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U.S. “methods awareness” (Methodenbewußtsein) for German Jurists

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I. Importance of *Methods Awareness*

Fikentscher is a proponent of awareness of legal methods: *Methods Awareness*. He contrasts his *Methods Awareness* to the *Methods Relativism* of Ernst Rabel.¹ For Rabel, comparison of methods, was not, as Fikentscher puts it, in the program.² Rabel preferred to emphasize the similarities among legal systems; he observed how different systems often reach similar solutions.³ Rabel, Fikentscher notes, espoused *Methods Relativism* in the 1920s when political events threatened to isolate Germany from its former wartime enemies. It was a time to stress similarities in approaches.⁴

*J.D., LL.M., Dr. Jur. (under Fikentscher). This reprint of the article provides German terminology and quotations from German sources as English translations in the text. All translations are the author's, except as otherwise noted. Translated German terms are in italics. The version as published gives German quotes in the text and provides English translations in the footnotes. The published page numbers are inserted in the text as star pages.

¹ See *Methoden des Rechts in vergleichender Darstellung* (hereafter “*Methoden*”), 1975-1977, vol. 1, p. 10-13.

² Id.

³ *W. Fikentscher, Gedanken zu einer rechtsvergleichenden Methodenlehre*, in: *Recht im Wandel, Festschrift Hundertfünfzig Jahre Carl Heymanns Verlag*, 1965, 141, reprinted in: *Methoden*, vol. 5, 693, 696.

⁴ *Methoden*, vol. 1, pp. 12-13.

When, in the 1950s, Fikentscher went to the United States to study American law, he was in the vanguard of what has become a massive pilgrimage of European and especially of German jurists to the "Bologna" of our day.⁵ In the decade after the Second World War, Rabel's reasons for [*115] *Methodenrelativismus* must have still seemed strong to Fikentscher at the University of Michigan, where Rabel himself found refuge.⁶ Only a few years before, the first contingent of German legal interns to study in the United States received a somewhat frosty, if understandable, reception as it was held by some suspect for Germany's recent Nazi past. That group still showed psychological and physical effects of the War.⁷ Fikentscher acknowledges that *Methods Relativism* stood him in good stead in his studies in Ann Arbor. If an answer in American law failed him, he could reach for the answer in German law, and chances were good they were the same.⁸ So why should Fikentscher later endorse *Methods Awareness*?

Jurists work with their legal methods often without thinking about them at all. Karl Llewellyn observed of American common law jurists that "Handling precedents is a matter of trade-craft, an art one learns from experience. ... One learns this from study, from the practice of law, in general from life as a lawyer. But little thought is given to *what* one is learning."⁹ When an experienced jurist goes abroad to study another legal system, this lack of *Methods Awareness* can be dangerous. It is all too easy to substitute for one's lack of knowledge of the foreign system the knowledge that one already has of one's own.¹⁰ Yet different legal

⁵ See R. Stürner, Die Rezeption U.S.-amerikanischen Rechts in der Bundesrepublik Deutschland, in Festschrift für Kurt Rebmann, 1989, p. 839 and W. Wiegand, The Reception of American Law in Europe, 39 Am. J. Comp. L. 229 (1991).

⁶ See Großfeld/Winship, The Law Professor Refugee, 18 Syracuse J. Int'l L. & Cmm. 3 (1992).

⁷ See M. Rheinsein, The German Referendar Training Program at the University of Chicago Law School, 3 J. Legal Ed. 273 (1950), reprinted in: M. Rheinsein, Gesammelte Schriften, 1979, vol. 1, 310.

⁸ Methoden, vol. 2, p. 467 n. 55.

⁹ K.N. Llewellyn, Präjudizienrecht und Rechtsprechung in Amerika, 1933, p. 2. Translated as The Case Law System in America, M. Ansaldi, transl., 1989, p. 2.

¹⁰ See J. Maxeiner, Die Gefahr der Übertragung deutschen Rechtsdenkens auf den US-amerikanischen Zivilprozeßrecht, RIW 1990, 440.

methods may produce very different results even with very similar substantive law.¹¹ Fikentscher has put the problem succinctly: one needs to know what the legal system can deliver.¹²

[*116] The jurist studying foreign law should begin by studying legal methods. The foreign jurist ought to learn what it means to think like a jurist in the foreign system.¹³ But a jurist studying foreign law usually has a particular area of law that he or she is anxious to learn about. It is the rare jurist who has the time and interest to tackle the foreign system *qua* system. The jurist who wants to focus on legal methods in foreign law study is apt to encounter frustration. Both in the United States and in Germany, legal methods are largely taught interstitially in substantive law courses and in extra-university professional settings rather than in university courses denominated legal methods. I probably learned more about German legal methods attending Judge Günther Schmitz's¹⁴ *Interns' Course* at the *District Court* in Munich than in any course at the university. The first year courses in which legal methods are imparted are just too slow and time-consuming for established jurists. In the United States, it is the rare LL.M. program that directs foreign students toward general courses that might provide training in legal methods and away from more-specialized courses such as international business law.

