of Law.

Demands of a formal Rule of Law for clarity, consistency, and predictability are challenged by our limited ability to generalize in rules. There is tension among justice, public policy, and legal certainty. Gustav Radbruch, perhaps the leading German legal philosopher of the first half of the 20th century, well recognized this tension (he called it an antinomy): “Legal certainty

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demands positiveness, yet positive law claims to be valid without regard to its justice or expediency [i.e., public policy or purposiveness].” 24 Legal certainty, he continued, “takes a curious middle place between the other two values . . . because it is required not only for the public benefit but also for justice.” 25 These conflicts have long been recognized by American common lawyers as well; they were at the heart of nineteenth century codification controversy. 26

Every modern legal system confronts these three competing components. Legal methods should facilitate deciding cases not only according to law, but aimed at providing optimal results for justice and policy as well.

26 See Maxeiner, Legal Indeterminacy, supra note 20, at 530-31.
II.

LESS THAN THE BEST?

THINKING LIKE A LAWYER
IN SCHAUER’S AMERICA

Do laws promote justice? Does legal reasoning facilitate answering legal questions justly, accurately and efficiently? Too many American lawyers say no. They are skeptical of rules and of legal methods. They think that rules and justice oppose rather than support each other.

Schauer combats rule skepticism. 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.”

Schauer is modest in stating the challenge that he has posed, for he knows how great it is. He tells readers that he aspires that his book emulate three of the most iconic works in American law: Oliver Wendell Holmes, “The Path of the Law,” 10 Harv. L. Rev. 457 (1897), Karl N. Llewellyn, The Bramble Bush: On Our Law and Its Study (1st ed. privately printed 1930, reissued with additional comments 1951), and Edward Levi, An Introduction to Legal Reasoning (1949).

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27 SCHAUER at xii.
It is ironic that Schauer, in a defense of the “formal side of
law,” should aspire to emulate three works identified with rule
skepticism. Holmes, in the “Path of the Law” famously said that
“The prophecies of what the courts will do in fact, and nothing
more pretentious, are what I mean by the law.” Llewellyn, in the
*Bramble Bush*, proclaimed that “What these officials do about
disputes is, to my mind, the law itself.” Edward H. Levi in his
*Introduction to Legal Reasoning* asserted that: “The pretense is
that the law is a system of known rules applied by a judge . . . .”

Although these statements, even when made, were hyper-
bole, rule skeptics point to them for support in seeing law more
as describing what courts do do and less as rules prescribing what
people should do. Mild rule skepticism is endemic among
American jurists. Many, perhaps most contemporary American
jurists, accept the aphorism that “we are all realists now.” By that,
they mean, ‘we are sophisticated professionals; we know that legal
decisions have little to do with legal rules.’ Schauer considers
this common saying “almost certainly false.” In its virulent form,
rule skepticism sees legal rights and obligations as arising out of
legal procedure, rather than seeing legal procedure as implement-
ing legal rights.

Schauer rejects rule skepticism or so he says. He tells
readers: “Rules actually do occupy a large part of law and legal
reasoning.” He implores them: “Law may not be all about rules,
but it is certainly a lot about rules . . . .” Yet he is half-hearted in
his defense of rules and 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?” Schauer feels the need,

28 At 1.
29 On the reissue of the book Llewellyn qualified his words as those of a “young
man” that were “at best a very partial statement of the whole truth.” LLE-
WELLYN, *supra*, at xi-xii (Acknowledgments to 1951 reissue).
(“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.”).
31 SCHAUER at 144.
32 JAMES R. MAXEINER, GYOOHO LEE & ARMIN WEBER & HARRETT WEBER,
FAILURES OF AMERICAN CIVIL JUSTICE IN INTERNATIONAL PERSPECTIVE (2011).
33 *Id.* Cf. James R. Maxeiner, *Imagining Judges that Apply Law: How They
in a text for neophytes, to address whether there is such a thing as legal thinking. Nor is he alone; other American authors feel the same.\footnote{See, \textit{e.g.}, \textsc{Steven J. Burton}, \textit{An Introduction to Law and Legal Reasoning} xiii-xvi (1st ed., 1985.). The 2007 edition does not include this preface.}

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.”\footnote{\textsc{Schauer} at 103.} To the contrary, he says that “straightforward application of existing rules [is] “far removed from the realities of actual practice.”\footnote{\textsc{Schauer} at 13.} He sees that general rules produce poor results in particular cases.\footnote{See, \textit{e.g.}, \textsc{Schauer} at 120.} 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.\footnote{\textit{Cf.} Ronald Reagan, \textit{First Inaugural Address}, January 1981 (“In this present crisis, government is not the solution to our problem; government is the problem.”)}

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.\footnote{It appears over a dozen times. \textit{See, \textit{e.g.}}, 8, 9, 10, 11, 30, 31, 32, 36, 41, 43, 61, 62, 64, and 68.} For Schauer legal thinking requires a choice between law and justice; it does not seem to be way from law to justice. 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 \textit{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.”

Schauer’s system of legal methods is incomplete. Legal system, lawmaking, law-finding and law-applying all deserve attention in discussions of legal methods. Yet Schauer, following American practice, focuses—one might say fixates—on law-finding. Even within that limited area, he ventures only a little beyond finding and making case law by appellate courts.

Schauer is not happy that American legal methods pay little mind to lawmaking. “Entire books,” he says, could be written about legislative drafting; he laments that “[s]urprisingly, and perhaps disturbingly, very few such books have in fact been written.” He realizes that exclusion is anachronistic: common law development is “very much the exception, rather than the rule;” “[t]he image of the common law has no real world instantiations.”

Schauer observes that legal decisions typically involve both factual and legal elements. He regrets that discussions of legal reasoning have “traditionally focused overwhelmingly on the latter only,” if only because questions of law “almost always” turn on determinations of fact. He modestly works to reverse that exclusion. But here too, Schauer’s efforts are half-hearted. He does not shake the American addiction to common law methods.

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40 SCHAUER at 233.
41 In twelve chapters of approximately twenty pages each Schauer addresses law and legal reasoning generally, lawmaking, law-finding and law-applying. Three chapters focus on the role of rules, one on lawmaking, six on law-finding, and two on law-applying.
42 SCHAUER at 202 n. 25.
43 SCHAUER 149.
44 SCHAUER 105-106.
45 SCHAUER at 205. That he himself may still be a prisoner of that thinking, however, is suggested by his statement that “events involving a straightforward application of existing rules will not wind up in court at all.” Id. at 13. That is only sometimes true. More cases turn on different views of facts than on different views of law. REMME VERKERK, FACT-FINDING IN CIVIL LITIGATION: A COMPARATIVE PERSPECTIVE 1 (2010) (“Debates on matters of fact are at the heart of the litigation process.” citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *330 (1768) “Experience will abundantly show, that above a hundred of our lawsuits arise from disputed facts, for one where the law is doubted of.”)
III.

**JUSTICE THROUGH METHODS:**\(^{46}\)

**ZIPPELIUS’ GERMAN LEGAL METHODS**

Your Honor a day for me set/
On which I my right may get.

16th Century German Codex\(^{47}\)

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\(^{47}\) JOHANN FREIHERR ZU SCHWARZENBERG, CONSTITUTIO CRIMINALIS BAMBERGENSIS, BAMBERGER HALSGERICHTSORDNUNG leaf 14 (1543 ed.) („Herr Richter setzt mir ein Tag/das ich meyn recht volsürn mag.”).
Zippelius presents an alternative world where law is intended to be a “solution to questions of justice.” 48 It is one in which doing justice is a “task” of legal methods. 49 Zippelius’ world is not an alien world. It is not a world beyond our reach. It is the world that we ought to have. It is the world that our founding fathers declared is our right. 50 It is the world that we teach our children to seek. 51

In four main chapters Zippelius addresses four aspects of legal methods: I. law is a body of rules intended to produce justice; II. good rules are drafted to facilitate their effective application; III. rules are interpreted to produce just results; and, IV. rules are applied to determine rights and duties justly and accurately according to law. 52

To facilitate use of this article as an aid in reading Zippelius’ book, we follow his book’s chapters seriatim. Each chapter consists of several subchapters indicated with § signs. We do not always follow the order of the subchapters. Where we address a topic directly addressed in a subchapter or section in Zippelius’ book, we list it. We focus on aspects of German legal methods that we believe offer the most fruitful insights for reforming American legal reasoning. 53 We conclude consideration of each of the German chapters with pointed comparisons of American to German legal methods.

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48 ZIPPELIUS 13.
49 ZIPPELIUS 14.
51 See text at note 17 supra.
52 There is a fifth chapter, V. Legal Formalization and Data Processing in Law. It is shorter and has fewer subchapters than any other chapter. I think that it is a vestige of the book’s first appearance at a time when there was much interest in computer decision-making in the law. We do not consider it here.
A. The Rule of Law is a law of rules

In Chapter I (“Concept and Function of the Law”) Zippelius describes the world within which German legal methods operate. It is a world of rules. Those rules serve justice. Legal reasoning implements those rules.

The world that Zippelius describes is familiar. It lies between popular and professional perceptions of law and legal reasoning in both Germany and the United States. The popular perception is that law is a body of rules. Straight-forward applications of rules determine individual cases.\(^{54}\) If rules seek justice, as they should, cases are determined justly according to law. Thus law’s rules realize both order and justice. The professional perception is more skeptical of law’s efficacy. In Germany professionals recognize that law application is not always straight-forward. Sometimes, despite lofty goals, law may not produce order or justice. In the United States many professionals doubt that law application is ever straight-forward. They question whether legal methods can routinely produce both order and justice.\(^{55}\)

\(^{54}\) ZIPPELIUS at 117.