The purpose of this contribution is to help develop *Methods Awareness* in German jurists unfamiliar with American law. I hope to do this by showing how distant from German understanding present-day American practice is. I proceed from Fikentscher's thumbnail sketch of German *Prevailing Teaching*: "this method starts from norm-thinking, therefore thinks in rules, that are applied to the case at hand."¹⁵ I refer to the core elements of this teaching, namely the place of the *legal norm* (*Rechtssatz*) in the *legal order* (*Rechtsordnung*) and its application to a particular set of facts (i.e., subsumption), and discuss the significance of these concepts

¹¹ See, e.g., J. Maxeiner, *Policy and Methods in German and American Antitrust Law: A Comparative Study*, 1986.

¹² *Methoden*, vol. 1, p. 13.

¹³ See W. Ewald, *Comparative Jurisprudence* (I), 143 U. Pa. L. Rev. 1889, 1896 (1995).

¹⁴ Now retired Judge of the Bavarian Constitutional Court.

¹⁵ *Methoden*, vol. 3, p. 638 (emphasis in original).

in American law. I leave unaddressed certain other key elements of *Methods Theory*, such as differences between case law and statute law, which are much discussed elsewhere in the literature.¹⁶ [*117]

II. Legal order

For German jurists, there exists an abstract legal order that governs all behavior. "The legal order is a structure of ought-norms. The idea of their message is not to describe facts, but to prescribe conduct."¹⁷ This objective order is contrasted to subjective rights of individual subjects. Fikentscher observes at the outset of his *Methoden*: The expression "objective right" designates the legal order that applies to all. In contrast to that one terms subjective right that right that pertains to an individual against another or to an object."¹⁸ The legal order forms a unity.¹⁹ The norms are interrelated. Taken together they form a system.²⁰ While it may be that the ideal cannot be realized, nevertheless the goal is a system organized as if a single plan governed. Different laws should mesh with each other: none should command contrary action. *Norm Variance (Normspaltung)* should be avoided.²¹

¹⁶ Fikentscher in his headings in Chapter 29 of *Methoden*, vol. 3, identifies several different elements to *Methodenlehre: Rechtsordnung und Rechtssatz* (legal order and legal norm); *Auslegung der Rechtssätze* (interpretation of legal norms); *Rechtsfortbildung* (development of law); and *Rechtsanwendung*, including *die syllogistische Lehre von der Subsumption* (application of law, i.e., the syllogistic teaching of subsumption).

¹⁷ R. Zippellius, *Einführung in die juristische Methodenlehre*, 3d ed., 1980, p. 12 ("The legal order is a structure of ought-norms. The idea of their message is not to describe facts, but to prescribe conduct.")

¹⁸ *Methoden*, vol. 1, p. 1. Compare K. Engisch, *Einführung in das juristische Denken*, 7th ed., 1977, p. 24 ("Legal usage distinguishes between Objective Right and Subjective Right. Objective Right is the legal order, the aggregate of legal rules, the norms, that a few moments ago we formulated as imperatives. Subject Right is an entitlement (*Berechtigung*).")

¹⁹ See K. Engisch, *Die Einheit der Rechtsordnung*, 1935, reprint 1987.

²⁰ See C. Canaris, *Systemdenken und Systembegriff in der Jurisprudenz*, 1969.

²¹ P. Raisch, *Juristische Methoden vom antiken Rom bis zur Gegenwart*, 1995, pp. 148-49.

Legal order is a term little used in the United States.²² But the ideal expressed by it—that the law is a rational, complete and logical system of rules—was at one time fairly common. In the 1930s John Dickenson described it as “customary”. He felt that the ideal of a complete and logical system of legal rules had survived largely out of habit in legal analysis rather than through conscious belief.²³ Although a customary view, American jurists have been skeptical of the ideal of law as an internally consistent system of rules.²⁴ James Herget describes how Oliver Wendell Holmes, Jr. rejected the German-inspired “Austinian strictures of an autonomous system of logically interrelated rules.”²⁵ Roscoe Pound likewise rejected one version as an ideal drawn from Byzantine Roman law: “We must,” he said, “hasten to repudiate a conception of law as an aggregate of rules, *i.e.*, of precepts attaching definite detailed legal consequences to definite detailed states of fact.”²⁶ Today, one would be hard pressed to find supporters of the ideal of a legal order in the German sense.²⁷ Indeed, the American legal scene has proponents of a virtually opposite view. The Critical Legal Studies movement is skeptical of the very possibility of any kind of rule-governed regime.²⁸

That American jurists have been skeptical of a legal order as a consistent set of rules is not surprising given the diversity of sources of American law. The ideal of a legislator laying down rules based on a single plan is pretty hard to square with the American legal system where large areas of the law are left to in-

²² See J. Herget, *Contemporary German Legal Philosophy*, 1996, p. 117.

²³ J. Dickenson, *Legal Rules: Their Function in the Process of Decision*, 79 U. Pa. L. Rev. 833, 834 (1931). Edward Levi, for example, while denying that the legal process is the application of known rules to diverse facts, nonetheless states “Yet it is a system of rules.” E. Levi, *An Introduction to Legal Reasoning*, 1949, p. 3.

²⁴ See R.S. Summers, *Instrumentalism and American Legal Theory*, 1982, pp. 138-39.

²⁵ J. Herget, *American Jurisprudence, 1870-1970: A History*, 1990, pp. 39, 41.

²⁶ *The Future of American Law*, Lecture delivered at The Catholic University of America School of Law, May 31, 1946, in: Fryer/Benson, *Cases and Materials on Legal Method*, 1949, pp. 64, 68.

²⁷ Compare Atiyah/Summers, *Form and Substance in Anglo-American Law*, 1987, p. 72 (“Leading legal theorists ... have even claimed that a legal system is essentially or in large measure a system of rules.”).

²⁸ See M. Kelman, *A Guide to Critical Legal Studies*, 1987, p. 45.

dependent control by fifty different states. American lawyers live with a lack of system that would be unthinkable in Germany. To be sure, Germany is also a federal system, but in Germany large areas of law that would be governed in the United States by a multiplicity of state laws are governed by unitary federal law, e.g., most of private law, criminal law, and procedure.²⁹ Of course, not all in the United States is legal chaos. Measures are taken to make laws consistent with each other: sometimes federal law preempts a field, sometimes uniform state laws govern, and sometimes state and federal courts in common law adjudication follow private compilations such as the Restatements of the Law. But these measures are designed not so much to achieve a goal of one consistent system, as to avoid the collapse of completely conflicting systems.³⁰

The German ideal of legal order faces another obstacle in the United States. The ideal is essentially legislative, but American skills with legislation are "primitive."³¹ Although most American jurists would agree that statutes are the predominant legal sources of our time,³² the United States has never developed an effective technique to deal with them. American statutes start with the handicap that America is generally hostile to any kind of law, whether legislative or judge-made.³³ Americans like to contrast their own free market, independent system to the European regulatory state. But worse still, American jurists have "no intelligible theory" on how to deal with legislation.³⁴ They have allowed statutory interpretation theory to lie in "conceptual desuetude."³⁵ As a result, American legislation is rarely comprehensive or sys-

²⁹ Query whether the German ideal of *legal order* can survive the European Union.

³⁰ See D. Currie, *Die Vereinheitlichung des amerikanischen Privatrechts*, JZ, 1996, 930, 931 ("a uniform law [is] not always desirable").

³¹ M.A. Glendon, Comment, p. 95, in A. Gutmann, *A Matter of Interpretation: Federal Courts and the Law: An Essay by Antonin Scalia with Commentary*, 1997.

³² Id. pp. 95, 97 (quoting a Harvard Law School Curriculum Report). G. Calabresi in *A Common Law for the Age of Statutes*, 1982, p. 1, speaks of the "statutorification" of American law.

³³ See *Methoden*, vol. 2, pp. 7, 463.

³⁴ A. Scalia, *A Matter of Interpretation*, in A. Gutman, *supra*, p. 14.

³⁵ W. Eskridge, *Dynamic Statutory Interpretation*, 1994, p. 1.

tematic. American statutes often resemble case law in that they may only resolve specific narrow points in controversy.

Indeed, system, whether achieved through legislation, judicial decision or legal writing, does not figure prominently in the program of the casuistic American legal world. Pound observed that "if one doubts it, he has only to compare a modern institutional book on the Roman law, a modern elementary textbook of French law or a modern introduction to the German code with the conventional Anglo-American textbook of elementary law to see that we have no true system of the common law, much less a system of law that actually governs.³⁶ Today more than ever, American jurists have turned their attention away from formulating general rules. Even systematic treatises are largely a thing of the past.³⁷ According to the Scottish jurist Alan Watson, "To an extent unparalleled elsewhere, [American] [* 119] students are not exposed to systematic treatment of law, with clear-cut concepts, institutions, and rules, but are presented with individual cases, outside of a historical, doctrinal, legal context but against a background of social interests."³⁸ The point is not lost on the German student in America: "One soon learns that the legal system largely does without ordering structures."³⁹

III. Rule skepticism and legal process

1. *Fixation on legal process*

The ideal of the legal order as a system of consistent rules never had much of a chance in modern America. For most of this century there has been a widespread skepticism of legal rules altogether. Nearly a half century ago, the classic work on legal method in the United States, stated succinctly: "[I]t cannot be said that the legal process is the application of known rules to diverse

³⁶ R. Pound, *Taught Law*, in: Report of the Thirty-Fifth Annual Meeting of the American Bar Association, 1912, pp. 975, 981.

³⁷ See M.A. Glendon, *A Nation Under Lawyers*, 1993, pp. 204-06.

³⁸ A. Watson, *Joseph Story and the Comity of Errors, A Case Study in Conflict of Laws*, 1992, p. 118 n. 29.

³⁹ H.J. Meyer, *Ein Studienjahr an der Harvard Law School*, JZ, 1987, 713, 714.

facts."⁴⁰ In his *Introduction to Legal Reasoning*, Edward Levi called that view a pretense: "It is important that the mechanism of legal reasoning should not be concealed by its pretense. The pretense is that the law is a system of known rules applied by a judge; the pretense has long been under attack."⁴¹ The "pretense" fell when American jurists determined that common law judges *make* rather than simply apply law. Their attention focused on the process of law creation.