\(^{55}\) Cf. for Germany, Roman Herzog, Gesetzgeber und Richter—Zwei Legalitäts-quellen?, in GESETZ UND RICHTERSPRUCH IN DER VERFASSUNGSORDNUNG DER BUNDESREPUBLIK DEUTSCHLAND 5, 5-6 (1990) (“The popular perception is that the legislature issues or rather “gives” general and abstract rules, to which the judge in deciding the individual case referred to him is not only bound, but which are so clear, un-mistakable and complete, that he needs only apply or “carry them out” without any individual creativity. In a metaphor repeated thousands of times, Montesquieu opined that the judge is only the “mouthpiece of the statute” . . . . I will not further address here, what could have led a man so experienced in practice to such fundamental mistakes. . . . The accuracy of [my] thesis is apparent to anyone who has ever only once interpreted a legal norm and applied it to a concrete case. [author’s translation]); for the United States: Vivian Grosswald Curran, Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union, 7 COLUM. J. EUR. L. 63, 82 (2001) (“Perhaps the most frequently expressed complaint on the part of beginning law students in the United States is that their professors don’t tell them what the law is. This discomfort stems from their not yet having ‘un-learned’ their still civil-law mentality, imported from the domain of their prior life experience and prior intellectual training, from their still equating law with immutable governing principles that, once learned, should, they believe, serve to solve and resolve all questions of law. They enter law school committed to the concept that law school will teach them the discrete guiding principles that resolve all legal disputes. This conception of law does not tally with the common law, however. Common-law legal education in the United States thus begins a process of teaching law students to
Zippelius has a healthy respect for “The Law as ‘Law in Action’” (the title of § 2, even in the German edition) to do so. He wants neither to overstate, as the popular perception does, nor to understate, as American professional perception does, the rationality of law.\textsuperscript{56} Legal answers should be “as fair and just as possible,” he says, “even in light of the fact that a particular statute, several statutes, or judicial decision does not comply with our demand, and the legal question cannot be solved justly.”\textsuperscript{57} Zippelius provides an actual and not an imagined alternative world for Americans to consider. They can put aside comic book pictures of the civil law and can see a real civil law world.

Americans ask, can justice and the Rule of Law be reconciled?\textsuperscript{58} Zippelius answers with a resounding yes: “all these conceptual considerations are aimed primarily toward the goal of a just result.”\textsuperscript{59} In this section we examine five principal points that Zippelius makes about the concept and function of law and then remark on their treatment in American law.

\textbf{1. Law is the art of good order and justice}

Zippelius embraces rules and justice. He celebrates the maxim of the first section of the Digests of Justinian: “The law is the art of good order and justice.” It is no accident, he says, “that this maxim finds itself at the beginning of the greatest and most influential work of jurisprudence.”\textsuperscript{60} Zippelius says that “law must regulate human behavior in such a way that necessities and encumbrances are distributed equitably, conflicting interests fairly balanced, actions worthy of criminal liability justly punished, and in short, that the legal

\textsuperscript{56} ZIPPELIUS at vi (Foreword).
\textsuperscript{57} ZIPPELIUS at 14.
\textsuperscript{59} ZIPPELIUS at 21.
\textsuperscript{60} ZIPPELIUS at 13. The English translation is from the similar German translation of the 10\textsuperscript{th} German edition (“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 1 (Alan Watson, ed., rev’d ed, 2009). The difference in translation underscores the point that for Zippelius law is connected with good order.
problems that arise in a society are resolved in a just and equitable manner.”

In addition to doing justice, however, law must provide legal certainty for the sake of good order and satisfy competing social interests (public policy).

Zippelius believes that law requires finding an optimal way between rules, justice and public policy. He rejects the view that rules undermine justice even as he acknowledges that sometimes they fall short of justice. Rules, justice and policy need not be a zero sum game. Zippelius says rules complement as well as challenge justice and public policy. Even as rules serve legal certainty and order, they promote equal treatment and justice as well.

2. Law does not describe facts but prescribes conduct

Zippelius does not doubt, as some of his American counterparts do, that legal reasoning is different from other forms of reasoning. Law, he says, does not exist to understand natural or social phenomena; it serves to guide and control human conduct. “The law does not describe facts, but rather prescribes conduct and

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61 Zippelius at 13.
62 Zippelius at 14.
63 Zippelius 14 (“[T]he law undoubtedly serves, appropriately and optimally, to satisfy societal interests. However, this is not simply attendant to the interests present in the society, but rather that the law should create a just order of those interests. The general composition of legal norms aims at legal certainty, and by inhibiting arbitrary unequal treatment, justice as well. On the other hand, by neglecting the particularities of an individual case, the law can run contrary to the demand for justice. Justice and legal certainty come into conflict in questions concerning the legal effect of a materially incorrect judicial decision.”)
64 See Zippelius at 14-15 (“The general composition of legal norms aims at legal certainty, and by inhibiting arbitrary unequal treatment, justice as well. On the other hand, by neglecting the peculiarities of an individual case, the law can run contrary to the demand for justice. Justice and legal certainty come into conflict in questions concerning the legal effect of a materially incorrect decision. In this case, depending on the circumstances, greater weight can be ascribed to legal certainty or to justice. There are, after all, legal norms which serve only the function of giving order but do not substantively decide a question of justice, e.g., traffic regulations according to which the right lane is a travel lane and the left lane is for passing. With these qualifications however, one can thus be sure that the purpose of the law lies in bringing about just solutions to the problems that arise between people.”)
results in ‘prescriptive statements.’”\textsuperscript{65} Zippelius relies on the Kantian distinction between “is” and “ought.” Already Plato and Aristotle, he observes, distinguished between observing behavior and ordering conduct.

That law prescribes conduct seems an elementary point. If law prescribes conduct, then those subject to it want to know who does the prescribing and what is the prescription. Schauer observes that legal methods tell us who may prescribe conduct. He says that “it is one thing to recognize a correct outcome but another to realize that some institutions might be empowered to reach that outcome while others are not.”\textsuperscript{66} As for what legal methods tell us about the prescription, we might say, it is one thing after-the-fact to recognize a correct outcome, but quite another beforehand to prescribe what must be done to attain it.

\textbf{3. Law is a body of precepts}

Zippelius teaches that law consists of “obligations to do something or refrain from doing something.”\textsuperscript{67} Zippelius does not limit law to rules that create rights and obligations. Law is more than that; it is “a body of precepts.” So there is another kind of rule. Rules of this type regulate creation, modification and termination of legal rights and obligations. Rules that organize creation of rights and obligations and are of great practical importance not only to designate who may make and determine law, but to guide and protect those subject to law. To be guided better by law, people need to know who will decide, for in an imperfect world, who will decide affects what is decided.

\textbf{4. Organization of authority is the backbone of a legal order’s rational structure}

Zippelius teaches that “organization of authority is the backbone of a legal order’s rational structure.”\textsuperscript{68} He argues for a

\textsuperscript{65} ZIPPELIUS at 5. See id. at 40 (“the law does not describe natural processes, but prescribes something upon the occurrence of these conditions provides a sufficient justification for the existence of the intended legal obligation. This relationship is wholly different from the relationship between a natural cause and its actual effect.”).

\textsuperscript{66} SCHAUER at 5.

\textsuperscript{67} ZIPPELIUS at 5.

\textsuperscript{68} ZIPPELIUS at 6.
“hierarchy of institutional authorities” so arranged that “the norms and decisions they promulgate contribute to consistent (conflict-free) and well-functioning behavioral organization.” Through a layered hierarchy of authorizations the legal system preserves consistency of law, provides guidance and brings order.

In Germany state and federal governments jostle for control. Yet in Germany that jostling does not commonly come at the expense of those subject to law. Ordinarily organizing rules settle before laws are made or, at least before they are applied, which laws govern and which authorities are competent. It is uncommon that a subject of law must be concerned with conflicting commands or competing courts. The story now being written strives for the same legal certainty in relations between the European Union and its twenty-seven member states.

5. Legislation has primacy in determining justice and policy

Zippelius pays tribute to the importance in the early history of jurisprudence of solving concrete cases, but he teaches the primacy of legislation today. Now, he says, societal relations are regulated largely through legislation. Even questions of justice are “predetermined” by legislatures. Citizens are bound to follow law adopted by their democratically chosen representatives. Those charged with applying law likewise are bound to follow enacted law, not only on grounds of separation of powers, but because doing so serves interests of equal protection (i.e., justice) and legal certainty.

For German readers Zippelius need not dwell on the primacy of statute law. In Germany the statute—das Gesetz—is the fundamental concept of all law. It is the central category of legal

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69 ZIPPELIUS at 6.
70 The German constitution recently received its most extensive revisions ever—more extensive than upon reunification—all to serve federalism.
72 ZIPPELIUS at 16.
thinking. It is the primary source of German law. Where an American would say, we have “a Rule of Law, not of men,” a German would say, “statutes, not men, govern.”

To follow enacted law does not mean, Zippelius stresses, to apply law blindly. Zippelius raises two important qualifications to legislative primacy:

- “the legislature has decided [the] legal question[] and the substance of the legal issue presented can unambiguously be determined through the means of interpretation;” and,
- The legislature is not acting arbitrarily, but “sensibly with the interests of community participants against one another.”

We may add a third that is second-nature to German readers: the German constitution (Grundgesetz = Basic Law) itself imposes limitation on statutes, both in an extensive catalogue of human rights (Articles 1 to 20) and in positive binding of the legislature to the constitutional order and of the executive and the judiciary to law and justice (Article 21).

Primacy of legislation means that the legislature has primary responsibility for providing substantive laws that are just. Better methods imply that more decisions are made according to law. That law must be just. Reformers of methods take this lesson to heart. It is no coincidence that David Dudley

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74 Id. at 5.
75 Id. at 13 (“Das Gesetz ist nicht nur ein Bereich des Rechts, es ist dessen primärer Ausdruck.”); HANS SCHNEIDER, GESETZGBUNG: EIN LEHRBUCH 1 (3rd ed. 2004) (“Das parlamentarisch beschlossene Gesetz bildet in der Bundesrepublik Deutschland den Hauptbestandteil des geltenden Rechts.”).
76 LEISNER, supra note 73, at 5 (“Nicht Menschen herrschen—Gesetze gelten.”).
77 ZIPPELIUS at 16. This first qualification is better conveyed in the German original. The German word in the first sentence of the second paragraph of b), which Junker and Roy translate as “inasmuch,” is, “soweit,” i.e., “insofar;” Insofar better gives the sense of the German original that judges defer to the legislature only to the extent, i.e., only insofar, as the legislature has decided the question.
78 ZIPPELIUS at 15. Cf. ZIPPELIUS at 33 (representative bodies “must legitimately orient themselves towards the notions of justice capably of consensus as seen by the majority”).
80 Cf. ZIPPELIUS at 34.
Field, America’s most ambitious law reformer, did. For each of his codes of procedure, civil and criminal, he proposed a corresponding code of substantive law.

6. What the American public expects; what American lawyers deliver

The world that Zippelius describes is the world that ordinary Americans expect. For most Americans who are not lawyers, law is a body of rules.81 Those rules should be just. Rules declare rights and prohibit conduct. Authority should be well-organized. Legislation should have primacy.

None of this is new. The world that Zippelius describes is the world that American lawyers once looked for and still should. Justice Joseph Story, who contributed as much as anyone to the making of American law, in America’s first encyclopedia, explained to the public that the object of legislation is to establish laws. “And by a law,” he wrote, “we understand a rule, prescribed by the sovereign power of a state to its citizens or subjects, declaring some right, enforcing some duty, or prohibiting some act.”82

81 And not just ordinary Americans: it is basic to law in the West. See HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 4 (1983) (“‘Law’ these days is usually defined as a ‘body of rules.’”)
82 Unsigned contribution, Law, Legislation and Codes, in 7 ENCYCLOPEDIA AMERICANA 581 (Francis Lieber, ed., 1831), reprinted in JOSEPH STORY AND THE ENCYCLOPEDIA AMERICANA WITH AN ORIGINAL INTRODUCTION BY MORRIS L. COHEN 99 (Valerie L. Horowitz, ed., 2006) and in JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 357 (1971, reprinted 1990 with a foreword by Stephen B. Presser). The entire paragraph reads: “Legislation, in its broadest sense, includes those exercises of sovereign power, which permanently regulate the general concerns of society. Its chief object is to establish laws. And by a law, we understand a rule, prescribed by the sovereign power of a state to its citizens or subjects, declaring some right, enforcing some duty, or prohibiting some act. It is its general applicability, which distinguishes it from a single edict, or temporary and fugitive order of the sovereign will. It is supposed to furnish a permanent and settled direction to all who are embraced within its scope. It is not a sudden executive direction, but annunciation of what is to govern and direct the rights and duties of the persons to whom it applies, in future. The rule being prescribed, it becomes the guide of all those functionaries who are called to administer it, and of all those citizens and subjects upon whom it is to operate. Neither is supposed to be at liberty to vary its obligations or its provisions.”
That Americans live in an age of statutes is an old development. When the American Bar Association was founded in 1878, its Constitution declared as object of the Association, to promote “uniformity of legislation throughout the Union ….” Art. I. It required the Association’s President to open each annual meeting with an address in which he was to “communicate the most noteworthy changes in statute law ….” Art. VIII. There was no mention of common law. Already in 1885 the Association debated a resolution: “The law itself should be reduced, so far as possible, to the form of a statute.” The following year the Association adopted the resolution with modification. From near the beginning to the end of the century and beyond American lawyers worked to develop legislation and legal methods that would meet public expectations.

That America in the twenty-first century does not have such methods, that American academics see much of their law “as a mass of rules that cannot be seen as the rational working out of general principles [but] as the accumulation of the victories and defeats of two conflicting visions of the universe” in “a battle of world views” in which judges engage, and that American judges characterize their system as “too costly, too painful, too destructive, too inefficient for a truly civilized people,” is an indictment of American lawyers, academics and judges who allowed it to happen and failed to develop modern legal methods.

Whereas in the nineteenth century American jurists tried with modest success and much disappointment to develop modern legal methods, in the twentieth they largely gave up the ghost.

83 Art. VIII, REPORT OF THE FIRST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION, 30, 32 (1878) [emphasis added].
84 REPORT OF THE EIGHTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 364 (1885) [emphasis added].
87 Cf. JAMES R. MAXEINER, EDUCATING LAWYERS NOW AND THEN 34-36 (2007).
Instead of working for new and improved methods, they apologized for failed ones, or simply despaired of ever being able to fix them. Instead of thinking about everyday cases, they focused on exceptional ones, *i.e.*, litigated cases raising constitutional issues at the appellate level. American academics write a lot about deciding particular cases and only a little about drafting legislation. Yet it is the latter that is responsive to the needs of the day as Schauer has himself pointed out.

Elsewhere Schauer describes the *Failure of the Common Law*. He finds it no surprise that legislative solutions are taking primacy over judicial ones. “[F]aith in the logic of the law has given way to an understanding of the law as a decisionmaking institution in which contested questions of policy, economics and morality play a large role, and … faith in the ‘common erudition’ of an elite of similarly trained and similarly situated judges has declined ….” Yet Schauer in his new book pays more attention to arcane issues of a common law past, such as the difference between “holding and dicta,” than to how better in the present to realize justice and law in individual cases through general legal rules and their methodical application. His unremarkable conclusion: the feature that makes rules rules is that “what the rule says really matters.”

That the American legal system does not live up to the public’s expectations is not reason to accept second best. It is cause

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91 See H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977) (“American jurisprudence …. Is marked by a concentration, almost to the point of obsession, on the judicial process, that is, with what courts do and should do, how judges reason and should reason in deciding particular cases.”).
93 *Schauer* at xii.
94 *Schauer* at 18.
to see how other systems work. Maybe they work better, maybe they work worse, but at least we should know how they work.

B. Drafting Rules that Work Well

If legal systems consist of rules intended to achieve justice, it is not much of a leap to think that optimal legal systems should consist of rules that work well, i.e., rules that facilitate reaching just and accurate results. Such rules are not handed down from heaven but are drafted here on earth.

In Chapter II (“Structure and Context of Legal Rules”) Zippelius shows readers how the German system constructs legal rules that facilitate application in individual cases. When legal rules are well-drafted and legal methods are up-to-date, there are fewer hard cases and more easy ones. Well-constructed rules help master life’s complexities.

America has a long history of legislation. Our first laws were statutory rules. Our constitution was among the first written constitutions in the world. Among the first tasks in our newly formed republic was rationalizing the numerous statutes we already had. Our first book of precedents followed in 1798 rather than preceded our first statutes and constitutions. Today we no longer question that we live in an age of statutes. Our leading legal institutions, e.g., the American Law Institute, the Uniform Laws Commission and the American Judicature Society, are concerned with making better statutes. That their successes have been fewer than their founders hoped counsels not for giving up, but for openness to foreign alternatives.

Here we discuss three points that Zippelius makes about drafting rules and then remark about American lawmaking and its institutional limitations.

1. Legal rules command legal consequences for specified sets of facts

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95 See, e.g., THE LAWS AND LIBERTIES OF MASSACHUSETTS (1648).
96 See Law, Legislation and Codes, supra note 79; COOK, supra note 88.
97 1 JESSE ROOT, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT AND SUPREME COURT OF ERRORS ... (Hartford Conn., 1798).
Zippelius teaches that legal rules are logical syllogisms. They are made up of major premises (law), minor premises (facts) and conclusions (legal consequence). Their application is deductive.

Zippelius 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.\(^9^8\)

Zippelius emphasizes that cause and effect of legal rules are “wholly different” from cause and effect in natural science.\(^9^9\) They are not descriptive. Most legal rules take prescriptive form. They tie facts of cases to particular legal consequences. The same legal consequences can flow from more than one rule. Some legal consequences otherwise commanded, may be precluded due to operation of still other legal rules.

The strict relationship between factual requisites and legal consequences has great importance for legal certainty and for efficiency of legal process.\(^1^0^0\) 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. There is no need to look for other factual attributes; legal process can end.\(^1^0^1\)

Applying rules defers to the institutional decisions as to what shall be deemed right and rejects highly personal decisions of those carrying out the law. Such decisions are not, however, less than the best, when the rules are the best. Rather than apologize for using rules or hope for better, it is incumbent upon all of us to work for better rules. More sophisticated rules can better adjust the tension among legal certainty, justice and public policy. How one manages to create more sophisticated rules is the next topic.