An English observer, H.L.A. Hart, commented that American thought about the general nature of law "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."⁴² Indeed, American jurists are more likely to talk about *legal pro [*121] cess*⁴³ than *legal order*.⁴⁴ Process-thinking places emphasis on how decisions are reached rather than on the abstract question, what is the law. For a long time there has been a position represented in American legal thinking that what matters is what the judges do about an issue, not what is the law (the "predictive" theory⁴⁵). Already in 1872 Holmes wrote: "it is not the will of the sovereign that makes lawyers' law, even when that is its source ... The only question for the lawyer is, how will the judges act?"⁴⁶ Later, in his more famous aphorism, he observed: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by

⁴⁰ E. Levi, *An Introduction to Legal Reasoning*, 1949, p. 3.

⁴¹ Id. p. 1.

⁴² American Jurisprudence through English Eyes: The Nightmare and the Noble Dream, 11 Ga. L. Rev. 1169 (1977), reprinted in: H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, 1983, p. 123.

⁴³ See, e.g., Hart/Sacks, *The Legal Process: Basic Problems in the Making and Application of law*, 1994, tent. ed., 1958.

⁴⁴ Fikentscher notes that Anglo-American legal thinking focuses on procedure and dealing with legal problems, that is, on methods, whereas Continental-European treatment of legal questions is concerned with finding the immediately just solution, that is, its focus is in legal philosophy. *Methoden*, vol. 2, p. 3.

⁴⁵ See R.S. Summers, chap. 5, *supra*, pp. 116-35.

⁴⁶ Book Notice, 6 *American Law Review* 723 (1872), reprinted in: F. Kellogg, *The Formative Essays of Justice Holmes: The Making of an American Legal Philosophy*, 1984, p. 92.

the law."⁴⁷ John Chipman Gray stressed the point: "whoever hath an absolute authority not only to interpret the Law, but to say what the Law is, is truly the Law-giver."⁴⁸

The Legal Realists of the 1930s focused on the political and social considerations that in their view underlie judicial decisions. Judges can and do make law, they proclaimed. Emphasis on the creative function of judges, however, led to what H.L.A. Hart called a "Nightmare" version of law in the United States:

The Nightmare is this. Litigants in law cases consider themselves entitled to have from judges an application of the existing law to their disputes, not to have new law made for them. Of course it is accepted that what the existing law *is* need not be and very often is not obvious, and the trained expertise of the lawyer may be needed to extract it from the appropriate sources. But for conventional thought, the image of the judge, to use the phrase of an eminent English judge, Lord Radcliffe, is that of the 'objective, impartial, erudite, and experience declarer of the law', not to be confused with the very different image of the legislator.⁴⁹

[*122] Hart was not just talking in the dark. Much of American legal theory—indeed, even much of American legal practice—tends to support at least a mild version of the Hart Nightmare. P.S. Atiyah and Robert Summers consider one characteristic of the American legal system to be the "open modification of the rule to allow purposes or policies to be taken into account."⁵⁰ Again, the

⁴⁷ *The Path of the Law*, 10 Harv. L. Rev. 457 (1897), reprints: *Collected Legal Papers*, 1921, p. 167, 173 and S. Novick (ed.), *The Collected Works of Justice Holmes*, 1994, vol. 3.

⁴⁸ J.C. Gray, *The Nature and Sources of the Law*, 2d ed., 1921, reprint 1972, p. 102.

⁴⁹ *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, 11 Ga. L. Rev. 1169, 1172 (1977), reprinted in *H.L.A. Hart: Essays in Jurisprudence and Philosophy* 123, 126 (1983).

⁵⁰ *Atiyah/Summers* p. 91. Roscoe Pound advocated an "equitable application of the law" which conceived of the legal rule "as a general guide to the judge, leading him toward the just result, but insist[ing] that within wide limits he should

point is not lost on the German student in America: “in large measure determining the law is necessarily result-oriented.”⁵¹ Fikentscher puts a positive spin on the predominant American treatment of rules: “The program is not rule antagonism, but flexibility of rules and adaptability of the system in order to meet ... the need of the hour.”⁵²

Hart could accept that sometimes American judges would be involved in law making, but he found surprising that “the Nightmare view should be presented by serious American jurists not merely as a feature of certain types of difficult adjudication ... but as if adjudication were *essentially* a form of law-making [and] never a matter of declaring existing law”⁵³ Since Hart wrote this critique, the Nightmare has become more vivid. The Critical Legal Studies movement has argued that all law is politics and that there is no such thing as separate legal analysis. Duncan Kennedy writes that “Teachers teach nonsense when they persuade students that legal reasoning is distinct, as a method for reaching correct results, from ethical and political discourse in general (i.e., from policy analysis). ... There is never a “correct legal solution” that is other than the correct ethical and political solution to that legal problem.”⁵⁴ The Critical Legal Studies movement attacks the very idea of the rule of law (i.e., “... that government in all its actions is bound by rules fixed and announced beforehand – [*123] rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and

be free to deal with the individual case, so as to meet the demands of justice between the parties and accord with the general reason of ordinary men.” The Scope and Purpose of Sociological Jurisprudence III, 25 Harv. L. Rev. 489, 515 (1912).

⁵¹ Meyer, *supra*, p. 714.

⁵² Methoden, vol. 2, p. 465.

⁵³ Id. p. 973, Essays pp. 127-28.