2. **Sophisticated legal rules deal with life’s complexities**

98. Zippelius at 43, 110 (“Rules are norms that are either applied or not applied in a particular case.”).
99. Zippelius at 40.
100. Unless specifically authorized by the rule, there is no room for balancing tests such as commonly occur in the United States. See, e.g., James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT’L L. 109, *** (2003).
101. The same idea is present in American motions to dismiss cases either on pleadings or dismissal on summary judgment.
Zippelius demonstrates that complete rules can be constructed out of several different rules. The factual attributes necessary to bring about a legal consequence require that factual attributes from more than one rule are needed to bring about a particular legal consequence. At first blush, this seems menacing. Incorporation by reference requires that one go to more than one place to construct a complete rule. In a lucid discussion Zippelius disarms what might seem a menacing bomb. He gives concrete examples that help readers understand how the process proceeds without simplifying facts excessively or making rules so complicated as to be unenforceable.

Far from complicating the task of relating facts and law to produce legal consequences, incorporation by reference, or as Zippelius calls it, use of supplemental norms, can materially simplify law application and increase legal certainty. The same condition can be required consistently throughout all laws. Thus in Germany statutes have “general parts” that regulate questions common to more than one of the substantive matters they address. Use of supplemental norms permits legislation better to deal with the complicated events of modern day life. Without incorporation by reference, in every rule it would be necessary to build in all the different exceptions and modifications one might think of.

3. Good legislation avoids conflicts among enacted rules

Zippelius teaches that good legislation avoids conflicts among legal rules. Not only can conflicts be avoided, Zippelius teaches that the Rule of Law demands that they must be avoided. According to Zippelius, “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 avoids conflicts. These are all found in American law and should be familiar to American readers. We only list them here:

102 He gives a seventh one which, as stated by Zippelius, is not so 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.

The very familiarity of these concepts may keep us from learning the lesson fully. That lesson again, emphasized, is that norms may not contradict one another; in fact they must complement one another.

4. America has syllogisms; they should be better

Zippelius, in teaching about making law, teaches about crafting syllogisms. He tells us that syllogisms should have clear premises and certain legal consequences. They deal with complicated life matters by incorporating multiple syllogisms. They should be drafted to avoid conflicts with other syllogisms.

Americans know about legal syllogisms.\textsuperscript{103} American law schools teach syllogisms when they teach students that there is no valid cause of action or no criminal offense when a necessary element of the cause of action or offense is missing. Bar examiners examine on syllogisms. Lawyers bring lawsuits on the basis of the elements of causes of action. Judges instruct jurors to apply law syllogistically to facts that jurors find.

Once upon a time American legal methods focused on logical syllogisms. That was the era of common law special pleading,

which preceded the Civil War and largely predated academic legal education. In those days, plaintiff’s attorney selected a particular syllogism—the form of action—and together with defendant’s attorney through pleadings chose one element of the syllogism as determinative of their lawsuit. The United States Supreme Court described that system as “the best logic in the world, except mathematics.”

Special pleading, by providing only a limited number of forms of action, and by limiting issues in dispute, was widely deemed inadequate and unjust. While subsequent systems have retained a role for syllogisms, that role is less than before. Just how much less depends on the extent of involvement of juries in applying law. Here we cannot go into that much discussed issue. We do note some important consequences. The more latitude jurors have in themselves choosing and formulating the syllogisms that they are to be apply, the less complex those syllogisms can be. It only stands to reason that trained professionals can formulate complicated legal syllogisms better than untrained laymen. American trial lawyers have reacted to that wisdom by moving away from strict syllogistic law application to presenting to jurors a “theory-of-the-case.” The theory-of-the-case should include a syllogism sufficient to establish the claim, but moves the focus of decision away from the syllogism.

A theory-of-the-case orientation suits many participants in American litigation better than does an orientation on legal syllogisms. As one might expect, lawyers who are on the losing side of dispositive motions (e.g., for summary judgments and for dismissal) feel that their clients are deprived of their day in court. But judges and jurors, too, are dissatisfied when legal syllogisms take from them decisions that they would like to make themselves. Some judges prefer indefinite tests such as “sliding scales” and “balancing tests” over syllogisms which provide them less room for maneuver. Some prefer to avoid syllogisms by not providing

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104 See James R. Maxeiner, *Pleading and Access to Civil Procedure: Historical and comparative reflections on Iqbal, a day in court and a decision according to law*, 114 PENN STATE L. REV. 1257 (2010).
106 See Maxeiner, *Pleading and Access to Civil Procedure, supra* note 104, at ***.
107 See, e.g., Maxeiner, *Standard-Terms Contracting, supra* note 100, at 119 (U.C.C. unconscionability requires a mix on a sliding scale of “procedural un-
Justifications for their decisions. 108 Jurors show their distrust of syllogisms when they choose not to follow instructions and decide according to their own individual preferences. 109 For many, particularly those subject to rules, dissatisfaction may be no more than dislike for outcome, based on fear that rules applied are not sufficiently sophisticated to take into account all concerns of those judges. 110

All too many Americans believe that syllogism based decision making causes bad decisions. They respond by undermining syllogisms to permit decision-makers to decide independent of syllogisms. 111 Zippelius reminds us that there is another way: we can write better syllogisms that better account for the complexity of life. Are we up to that challenge?

5. What American legislatures deliver

Good syllogisms are only part of good legislation. Good legislative rules complement, not contradict each other. Americans know about consistency of rules. Our classic writings on legislation tell us of its importance. Ernst Freund had a special word for consciousability” and “substantive unconscionability” while under German law the tests are independent).

108 SCHAUER at 180.
109 See MAXEINER ET AL., FAILURES OF AMERICAN CIVIL JUSTICE, supra note 32, at ***.
110 Cf. JAMES R. MAXEINER, EDUCATING LAWYERS NOW AND THEN: AN ARTICLE COMPARING THE 2007 AND 1914 CARNEGIE FOUNDATION REPORTS ON LEGAL EDUCATION 18 (2007) (“[t]he … Report observes that in the case method the “relentless stress is on learning the boundaries that keep extraneous detail out of the legal landscape.”[55] Students are learning that “facts are only those details that contribute to someone’s staking a legal claim …. ”[53] Students are being taught not only how to think as lawyers, “but also, from a legal point of view, what is worth thinking about.”[53, 187] The case method, the … Report concludes, provides a deliberate simplification of life: “[i]t consists in the abstraction of the legally relevant aspects of situations and persons from their everyday contexts.”[187] The Report laments that “the rich complexity of actual situations that involves full-dimensional people, let alone the job of thinking through the social consequences or ethical aspects of the conclusion, remains outside the method.”[187] It questions whether the law itself reflects popular understanding of justice.[186]”).
it: “correlation.” Yet we have not done a good job of correlating our laws. One might think of the two conflicting state statutes at the heart of *Bush v. Gore*.

When it comes to writing systematic consistent legislation with clear syllogisms, Americans are disadvantaged compared to their German counterparts. While we have had centuries of experience with statutes, our institutions are just beginning to learn to deal with them. Zippelius only alludes to the German institutions responsible for drafting and applying those syllogisms. He does not directly teach about them or about their approach to legislation. He assumes that his readers—Germans—are familiar with them. American readers are not likely to know about German institutions. The American institutions that they do know about do not yet have the legislative capabilities that their German counterparts do.

America’s lawmakers and law-applying institutions, as presently configured, are unable routinely to create systematic and consistent legal rules. None of these shortcomings is immediately apparent from reading Zippelius’ book and comparing it to Schauer’s. Both authors take their respective institutions as self-understood givens. Here we identify without discussion six of our disadvantages in legislation:

(a) *Incremental rather than systematic legislation.* Professor Peter L. Strauss has written of what he calls “common law legislating—that is, the practice of creating statutes to achieve marginal changes in existing law to perceived deficiencies, rather than legislating comprehensively as continental codes seek to do.”

(b) *Too many law givers.* In the United States, not only do we have one federal and fifty state governments adopting laws, we have 3,034 county governments and 35,937 sub-county govern-

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112 ERNST FREUND, STANDARDS OF AMERICAN LEGISLATION: AN ESTIMATE OF RESTRICTIVE AND CONSTRUCTIVE FACTORS 225 (1917). See also Ernst Freund, Prolegomena to a Science of Legislation, 13 ILL. L. REV. 264, 268 (1918).

113 Cf., JAMES WILLARD HURST, DEALING WITH STATUTES (1982).

114 See, e.g., Ronald L. Gainer, Federal Criminal Code Reform: Past and Future, 2 BUFF. CRIM. L. REV. 45, 49 (1998). (A former Deputy Associate Attorney General describes the federal criminal laws as a “morass of statutory provisions and judicial decisions [that] is so complex, and so confusing to law enforcement officials as well as to the public, that it could scarcely have been designed to be less efficient. This is extraordinarily costly.”)

115 Strauss, supra note 19, at 225.
ments (municipalities and townships). Many of these issue their own laws with without oversight, without coordination with other laws and without meeting minimal standards of quality.\(^\text{116}\)

(c) Too little coordination among the many law givers.\(^\text{118}\) In the United States the lines of competencies between federal and state governments are often indefinite or intentionally allow for concurrent legislation. There are few provisions for proactive coordination. Whether a line is crossed is not determined until after a rule is invoked.