⁵⁴ D. Kennedy, Legal Education as Training for Hierarchy 47, in D. Kairys (ed.), The Politics of Law: A Progressive Critique, 1982, p. 40.

one's individual affairs on the basis of this knowledge"⁵⁵). The rule of law is but a myth.⁵⁶

2. *Mainstream acceptance of rule skepticism*

Will the Critical Legal Studies movement carry the day? Will American jurists accept the idea that all law is politics? Will the majority reject the ideal of the rule of law?⁵⁷ Probably not. Yet, just how far the American legal world has gone toward accepting, at least in principle, Hart's Nightmare view is suggested by observations of a number of mainstream scholars. Summers notes that many American lawyers regard "the purported neutral application of rules [as] a sham."⁵⁸ Richard Posner says that it is Hart's England that has departed from the common law tradition by emphasizing law as rules, by viewing the judge as primarily an applier of rules laid down by legislatures, and by seeking to separate law from politics.⁵⁹ Mary Ann Glendon says that "the American legal profession lacks even a minimal consensus that judges, practitioners, and scholars have roles and responsibilities to which personal interests and predilections must be subordinated"⁶⁰ "[S]ubjective forms of judging in which neither text nor precedent is accorded much respect seem in [*124] creasingly

⁵⁵ F.A. Hayek, *The Road to Serfdom*, 1944 edition with a new Preface from 1976, p. 72. According to Neil MacCormick, there is no material difference between the concepts of the rule of law and of the Rechtsstaat. N. MacCormick, *Der Rechtsstaat und die rule of law*, JZ 1984, 65.

⁵⁶ See A. Altman, *Critical Legal Studies, A Liberal Critique*, 1990. The CLS attack on the rule of law would strike German scholars as "something threatening, dangerous or, indeed, nihilistic." A. Somek, *From Kennedy to Balkin: Introducing Critical Legal Studies from a Continental Perspective*, 42 Kan. L. Rev. 759, 765 (1994). Compare Methoden, vol. 2, p. 170: "It is recognizable in Holmes as in no other legal thinker how immediately in the end "Problem-Openness" (*Problem-offenheit*) leads to nihilism."

⁵⁷ See F. Mootz, *Rethinking the Rule of Law: A Demonstration that Obvious is Plausible*, 61 Tenn. R. Rev. 69, 71 (1993).

⁵⁸ Atiyah/Summers p. 91.

⁵⁹ R. Posner, *Law and Legal Theory in England and America*, 1996, p. 20 (arguing that English law now has a "Continental Character"). But see Methoden, vol. 2, p. 152 (arguing that American methods are closer to Continental French and German methods than are English methods).

⁶⁰ M.A. Glendon, *Comment*, p. 112.

to be accepted as legitimate."⁶¹ *Subjectives Recht* is understood in America; *Objectives Recht* may not be.

That many mainstream American jurists are skeptical of rules may be attributed to the low level of abstraction and sophistication of rules in American law generally. The American approach to rules frequently is an either/or proposition: either the rule is detailed and strict or the rule is no more than a grant of uncontrolled discretion. As a result of the former, there are many areas in American law where there are "legitimate departures from rules," e.g., "jury nullification" (where juries are permitted to decide against the law) and "prosecutorial discretion" (where prosecutors are permitted to decide when to enforce laws).⁶² Perhaps because American rules are so unsatisfactory, some American jurists tend to see deficiencies in American rules as typical of all rules. They are unfamiliar with more sophisticated systems of rules and systems of granting and controlling discretion as are well-known to German jurists.⁶³ Some American legal scholars seek to present these departures from rules as if they were in fact virtues rather than vices in the American legal system which permit decision makers to take into account individual circumstances that would be insufficiently appreciated by rule-bound decisions.⁶⁴

⁶¹ Id. p. 110.

⁶² C.R. Sunstein, *Legal Reasoning and Political Conflict*, 1996, pp. 148, 153.

⁶³ American theorizing about law is extremely self-centered. Rarely do legal scholars examine approaches outside the Anglo-American world. Only occasionally is this restricted view recognized as a limitation on the ability to generalize. See, e.g., Altman, p. 104. See generally J. Langbein, *The Influence of Comparative Procedure in the United States*, 43 *Am. J. Comp. L.* 545, 551 (1995); Stiefel/Maxeiner, *Why are U.S. Lawyers not Learning from Comparative Law?*, *Festschrift für Bär & Karrer*, 1997.

⁶⁴ See, e.g., Kadish/Kadish, *Discretion to Disobey: A Study of Lawful Departures from Legal Rules* (1973); C.R. Sunstein, *Legal Reasoning and Political Conflict*, 1996, substantially incorporating C.R. Sunstein, *Problems with Rules*, 83 *Calif. L. Rev.* 953 (1995) ("One of my principal goals in this Article is to respond to a pervasive social phenomenon: extravagant enthusiasm for rules and an extravagantly rule-bound conception of the rule of law."); F. Schauer, *Giving Reasons*, 47 *Stan. L. Rev.* 633, 634 (1995) ("at times it is better not to give reasons than to give them"); G. Calabresi, *supra*, p. 180 ("One should recognize openly that courts are exercising the power to allocate legislative inertia and to decide whether statutes deserve a retentionist or a revisionist bias.").