(d) Legislative rather than executive origination of statutes. Most American statutes are drafted within Congress or within state legislatures. In parliamentary systems the government presents legislation to the legislature for consideration. Before it does so, it has resolved most political issues regarding content. In the American Congressional system, those issues are resolved—often imperfectly—by consensus negotiating in the legislature.\(^\text{119}\)

(e) Amateur rather than professional draftsmen. Since most American statutes are drafted within legislatures, they are often drafted by people untrained in legislative drafting. While Congress and some state legislatures have support staff for professional drafting, their use is optional rather than mandatory. Moreover, do not have the familiarity with the existing laws that they amend that national ministries do. Worse, some laws are drafted by people with direct interest in the legislation.

(f) Competing rather than authoritative interpretations. Many American statutes of national import, i.e., all federal laws and uniform state laws, are subject to diverse interpretations. Conclusive interpretations of these laws is difficult, delayed and sometimes impossible. In the case of federal laws, the United States Supreme Court hears so few cases (less than one hundred a year), and

\(^{116}\) 2002 CENSUS OF GOV'TS, GC02-1(P) 5 (2002), available at http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf. The same census also reports another 13,522 school districts and special district governments (e.g., natural resources, fire protection, water supply).

\(^{117}\) Americans assume that localism requires independent legislative authority. A century ago, they did not. In Germany, the Constitution guarantees local government, but localities have only very limited legislative authority and that under the watchful eye of state ministries of justice. See Maxeiner, Legal Indeterminacy, supra note 19, at ***: Legal Certainty, supra note 19, at ***.

\(^{118}\) See ERNST FREUND, STANDARDS OF AMERICAN LEGISLATION 225 (1917) (referring to “correlation”).

\(^{119}\) See Strauss, supra note 19, at ***.
many of those constitutional rather than coordinating, that it cannot
keep a uniform interpretation for federal laws. In the case of uni-
form state laws, there is no court that can decide issues authorita-
tively for the entire country.

C. ZIPPELIUS CHAPTER III.

Justly interpreting rules

If better legal systems consist of rules that seek justice and
that facilitate their own application, according to Zippelius,
optimal legal systems should seek to interpret those rules justly in
individual cases.

In Chapter III (“Implementing, Supplementing, and
Correcting Statutes”) Zippelius addresses interpretation of legal
rules.\(^ {120} \) Interpretation of statutes and of precedents make up the
traditional core of academic study of legal methods. They amount
to law-finding, i.e., identifying and interpreting rules that might
appropriately govern specific cases.\(^ {121} \)

Chapter III is deceptively familiar to American readers. In
today’s world sophisticated lawyers speak of convergence of legal
systems. In interpreting legal rules we see what seems to be a case
of convergence. Where once scholars distinguished between
common law and civil law jurisdictions by whether a jurisdiction
was case law or statute law based, today statute law is dominant in
the American system and case law is important in the German
system. Schauer warns not to assume that convergence has gone so
far as to have reached congruence.\(^ {122} \) Critical differences remain.

Here we discuss eight key points of statutory interpretation
that Zippelius makes. We follow these with remarks on American
law. The first point that Zippelius makes—a just outcome is the
first consideration—drives the rest. He makes it already in Chapter
I.

1. The function of legal interpretation is to find just
solutions to legal problems (Chapter I, § 3 I b)

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\(^{120}\) Already in Chapter I, § 3 I b

\(^{121}\) Zippelius distinguishes finding an “appropriate” rule, that is, essentially giv-
ing concrete form to a rule for a particular case, and then choosing the “relevant
rule” to apply in that case. ZIPPELIUS at 118.

\(^{122}\) SCHAUER at 108.
Since law is a solution to questions of justice, we are not surprised that Zippelius teaches that the goal of interpretation is “justly finding a solution to the legal question at hand.” While statutory language bounds interpretation, within those bounds, statutes do not require that law appliers decide unjustly. To the contrary, Zippelius teaches that within those bounds, law appliers have the task of reaching just solutions.

Zippelius reviews tools that the German legal system provides law appliers to assist “in solving legal problems in a just way, free of contradiction and protective of interests.” These include interpretive criteria (i.e., grammatical, logical, historical, systematic), general principles (e.g., proportionality, prohibition against excess, requirements of equal treatment), and procedure (i.e., a free exchange and airing of arguments followed by a justified decision).

Sometimes these tools fall short of fully solving legal questions. They may not always clearly identify just solutions. Help is needed to measure what is just. Zippelius proposes a “Standard Gauge of Just Decisions” (§ 3 II) for use when present-tools of interpretation fail to reach a conclusive interpretation. His gauge has three measures:

a) A just decision should reflect a just community. It should not be the “highly personal view of an individual judge.” While the individual conscience is the last moral authority, everyone is a moral authority to be regarded equally with respect to others.

b) 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

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123 Zippelius at 16. Similarly, Zippelius at 21 ( “there can be no dispute that all these conceptual considerations are aimed primarily toward the goal of a just result.”)

124 Cf. James Maxeiner, Policy & Methods, supra note 4 at 28.

125 Zippelius at 17-18. Here Zippelius defends an idea, once thought anathema, but now accepted in discussions of German legal methods: “that the interpretative means are only chosen after the outcome is determined. … In other words, a judge confronted with a particular case already develops a preconception about how to rule according to his own sense of the law.” The path-breaking book is Josef Esser, Vorverständnis und Methodenwahl in der Rechtsfindung (1970).

126 Zippelius at 24.

127 Zippelius at 23.
concepts.” Zippelius gives three grounds for this view: the “democratic notion,” “equal treatment” and “legal certainty.” A democratic society permits broad participation in society and expects judges to follow prevalent beliefs. Equal treatment requires that judges uses standards that enjoy broad consensus in society and are not dependent on particular judges. Legal certainty requires following the same course or, an American might say, valuing precedent.\footnote{Zippelius at 23}

c) Determining what is a concept of justice capable of majority consensus is a difficult standard to apply. It should not be equated with the ostensible opinion of the majority, since these views often are determined by matters other than conscience. It is the legitimate duty of legislators and judges to guide the public’s views.

2. A statute’s text provides the starting point and limits its interpretation (§ 9)

While the function of legal interpretation is finding just solutions, since separation of powers assigns the legislature priority in determining those issues, Zippelius teaches that where it has spoken conclusively, its determination is to prevail. That means that a statute’s text provides the starting point of its interpretation. A statute’s text also limits its interpretation. But a statute’s text does not end its interpretation.

Law, Zippelius teaches, is prescriptive and not descriptive. Statutes are “objectified regulation.” (Chapter I, § 4.) Statutes 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;\footnote{Cf., Friedrich von Schiller, Die Braut von Messina (1806) ("The statute is the friend of the weak.").} they control those charged with carrying statutes out. But words are ambiguous; they may refer to more than one concept.\footnote{Zippelius at 28. Anyone who has studied a foreign language knows this. My seventh grade Latin teacher, Mr. Witscher, made the point by asking his students for all of the meanings of the word “frog” that we could give. He had more than a dozen. My favorite: a device on intersecting railroad tracks that permits wheels to cross the junction. Running over frogs in this sense is not distasteful.} Understanding a statute means associating correct concepts with statutes’ words.
Zippelius explains: words that describe facts seldom carry the same meaning for everyone. A given word has a “range of meanings.” 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. The idea is familiar to Americans. 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.\(^{131}\) Within the range, there may be many possible meanings; it is the task of interpretation to identify the correct meaning.\(^{132}\)

To identify which meaning is correct Zippelius uses the four “classical” criteria of interpretation of German law: “grammatical,” “logical,” “historical” and “systemic.”\(^{133}\) We need not expound on these criteria here; Zippelius explains them lucidly.\(^{134}\) The ideas behind them, if not their precise definitions, are well-known in American law.

From the standpoint of legal certainty and predictability, a range of meanings is a drawback. But, Zippelius argues, such latitude can be a distinct advantage in many cases: it gives the law legal 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.”\(^{135}\) Legislatures do this deliberately when they use what are known as general clauses.\(^{136}\)

The classical criteria of interpretation, while they facilitate finding the correct interpretation, do not give license to go outside

\(^{131}\) See FRANK B. CROSS, THE THEORY OF STATUTORY INTERPRETATION 50 (2009) (a tiger may be a cat, but not a dog); SCHAUER at 155 (a cat or bat is not a dog).

\(^{132}\) ZIPPELIUS at 67.

\(^{133}\) ZIPPELIUS at 60. Zimmermann likewise puts forward four, 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))).

\(^{134}\) ZIPPELIUS at 59-62.

\(^{135}\) ZIPPELIUS at 66.

\(^{136}\) For example, requirements for good faith in contract performance.
the range of the possible meaning of the words. Zippelius explains:
“All further efforts at interpretation proceed on the basic 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). To go outside the
range of possible meanings creates a legitimacy problem; it is to
take over the function reserved to the legislature. The text then,
is not the end, but it is an end.

3. Statutes should be interpreted objectively (Chapter I, § 4 II)

Zippelius teaches that statutes should be interpreted objectively, that is, according to what he calls “the intention of the
statute itself.” An objective interpretation seeks an understanding “familiar to the mindset of a wide number of
people.” Following Hegel’s philosophy, organized power finds
its source in objective reason as manifested in “the prevalent and
living ideas within the community.”

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. 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
Führers”). 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 one with another.

137 ZIPPELIUS at 67.
138 ZIPPELIUS at 96.
139 Cf. ZIPPELIUS at 72.
140 ZIPPELIUS at 30.
141 ZIPPELIUS at 32.
142 ZIPPELIUS at 32.
143 ZIPPELIUS 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).
144 ZIPPELIUS at 31.
145 ZIPPELIUS at 33.
4. Statutes should be read in the present and not in the past (Chapter I, § 4 III)

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”). He argues that “The 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.”

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.” He says that what interpretation of statutes over time allows (e.g., the older the statute, the greater freedom there is to develop it through interpretation).

5. Interpretation justifies decisions of cases (§ 10)

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. “In choosing a particular meaning, it is necessary to justify the choice—that is, provide reasons for choosing it.” “When interpretive arguments conflict, there is no strictly rationale hierarchy between them.” The most important guiding principle, however, is allowing the selection of an interpretive argument to be determined by a search for the most just solution to the problem. “In other words: Which

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146 ZIPPELIUS at 34, 35.
147 ZIPPELIUS at 36.
148 He quotes the German 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.” ZIPPELIUS at 67.
149 ZIPPELIUS at 67.
150 ZIPPELIUS at 86.
of the possible ‘justifiable’ interpretations, according to the rules of the art, lead to the most just solution?”

Interpretation is thus case “result-oriented.” It is not oriented toward developing the law or providing an authoritative interpretation of the statute. Zippelius rejects the idea that interpretation is “the reproduction of something already done.”

Interpretative arguments do not fully solve questions of interpretation.

7. Supplementing and correcting statutes (§ 11)

Zippelius recognizes that interpretation does not always reach solutions that satisfy our sense of justice. Sometimes, the law provides no answer. In such cases statutes require supplementation, either through future legislation or through judicial gap-filling of existing law. Other times, a statute provides an answer, but it is an answer which is unacceptable. The statute needs correction. Filling gaps is less controversial than correcting statutes. It is easier from the standpoint of legitimacy for courts to act when the text provides no answer than when it provides a bad answer. In filling in gaps, it is appropriate to consider societal goals, system consistency and justice.

Although less controversial, even 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 “By 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

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151 ZIPPELIUS at 86.
152 ZIPPELIUS at 84.
153 ZIPPELIUS at 68.
154 ZIPPELIUS at 85.
155 ZIPPELIUS 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”).
156 ZIPPELIUS at 17.
157 Zippelius at 97.
legitimacy, particularly with respect to the necessary debate and conversation with the public.”

Who should act and when become acute issues when raised in the context of correcting, i.e. reversing, what the legislature enacted. Yet 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.” What are judges to do? Zippelius quotes the resolution of the issue adopted by the German Constitutional Court:

Judicial legal development may depart from the text of a law only when the reasons that speak for a particular ‘law,’ carry more weight than do the arguments of separation of powers and legal certainty, which demand strict adherence to a ‘law.’ Further, such a departure may be made when the text of the law leaves open the possibility that the legislature did not consider the particular problem at hand, and as such, failed to provide a rule with respect to it. However, if the clearly indentified meaning of the law precludes the possibility, then the only remaining option is within the exclusive domain of constitutional law courts to declare a norm invalid on constitutional grounds (constitutional norm control).

Zippelius stresses that departing from a law’s text, on grounds of separation of powers and legal certainty, is justified only by “overwhelming reasons of justice.” Ordinary judges are not permitted to do that. A judge may not put a statute out of force. If a judge believes that the statute is unconstitutional, the judge is required to refer the case—prior to deciding it—to the Constitutional Court for decision of the constitutional issue.

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158 ZIPPELIUS at 91.
159 TSCHENTSCHER, supra note 79.
160 ZIPPELIUS at 92 (with references to decisions of the Federal Constitutional Court).
161 ZIPPELIUS at 113.
162 A similar procedure exists with respect to European Union law.
8. Case law produces continued legal development (§13), but statutory precedents are not strictly binding

In Germany court interpretations of statutes 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 instant cases. That is not to say that precedential value is ignored. 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 interpretation does proceed 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.”

Nevertheless, Germany does have case law. In the course of what Zippelius refers to as “continued legal development,” judicial decisions do become binding. He explains:

[1]Interpretations and gap-fillers, once chosen by courts, attain a certain binding character; this follows from the principles of equal treatment and legal certainty. These principles admonish the state to remain true to a view of the law that has been decided upon, and as such is all the more settled, provided overriding reasons do not speak in favor of charting a new and different path than the one already embarked on. … In short: once an interpretation or gap-filler is chosen, and it is justified with the latitudes allowed hermeneutically, it may not be overruled without good reason.

This might seem to be opposed to the idea that interpretation serves first to resolve cases and only second to clarify statutes. But Zippelius explodes that assumption. 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

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163 Zippelius at 84.
164 Zippelius at 110-111.
common law appellate courts apply to their own decisions: “not departing from like decisions without very good reasons.”

9. Differences that disappoint America

Zippelius describes an approach to interpreting statutes that sounds familiar to 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.” He adds “[w]e wouldn’t be far off in our result today if … were we to formulate the view, according to which the goal of interpretation is to determine what the ideas of the legislator were ….” That could be the beginning of an American book on statutory interpretation; it practically is.

Indeed, there are many similarities between the two approaches. The classical interpretative criteria of Germany described by Zippelius have parallels in the canons of construction of America. Zippelius’ consideration of objective and subjective interpretation parallel the American textual and purposive interpretations on the one hand, and original intent on the other. Zippelius’ evaluation of a “living interpretation,” on the one hand, and “interpretation at the time of inception” parallels the American dynamic and static interpretations on the other. Yet there are important differences in resolution of these issues as well as a fundamental difference as to the end served by statutory interpretation.

German statutory interpretation is directed primarily toward fair resolution of the case at hand? American statutory interpretation is directed primarily toward development of the law under consideration.

Remarkable about this difference is that it runs contrary to American prejudices about the civil law. 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

165 ZIPPELIUS 112 (citing D. NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 227 (1978)).
166 ZIPPELIUS at 59-60.
167 In fact, it practically is. See HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 1 (2nd 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 it, the meaning which the authors of the law designed it to convey to others.”).
rule bound. American judges more than often than German judges choose between the legal decision and the right decision. American procedure and its strict separation of law and fact contributes to some this difference.

We list here four American differences in statutory interpretation that contribute to Schauer’s conclusion that in American we often must choose between the legal solution and the better solution:

(a) *Canons of construction rather than criteria for interpretation.* Instead of flexible standards of interpretation, 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”¹⁶⁸ and a proposed Federal Rule of Statutory Interpretation.¹⁶⁹

(b) *Textualism or intentionalism rather than purposivism.* Americans debate the role of statutory text and intentions of legislators in interpreting statutes. Germans and other Europeans read texts as constraining courts, but not as commanding unique solutions. The American approach puts the legal solution at odds with the “best” solution seen by the decision-maker; the German approach leaves room to decision-makers to make the best, i.e., the equitable decision.¹⁷⁰

(c) *Static rather than dynamic interpretation.* Americans debate whether interpretation should orient on the understanding of our day or on the understanding of the ancient day when the text was adopted. The German position—today—is more likely to lead to what today’s decision-maker thinks is the best solution.

(d) *Statutory precedent rather than free interpretation.* In the United States when once a court interprets a statute, that interpretation becomes binding on courts subordinated to it.

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¹⁷⁰ Zimmermann, *supra* note 133 at 320-322. Professor Reinhard Zimmermann explains that Germany has managed to “shake off the self-imposed fetters of a literalist approach to statutory interpretation.” It has made a “considerable advance in legal culture;” in Germany a “refined and liberal approach” to statutory interpretation prevails. “The purpose and the equity of the statute most often determine the result.” The view is similar in France. *See* Strauss, *supra* note 19 at ***.
Professor Strauss has shown the pernicious effect of this rule. It gives the appellate court the last word on a statute until the legislature acts again. In effect the appellate court takes over the law-making role. The appellate court becomes, Professor Strauss observes, “a political competitor with the legislator in the creation of law;” there is now a real possibility of “interbranch war.”

We note here how American procedure contributes to the unsatisfactory situation that Schauer describes.

One procedural reason for rigidity of America statutory interpretation is the placement of principal responsibility for case management on the lawyers themselves. Since lawyers present cases to passive judges, to properly prepare for trial, they need to know beforehand what is the interpretation of the applicable rule of law.

Another procedural reason is the passivity of American judges in factual findings and their activity in law determinations.

how the American syste combination of the doctrine of statutory precedent, just discussed, and the treatment of facts in courts of first instance. near complete deference to findings of fact of courts of firsThe American doctrine of statutory precedent when combined with the equally American rule that facts found in first instance are largely is symptomatic of the difference between the two systems that is fundamental yet which is nearly invisible and largely unremarked. The principal purpose of statutory interpretation in the German system is to find how this rule applies to this case. In the American system that role often recedes; the role that becomes dominant is determining the law.

In Germany issues of statutory interpretation are questions judges must resolve in order to apply law to established facts to decide particular legal problems. In their judgments judges are to interpret statutes only as necessary to decide the cases before them. We might say that the literal language of the statute delimits the outer bound of interpretation, but does not determine the decision. Judges must justify their decisions in writing.