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IV. Application of law

1. *Relationstechnik*

In their *Internship time* German jurists train to act as judges to apply law to facts. They learn the skill of drafting a judgment, the so-called *Relationship Technique (Relationstechnik)* or *Judgment Technique (Urteilstechnik)*. Foreign jurists learning German law are advised: "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 being based on the personal opinions of the deciding justices. ... The typical German judgment, like its French counterpart, strives after the ideal of deductive reasoning."⁶⁵ The two principal substantive parts of the judgment are the *Tatbestand* and the *Entscheidungsgründe*. The *Tatbestand* is a short statement of the parties' legal claims and assertions of fact.⁶⁶ It is to include everything that is legally relevant to the decision, everything that might be legally relevant to the decision, and everything that a party might think is legally relevant to the decision. Yet, it is to be as short and as colorless as possible. From the *Tatbestand*, it should be possible to determine quickly who is seeking what, from whom, on what ground and to determine which matters are in dispute and which are not.⁶⁷ The *Entscheidungsgründe* is a summary of the considerations for the decision.⁶⁸ It is to evaluate and subsume the concrete facts of the *Tatbestand* under the abstract elements of the applicable norm.⁶⁹ Similarly, it is to be as sparing with words as possible. It is to state a conclusion and justify it, rather than to develop a position and argue to a decision. That which fails to support the decision, has

⁶⁵ R. Zimmermann, *An Introduction to German Legal Culture*, in Ebke/Finkin (eds.), *Introduction to German Law* 1, 21 (1996).

⁶⁶ ZPO § 313 II; E. Schneider, *Der Zivilrechtsfall in Prüfung und Praxis*, 6th ed., 1974, p. 186.

⁶⁷ E. Schneider, p. 185.

⁶⁸ ZPO § 313 III.

⁶⁹ Schmitz/Ernemann/Frisch, *Die Station in Zivilsachen*, 1986, 90.

no place.⁷⁰ They *Entscheidungsgründe* is to find facts, not by simply stating which evidence was believed, but to evaluate the evidence and say why it was believed.⁷¹

[*126] The highly-stylized German judgment is designed to assure that the parties understand the grounds for the court's decision.⁷² Ideally the judgment will convince the party losing the lawsuit that that loss is the correct outcome.⁷³ At a minimum, the judgment should persuade the loser that the process was rational. "The party affected by the judgment should be enabled to rationally reproduce the grounds for the decision. He should recognize, that not arbitrariness, but rational argumentation determined the judgment, that use was made of practical reason (Kant)."⁷⁴ In this way the parties are guaranteed the constitutional right to equal treatment under the law (GG Article 3) and to the right to be heard (*rechtliches Gehör*, GG Article 103(1)).⁷⁵ The judgment also controls the judge.⁷⁶ If the judge fails to subsume the facts of the case under the applicable law properly, the judge's decision is subject to correction on appeal. The judgment demonstrates whether the judge understood the losing party's position; through its impersonal and colorless nature, it demonstrates the judge's neutrality.⁷⁷

Although training in the *Relationship Technique* is designed for judges, the technique is pervasive in the German legal world. All German jurists of whatever function are trained in it and utilize it as a matter of second nature. Administrators draft decisions that resemble judgments. Lawyers use the *Relationship Technique* to evaluate clients' positions.

⁷⁰ Thomas/Putzo, *Zivilprozeßordnung*, 10th ed. 1978, § 313, p. 574.

⁷¹ E. Schneider, p. 204.

⁷² Baumbach/Lauterbach/Albers/Hartmann, *Zivilprozeßordnung*, 53d ed., 1995, § 313, margin no. 33.

⁷³ K. Schellhammer, *Die Arbeitsmethode des Zivilrichters*, 7th ed., 1984, p. 242.

⁷⁴ P. Raisch, *Juristische Methoden vom antiken Rom bis zur Gegenwart*, 1995, p. 121.

⁷⁵ Baumbach/Lauterbach/Albers/Hartmann, *Zivilprozeßordnung*, 53d ed., 1995, § 313, margin no. 33.

⁷⁶ Schellhammer p. 242; Schmitz/Ernemann/Frisch p. 83.

⁷⁷ E. Schneider, pp. 178-79.

2. *Application of law in America*

Fikentscher puts it bluntly “that there is no American teaching of subsumption of facts under a norm is, is because no memorandum (“*Gutachten*”) and judgment technique has been [*127] developed.”⁷⁸ Far from developing a theory that subsumes facts under law, Anglo-American civil procedure, that is, that branch of the legal system where law is necessarily applied to facts, is concerned with *separating* law from facts. The purpose of this separation is to permit two different decision-makers to decide two different kinds of questions, namely judges to decide questions of law and lay juries to decide questions of fact. This distinction has been important for so-called *common law* courts, which used juries, but had less importance for *equity* courts, which did not.

Although American law did not develop a subsumption theory, it did have another mechanism that gave form to the application of substantive law: the system of common law pleading. Common law procedure was highly formulary. A party seeking relief had to bring his or her claim under one of a limited number of “forms of action.” Through the system of pleading, that is, through the exchange of statements regarding the case, the parties in theory reached a single point in dispute, either a legal one, for the judge to determine, or a factual one, for the lay jury to decide. In effect, the parties applied the law to the facts and agreed upon the point to be decided. Pleading served “to develop and present the precise point in dispute upon the record itself, without requiring any action of the part of the Court for the purpose.”⁷⁹ The legal

⁷⁸ Methoden, vol. 2, p. 262. He attributes this to an absence of a theory that covers both case law and statute law. Case law results from decision of concrete disputes between parties. By its nature, it focuses on the substantive claims in the individual cases. Statute law, on the other hand, partakes more of the form of a command and is, therefore, more formalistic. See *Atiyah/Summers*, p. 96 (“an inherently more formal type of law”).

⁷⁹ *S. Tyler*, *The First Report of the Commissioners Appointed by the General Assembly of Maryland to Revise, Simplify and Abridge The Rules of Practice, Pleadings, &c. In the Courts of the State*, 1855, p. 10. This is a spirited defense of “special pleading” against the civil law system and against equity procedure. The Report stresses: “*The Pleadings shall be so conducted as to evolve upon the record, by the effect of the allegations themselves, the questions of law and of fact disputed be-*

issue might be whether the conduct claimed fell under the requirements of the selected form of action. The factual issue might be whether the particular fact required by a form of action had occurred.

In the second half of the nineteenth century, America abandoned the common law system of pleading. It adopted new procedures that had more [*128] in common with procedure in the courts of equity.⁸⁰ One goal of this reform was to make dispute resolution less formal. But one result was to strip away what form there had been that had guided the proceedings. This the relatively formless equity procedures which were adopted, were in large measure implemented by lay juries rather than professional judges. These juries no longer were limited, however, to deciding one or two points in dispute. They had to consider the whole case. One of the few limiting factors on their decision that remains, at least to some extent, is the concept of "cause of action," which requires parties to prove a group of facts that give rise to a claim for relief.⁸¹ While the idea of a cause of action containing distinct elements bears similarity to the German idea of *Tatbestand* and *Tatbestand elements*, in practice, however, the two concepts are far apart.

In theory, in modern American litigation, the judge determines the legal rules, while the jury finds the facts and applies the legal rules to these facts.⁸² The judge thus is the law-giver and not the law-applier. Some American judges seem to like it that way for it permits them to make policy.⁸³ The judge gives the law in a variety of ways: at trial, at the conclusion of the parties' presentations, when the judge instructs the jury in what the law is that the

tween the parties, and present them as the subject matter agreed upon for decision." P. 109. Compare O. Hartweg, *Die Kunst des Sachvortrags im Zivilprozeß: Eine rechtsvergleichende Studie zur Arbeitsweise des englischen Pleading-Systems*, 1988.

⁸⁰ See generally S.N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909 (1987).

⁸¹ See F. James, *Civil Procedure*, 1965, § 2.9, p. 76.

⁸² See *Skidmore v. Baltimore & Ohio Railroad Co.*, 167 F.2d 54, 60-61, 64 n. 25b. (2d Cir. 1948) (*Jerome Frank, J.*).

⁸³ See *Posner*, *supra*, p. 34-35 and C. Wyzanski, *Whereas—A Judge's Premises*, 1965, p. 6.

jury is to apply to the facts; earlier in the case when the judge on motion determines that the allegations of the complaint are legally insufficient to state a particular "cause of action" (motion to dismiss for failure to state a claim), or holds that the facts as discovered by the parties in "pre-trial" discovery can not support a claim (motion for summary judgment); during trial, when the judge determines that evidence presented is irrelevant or immaterial to the cause of action at hand; and after the trial when the judge, on motion, gives decides that there is no legally sufficient evidentiary basis for a reasonable jury to find on an issue for a party (judgment as a matter of law). It is this creative function in law-giving that has so fascinated legal scholars around the world.

In theory, the jury finds the facts and applies the law to the facts, after the parties have tried the case and the judge has instructed the jury in the applicable law. In theory, it should evaluate the parties' evidence and de [*129] termine whether the party seeking relief has established each and every element of each and every cause of action raised. The reality is, however, almost certainly quite different. It begs credulity to think that a group of laymen, never educated in the law, is able to grasp complicated instructions given them in the law and apply that law unassisted. Juries often do not comprehend the elements of causes of action and just decide for the party they favor.⁸⁴ Nor have American judges made the task any easier for juries. At the same time as America abandoned the issue narrowing of common law pleading, it also largely stopped the English practice of judges commenting on the evidence. That is, judges no longer express their views as to how they would apply the law to the facts of the case as disclosed at trial.⁸⁵

In any event, how a given jury actually does apply law to facts in a give case is unknown. The jury's verdict is "general," that is, it is merely a statement of decision. The German equivalent would be a judgment that consisted solely of the *formal state-*

⁸⁴ See *Skidmore v. Baltimore & Ohio Railroad Co.*, supra; *C. May*, Perspectives on Judicial Speech: "What Do We Do Now?": Helping Juries Apply the Instructions, 28 *Loy. L.A. L. Rev.* 869 (1995) (with copious further references).