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171 This practice explains why, although American courts say that they begin with the statute, often in fact they begin with a precedent that discusses the statute. Strauss, supra note *** at 231.
172 Id. at 244-245.
173 SCHAUER at 150.
174 See Maxeiner, Imaging Judges that Apply Law, supra note 33 at 474.
175 See MAXEINER, POLICY AND METHODS, supra note 4 (speaking of “negative binding”).
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.

In Germany, the first instance appellate court that finds the decision below unjust may take further evidence. It may then conclude on the basis of this evidence that the law should be applied differently or that a different law is implicated. In the court of first instance, the judge may suggest to the parties that they provide more evidence on particular points.

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.” 177 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 appellate courts. In Germany, on the other hand, statutory interpretation is principally an issue of directing lower courts to optimal solutions of legal problems.

D. ZIPPELIUS CHAPTER IV.

Applying legal rules accurately and justly

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176 See text at note *** infra.
177 CROSS, supra note 131 at ix.
Appropriate general rules, designed to promote justice, drafted to facilitate their application, and interpreted to reach just outcomes, still are not sufficient to reach just legal conclusions in individual cases. Still needed are methods to establish facts and to apply law to them. In Chapter IV (“Application of Legal Norms”) Zippelius addresses applying law in Germany.¹⁷⁸

In most cases people apply law to themselves. When people apply law to themselves, they know what they are doing (the “facts”), they identify rules that might govern their actions (the “law”), and they can determine the legal consequences of the actions they contemplate. Clear law facilitates self-application when the law allows no discretion in its application.¹⁷⁹

Some cases remain where people do not apply law to themselves. Where they do not, resort to formal process is necessary. In private controversies people may not do so because the disputing parties disagree about facts, about law or about legal consequences that applying law to facts entails. Parties may not apply law to themselves, not because they dispute what the law requires, but because one party does not like the result and hopes to be able to escape or at least to delay the legal consequence. In public controversies the law may even anticipate process to determine questions.

To lay persons, Zippelius says, this is the main use of legal thinking: the legal norm is the major premise, the facts are the minor premise, and the valid legal result for the facts is the conclusion.¹⁸⁰ Citing Schopenhauer Zippelius teaches that the difficulty in the process is not the reaching of the logical conclusion, but “the discovery and exact limitations on the establishment of the premises (namely the appropriate statements of law on one side and the determination of the facts of the case on the other side).”¹⁸¹

Formal process seeks just decisions, accurate according to law, reached expeditiously in fair proceedings that are freely

¹⁷⁸ Current methods have a long and successful history. The leading text trades back more than 125 years! See Winfried Schuschke, Bericht, Gutachten und Urteil: Eine Einführung in die Rechtspraxis (34th ed., 2008), being the 34th edition of Hermann Daubenspeck, Referat, Votum und Urteil: Eine Anleitung für praktische Juristen im Vorbereitungsdienst (1884).
¹⁷⁹ If the law allows discretion, unless the criteria for exercise are limited and clear, formal application may be needed to know how the law applies.
¹⁸⁰ Zippelius at 117.
¹⁸¹ Zippelius at 117.
available to all.\textsuperscript{182} Here we can only incidentally refer to process as such. Elsewhere we (and others) have provided introductions to the process.\textsuperscript{183}

We address five aspects of German methods that are designed to facilitate applying law accurately, justly, expeditiously and efficiently. German methods recognize that applying law is a process of bringing law and facts together. As we shall see, that is an interdependent process. In that process, the court has principal responsibility for elucidating the law, while the parties have principal responsibility for establishing the facts. To assure that the court conducts process fairly and to certify that the court has considered fully law and facts, the court is required to give reasons for its decision. Because legal rules and legal methods cannot always predetermine issues of justice, sometimes statutes deliberately give decision makers room for judgment in deciding whether a particular rule should apply or discretion in determining what the legal consequences of that application will be. Giving of reasons legitimizes courts’ exercises of judgment and discretion. We conclude, then, with remarks about American law.

\textit{1. Applying law brings laws and facts together}

Zippelius succinctly states what law application entails: “The court applies legal norms as rules to established facts.”\textsuperscript{184} The “difficult tasks” of finding the limitations of the premises necessary for law application are for the judge.\textsuperscript{185} The establishment of the facts is for the parties. The court knows the law (\textit{iura novit curia}); the parties know the facts. Once the parties have established the facts, the court can determine their rights (\textit{da mihi factum, dabo tibi ius}—give me the facts; I will give you right). The process is interactive and interdependent.

Applying law to facts requires determining law and finding facts. Only then can laws and fact be brought together, i.e., only then can the judge apply laws to facts to decide cases correctly. Determining applicable rules and establishing material facts are

\textsuperscript{182} See MAXEINER ET AL., FAILURES OF AMERICAN CIVIL JUSTICE, \textit{supra} note 32.
\textsuperscript{183} For fuller introductions to German process, see Peter Murray & Rolf Stürner, German Civil Justice (2004); MAXEINER ET AL., FAILURES OF AMERICAN CIVIL JUSTICE, \textit{supra} note 32.
\textsuperscript{184} ZIPPELIUS at 124.
\textsuperscript{185} ZIPPELIUS at 117.
interdependent inquiries: until one knows which rules are applicable, one cannot know which facts are material. Until one knows the facts, one cannot 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 soon enough and the process may detour to find facts that are not material under the rules actually applied.

In the German system the judge knows the law and is in charge of what the court does. The judge directs proceedings to those matters material to decision and in dispute. Zippelius describes what interdependency means:

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 testworthy norms, applicable alternative and circumstances of fact that are considered.186

2. Judges know law

In German process the judge determines which rules govern.187 The parties need not identify applicable law in their pleadings. They may, and if they do, the court must consider them.

In a nutshell, here is how German process does this. The plaintiff in a formal complaint describes the matter in controversy, identifies material facts that support plaintiff’s demand for recovery and states how he or she will prove those material facts. The court examines the complaint and, upon concluding that the complaint, if true, states a basis for legal recovery, and facts that support jurisdiction, serves it on defendant. Defendant responds in the fashion of plaintiff’s complaint.

186 Id. at 121-122.
187 In Chapter III Zippelius describes finding “appropriate” legal norms; in this Chapter IV he describes applying “relevant” legal norm. That involves choosing from among several norms of potential application (i.e., several appropriate norms), the one or more than one legal rule that governs a particular case.
In Germany the parties usually have the right rules in mind. Zippelius notes that “[in] the most common cases, the jurist knows immediately “where to get started,””\textsuperscript{188} because “great trouble has been taken to put the legal norms together in the clearest arrangement within the statutes.” Thanks to systematization of the law, often through codes, German jurists need not flail about looking for law before beginning to analyze cases. Sometimes, however, the applicable norm does not present itself immediately. Then, “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.”\textsuperscript{189} This usually begins immediately upon 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.

In American parlance, what the German judge is doing, with the cooperation of the parties, 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 \textit{material} to the case and which are in \textit{dispute} between the parties. What sets German process apart from historic and contemporary American process, is that issue-narrowing in Germany is on-going and continues until the very end of the process. There is no need ever to settle on a single issue as determinative (as there was in historic common law pleading) or on a limited number of issues (as there is in contemporary American motion and trial practice). Moreover, in Germany the judge directs the process; in the United States the parties are to agree on the issues.

3. Parties establish facts

In Germany the parties have responsibility for establishing facts. German judges cannot consider matters that the parties do not present. Nor can they take evidence that the parties do not request be taken.

\textsuperscript{188} \textsc{Zippelius} at 119.
\textsuperscript{189} \textit{Id.} at 119-120.
The court and the parties discuss whether the facts essential to application of a rule are present. The parties are not free to deny elements without substantiation. Most essential facts—often all essential facts—can be established by give-and-take between the parties. Insofar as facts may not be present, it is up to the parties to apply to the court for taking of evidence on the point. The court ordinarily grants such requests. Consideration of the applicability of that rule continues until its applicability or non-applicability is clear. Should other avenues of approach open up, so long as the case is pending, the court may turn down those streets. It may be that the applicable legal rule is not known until all the facts are established.\footnote{ZIPPELIUS at 123 ("This division between ‘questions of law’ and ‘questions of fact’ does not exclude the possibility that the applicable ‘major premise’ will be specified in hindsight after the facts of the case are deliberated and before they will be subsumed under it *§16 II.").} 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.

In Germany, unlike in the United States, the taking of facts is directed to particular elements of legal claims. Before a court takes any evidence, together with the parties it determines that there is one or more relevant rules that might justify granting one party relief. If the parties agree—or at least do not dispute—that an essential element of a potentially relevant rule is absent, no proof-taking is needed. That claim can be dismissed. Likewise, if the parties do not dispute that a particular factual element is present, the court need not take any proof of it either. In many cases, the court hears the parties, but need not take any proof at all. In all cases, the court avoids unnecessary proof taking.

In German proceedings the parties do not present their “cases” to the court. They do not have to guess which legal rules are relevant, which elements are required and what level of evidence they must produce. The court is under an obligation to elucidate the case at all times. The court may not decide a case based on an issue that it has not given both parties an opportunity to contest.