⁸⁵ See *S. Saltzburg*, The Unnecessarily Expanding Role of the American Trial Judge, 64 *Va. L. Rev.* 1, 22 (1978).

ment of the judgment (Urteilsformel). The jury's decision is, as Jerome Frank put it, "as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi."⁸⁶ Because of the general nature of the verdict, errors in determination of facts, understanding law of, or application of law to facts largely can not be determined⁸⁷ and usually can not be corrected on appeal. American appeals do not consider whether the decision of the lower court was correct, but whether the procedure followed there was proper and whether the law was properly stated. In German understanding, America has *Revision* (appeal on the law) but no *Berufung* (appeal on the facts). The German student would well remember a recent television program's comment on the American system: "If the American jury system promises anything, it is not a fair outcome, only a fair process."⁸⁸

It is readily apparent why the American system places such great weight on values related to the fairness of the process, namely, whether the parties were given fair notice of the proceedings, whether judge and the jury were completely neutral and unprejudiced, and whether the parties had a [*129] full, fair and ample opportunity to present their views of the case. These factors legitimate the proceeding. They are all that the system can assure; the system cannot assure the correctness of the decision. While this approach to legitimating resolution of conflicts is defensible, it makes for a legal method that is, at best, awkward in a modern, mass society.

3. American law application in other areas of life

Most applications of law occur in daily life without intervention of judge or jury.⁸⁹ The myopic approach of American jurists to consideration of legal methods, largely limited as it has been to judicial decision-making, has slighted all other venues in

⁸⁶ *Skidmore v. Baltimore & Ohio Railroad Co.*, 167 F.2d 54, 60.

⁸⁷ *Id.* 61.

⁸⁸ *Schlesinger/Bradley*, CBS Reports: Enter the Jury Room, first broadcast April 16, 1997 (transcript and video tape available).

⁸⁹ See *R. Summers* pp. 220-22.

which law is applied⁹⁰ and has led to pernicious effects for society generally.

When evaluating a legal position outside the courtroom, one generally still needs to bear in mind the potential impact inside the courtroom or other forum empowered to enforce the law. If the system for enforcing the law is irrational and unpredictable, as the American system often is, no matter how clear or how wholesome the substantive law is, the legal situation may be unsatisfactory. It should not be surprising that it is in America that the classic phrase expressing the dichotomy of "Law In Books and Law in Action" was first coined.⁹¹ Parties evaluating potential conduct then need to consider not only that the irrational system might defeat their meritorious claims, but also that parties with frivolous claims may seek to use the legal system to damage them without legal justification. Learning to spot issues is an important aspect of American legal education and the ability to theorize about how facts should give rise to a legal remedy even though no such cause of action presently exists is considered an important talent for a lawyer.⁹² The mere threat of litigation can be enough to cause someone to back off, because litigation is extremely expensive and its costs [*131] are largely determined by the parties in the lawsuit. Those costs, moreover, are borne by each party and are not assessed against the losing party. Consequently, Americans seek to so conduct their lives as to avoid litigation as much as they can. For example, they structure contracts so as to avoid creating possible issues for courts to consider and, above all, to avoid issues of fact.⁹³

⁹⁰ Pound criticized the Anglo-American analytical theory's definition of law as a body of precepts enforced in judicial tribunals for ignoring the role of law as anything but a rule of decision, and therefore for ignoring the administrative element in the legal order in action. *R. Pound, Nineteenth Century Theories of Judicial Finding of Law*, 36 Harv. L. Rev. 802, 810 (1923), reprinted in Association of the Bar of the City of New York, *Lectures on Legal Topics*, vol. 4 (1922-1923), 1928, pp. 93, 127.

⁹¹ *R. Pound, Law in Books and Law in Action*, 44 Am. L. Rev. 12 (1910).

⁹² *T. Disare, A Lawyer's Education*, 7 Md. J. Contemp. L. Issues 359, 370-71 (1996).

⁹³ See *J. Langbein, Comparative Civil Procedure and the Style of Complex Contracts*, 35 Am. J. Comp. L. 381 (1987), in German, *ZVglRWiss*, vol. 86, 1987, 141.

When applying the law outside a courtroom setting, one still needs to be able to legitimate the decision. The litigation model offers only one way to legitimate decisions: a full and fair hearing before a neutral body. But this method of proceeding is extremely expensive and practically foreclosed in many areas of daily life that nonetheless require kind of control. The justified judgment-like decision of a German administrator provides an alternative legitimization mechanism unavailable to American administrators. In the United States, such reasoned decision-making would likely be attacked as not fitting within the American model, because it combines the role of judge and prosecutor in one. With such a handicap, however, it is no wonder that American jurists have yet to develop an effective system of granting and controlling discretion.

V. Conclusion

German jurists who are familiar with American legal methods will think along the lines of their American counterparts. They will recognize that legal questions in the United States should be analyzed with awareness of the legal methods used to apply the law. They will see that they need to consider all of the parties potentially concerned with the law. They will understand that they should consider not just how the parties immediately affected by the law may act, but also how other parties in society—including lay jury members and judicial and administrative authorities—might react to action based on that law. They will see that legal rights may in theory exist that in practice cannot be enforced. At the same time, however, they will note that weak claims may be stronger than the law would seem to permit. They will better understand that in American law—and probably in their own law as well—that law is more than just the black letter rules. Above all, they will have a better feeling for the complexity of law as a means of governing social interaction.