Much of what Zippelius says about fact questions in German law is familiar to American readers. For example, it is not always easy to distinguish whether a particular issue is one of fact or of law. This is particularly so when it requires a value judgment.
(e.g., speaking of normative concept (e.g., desire to murder) (§§ 15 I, II, 16 II.) Even those questions that clearly are fact questions can not always be proven directly; sometimes they must be proven in-
directly through circumstantial evidence (e.g., defendant’s gun in-
jured the plaintiff). (§ 15 II.) “Rules of operation” are needed to
know when an element as been proven (e.g., burdens and standards
of proof). (§ 15 III.)

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 Par-
ticular.”191 He tells us how “[t]he judge decides whether the re-
quired degree of probability exists, basically in free consideration
of evidence.”192 Judge in formal opinions explain and justify those
findings.

4. Giving reasons for decisions

A fundamental principle of the Rule of Law in Germany
(and throughout Europe) is a requirement that courts give reasons
for their decisions. In lawsuits judges are required to give formal
judgments. These judgments must deal with all possibly relevant
laws and party assertions. This means, as Zippelius colorfully
states, that “legal decisions will be found playing a musical en-
semble of premise searching, premise restricting, and premise es-
establishment as well as formal logical thinking.”193

Zippelius explains that justifications help make up for
shortcomings of statutes. As we just saw, legislation cannot always
predetermine solutions. Both legal and factual premises may be
uncertain. Moreover, as we shall shortly see, sometimes legislation
deliberately grants law applicers a certain room for judgment as to
whether a rule applies (e.g., what constitutes “good faith”) or dis-
cretion 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 al-
ways direct decision-makers to a single correct solution. Yet, Zip-
pelius stress, that does not mean that all justifiable decisions are

191 Heading of § 15 III, ZIPPELIUS as 126 (emphasis added).
192 ZIPPELIUS at 129.
193 ZIPPELIUS at 117.
alike. Some findings of fact, determinations of law and applications of laws to facts are more justifiable than others.

Justifications 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.

Zippelius does not dwell on judgments. He assumes that his readers know about them already. To appreciate fully Zippelius’ book, Americans should know more. Professor Reinhard Zimmermann has given a concise explanation of judgments:

A German judgment is supposed to appear as an act of an impartial as well as impersonal public authority furnishing the official and objective interpretation rather than personalized opinions of the individual deciding justices. . . . The typical German judgment . . . strives after the ideal of deductive reasoning.”

A judgment is designed to assure that the parties understand the grounds for the court’s decision. Ideally it convinces the party who loses that that loss is the legally correct and right outcome. At a minimum, the judgment should persuade the loser that the process was rational. Parties affected by the judgment should be enabled rationally to reproduce the grounds for the decision. They should recognize that rational argumentation, not arbitrariness, determined the judgment. In this way, the parties are guaranteed the constitutional right to equal treatment under the law and the constitutional right to be heard.

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 judg-

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194 See, e.g., ZIPPELIUS at 46-47 (discussing “legal memorandum style” and “style of a judgment”).
195 Reinhard Zimmermann, Characteristic Aspects of German Legal Culture, in INTRODUCTION TO GERMAN LAW 1, 26-27 (Mathias Reimann & Joachim Zekoll eds., 2005).
ment demonstrates whether the judge understood the losing party’s position; through its impersonal and colorless nature, it demonstrates the judge’s neutrality.

5. Room for judgment in finding factual prerequisites

Rules carefully crafted, interpreted and applied, all with justice in mind, 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 whether to find a rule applicable and discretion as to what legal consequences to direct.

Room for judgment occurs when a statute uses a term with an indefinite meaning. In §16 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?196 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.” 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.” 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).”197 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.”198

That Zippelius does not see this as discretion is seen from his extensive reference to the discussion of the “case norm” (Fallnorm) idea developed by Professor Wolfgang Fikentscher: “For subsumption, the legal norm, and thus the major premise, must ‘be

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196 ZIPPELIUS 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.” See text at note *** supra.
197 ZIPPELIUS at 132 (emphasis in original).
198 ZIPPELIUS at 133 (with further citations).
prepared in certain ways with regard to (the) facts of the case;’ it needs a last possible concretion of the normative faces of the constituent parts of the facts of the case.’ So one must ‘[make concrete] the major premise of subsumption … before a subsumption … can take place.’”

Until now, Zippelius addresses indefinite concepts that are descriptive. What he calls a “subtle problem” arises when those indefinite concepts are “valuation concepts,” i.e., normative, such as making void a transaction “against public policy” of section 138 I of the German Civil Code.

German statutes use indefinite legal concepts in so-called 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. While indefinite legal concepts threaten legal certainty, different techniques are used to counter that threat. General clauses do not permit judges simply to decide what they think is “fair” or in the “general welfare.” Instead, case groups develop in an almost common-law manner. Only where there are no prior decisions do judges have some freedom in reaching new solutions. Sometimes the legislature notes the development of these case groups and enacts them into law or introduces its own groups of cases.

199 ZIPPELIUS at 133 citing to 1 WOLFGANG FIKENTSCHER, METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG 372 (1975) and id. at 191, 202, 207.


202 See Maxeiner, Standard Terms Contracting, supra note 100, at ***.

203 Wieacker, supra note 201, at 203. Wieacker also notes that section 242 looks to issues of individual justice and not to general welfare (policy). Id. at 196; cf. MAXEINER, POLICY AND METHODS, supra note 4 at 122.
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.”

This sounds like a law professor’s theoretical excursion until one gets down in the trenches and fights real battles in legal practice. Whose decision should prevail in such cases? That of the court of first instance, or that of the appellate court? And then, of which appellate court? Zippelius states that the “question of the reviewability of ‘justifiable’ decisions is of considerable practical meaning.” It is, as he notes, particular acute when it is the justifiable decision of an administrative authority being reviewed.

6. 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.

We may note here that 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 for judicial decisions, on the other hand, is preferably limited to situat-

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204 ZIPPELIUS at 135.
205 ZIPPELIUS at 135.
tions 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. 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

7. American law application: a swing and a miss

That German process aspires to apply law accurately, fairly, expeditiously and efficiently surely should find sympathy in America. Indeed, since Independence in 1776 we have longed for realization of those very goals. Coincident with the Declaration of Independence, several states issued Declarations of Rights that included explicit provisions stating such expectations. The relevant provision of the Maryland Declaration of Rights of November 3, 1776, based on the English Magna Carta, declares:

17. That every freeman, for any injury done to him in his person, or property, ought to have remedy by the course of the law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the law of the land.  

The goals of German process parallel ours; the means for getting there do differ, but not so greatly as some Americans suppose. German judges are more active in applying law to facts than are their American counterparts. That leads some Americans to think that German judges are inquisitorial. They think that German judges are not the impartial referees that American judges are. Nothing could be further from the truth. These Americans incorrectly equate passivity with neutrality.

Our Chief Justice has compared the American judge to a baseball umpire who just “calls balls and strikes.” We might compare the German judge to a track-and-field referee, who directs parties in their competition and measures their achievements. The track-and-field referee’s greater activity is necessary to achieve

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accurate results. The track-and-field referee is more active, but no less neutral and no less-dispassionate, than is his or her baseball counterpart.

This is not the place to discuss respective merits of two litigation systems.\textsuperscript{207} We note here that for two centuries Americans have been disappointed by the performance of their formal law applying systems. Proposals for reform have often call for judges to be more active. German judges offer a more active, but neutral alternative; they work to judge accurately and justly. They have a greater role in identifying issues. Their activity is bounded, however, by statute, by the requirement of giving reasons for their decisions\textsuperscript{208} and by full review of those decisions on law, facts and applying law to facts.

\textsuperscript{207} See MAXEINER \textit{ET AL.}, FAILURES OF AMERICAN CIVIL JUSTICE, \textit{supra} note 32. 
\textsuperscript{208} Schauer defends the American practice of not requiring reasons. SCHAUER at 175-180; Frederick Schauer, \textit{Giving Reasons}, 47 STAN. L. REV. 633 (1995). The defense is really an apology for our system of lay jurors. Of course, we do require judges to give reasons. \textsc{Fed. R. Civ. P. Rule} 52. We just do not impose the same requirement on jurors. We spared jurors that duty in order to protect them from an authoritarian monarch. We continue to spare them that duty because of doubts that they have the intellectual capacity to provide judgments. In a democratic Rule of Law State, protection as a reason has faded; in an educated, information society, the supposed incapability is surmountable by providing assistance through a mixed bench (as in many countries) or through an assistant (as in the \textit{Gerichtsschreiber} in Switzerland) or through special verdicts.
CONCLUSION

Schauer sends a clear message in his book: American “rule-based and precedent based decision making often require legal decision-makers to do something other than the right thing ....”209 Zippelius sends the opposite message: rule-based decision making can help legal decision-makers to do the right thing. The former is a message of failure; the latter is a message of success.

Schauer judges historic American methods a failure, not in his introductory book for beginners, but in an article for professionals, titled The Failure of the Common Law. There he explains that the common law had its origins in dispute resolution, that dispute resolution has given way in importance to the guidance function of law, and that in fulfilling the guidance function, the civil law has the comparative advantage.210 Americans do not like failure; they do like success. Kirk W. Junker and P. Matthew Roy, in translating Zippelius’ book into English, have given American lawyers a manual for modern legal methods that are successful. Let’s use it. It’s the right thing to do.

209 See text at note *** supra.
210 Schauer, Failure of the Common Law, supra note 92, at 781 (“we should no longer be surprised that a model of law based on so-many now-rejected premises has failed to keep up with the needs of the contemporary world.”).
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