FAILURES OF AMERICAN METHODS OF LAWMAKING IN HISTORICAL AND COMPARATIVE PERSPECTIVES

America's 18th century founders expected that the people of the United States would establish a wise and happy government of written laws adopted with a single eye to reason and the good of those governed. Few Americans today would say that America's lawmaking fulfills the founders' expectations. Dysfunctional is the word that many Americans use to describe their methods of lawmaking.

The legal professions tell the American people that they are doing the best they can. They tell a myth of common law. They say the people should rejoice, and not complain, when America's judges make law, for such lawmaking makes America's laws exceptional. It is how America has always made law, they say. Judges make better laws than legislatures, they claim.

The historical part of this book explodes the common law myth of dominance of judge-made law in American history. Using sources hardly accessible until 21st century digitization, it shows that statutes have had a much greater role in American law than the legal professions acknowledge.

The comparative part of this book dismantles the claim that judges make better law then legislatures. It shows how the methods of American legislative lawmaking, owing to neglect, have failed to keep up with their counterparts abroad, and have thus denied the people the government of laws that the founders expected. This book shows how such a system works in Germany and would be a solution for the American legal system as well.

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Failures of American Methods of Lawmaking in Historical and Comparative Perspectives

JAMES R. MAXEINER

With a Foreword by

PHILIP K. HOWARD

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To Philip K. Howard

America's finest jurists have combined practical and theoretical knowledge, dedication to law improvement, and appreciation for how legal science and foreign law facilitate better law. You stand in this tradition of Joseph Story, David Dudley Field, and Karl N. Llewellyn. Your generous support has made this work possible.

Laws for the People

The laws are not made for the lawyers but for the people.

American Law Journal (1813)

The laws are not – we mean they ought not to be – written for the lawyers, but for the people.

American Themis (1844)

Though our [government] claims to be a democratic government, our statutes are addressed to lawyers and not to the people; a layman can hardly be expected to understand their phraseology. The principal German statutes, particularly the civil code, are published in cheap, popular and handy editions, and are found in hundreds of thousands of homes. The extraordinary sense of legality of the German people is not entirely unconnected with the intelligibility of their laws.

Special Committee on Drafting of Legislation, American Bar Association (1914)

Our legal system has become extremely difficult to understand for ordinary citizens, even for smart lawyers.

Geoffrey C. Hazard, Jr. (2014)

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Foreword

PHILIP K. HOWARD

The test of law is how it works. Of course, that begs the question of how law is supposed to work. A further difficulty is getting a clear view of modern law; there's just too much of it. We constantly complain about legal excesses – telling stories about red tape and lawsuits has become a national pastime. But debates about reforming law always seem like rear-guard actions, striving to avoid legal defeat instead of making law work for us.

What's needed is a fresh perspective. What is law supposed to do? Well, it supports our freedom by setting outer boundaries of reasonable behavior – by prohibiting misconduct, law liberates us to deal with strangers without undue defensiveness. Law also supports freedom by providing a legal framework to protect common resources, such as clean air and water, and providing common services. With law in place, we don't tiptoe through the day looking over our shoulders, or carry chemical kits to test the water we're drinking, or check to see if toys have lead paint. Law is supposed to be a framework designed to liberate human freedom and initiative.

How's American law doing? On the positive side, there's not a scourge of banditry (in most communities); people generally trust contracts; state power is not abusive; and common resources are okay. On the negative side, law is suffocating human initiative. Instead of a framework for freedom, law has replaced freedom. Instead of asking "What's the right thing to do here?," people ask "What does the rule require?" or "Could someone sue me?"

The stifling effects of too much law are evident in every aspect of society. It may be useful to flip through some snapshots:

- Decrepit infrastructure isn't fixed for a decade because of endless red tape. By prolonging bottlenecks, multi-thousand page environmental reviews end up harming the environment.

- Starting a business is fraught with legal costs and uncertainty. The United States ranks low in the world in ease of starting a business.
- Doctors spend up to half their time filling out required paperwork. Because of distrust of American justice, they practice "defensive medicine," raising costs and compromising patient safety with unnecessary tests. It's hardly surprising that the cost of American healthcare approaches twice as much as other developed countries, with no better outcomes.
- Candor in the workplace is basically illegal. Businesses no longer give job references. For fear of offending someone, we now make it almost impossible for people to learn from their mistakes and from the opinions of those around them.
- Government itself is legally ossified, doing what it did yesterday because the law doesn't allow anything else. The idea of a "public choice" is an oxymoron in Washington. No one is choosing anything, at least when it comes to domestic matters. Every institution is frozen. Personnel choices are not permitted; over 99 percent of federal employees got a "fully successful" rating or better in 2013 – because any negative comment would subject the supervisor to an awful legal trial. The Trump election was clearly a vote against Washington, but it remains to be seen whether Trump can remake the structure of government so that it works.
- Children are the canary in the legal mine. Children often need affection – but teachers and caregivers are forbidden from hugging a crying child. Children need to learn to take responsibility for themselves – but legal fear has eliminated free play and stripped playgrounds of anything involving modest risk, such as seesaws and jungle gyms. Young people must learn to deal with conflict, but schools instead feel a legal need to coddle and create "safe zones," even in college, to protect them from being upset by different points of view.

In all these stories, no one is doing what they think is right, or sensible. Why not? The law doesn't let them, or puts them at risk for reasonable choices.

Who designed the legal system? The answer is that no one designed it. It just grew. Nor is it a "system." It's a dense jungle of overlapping laws, regulations and rights. Most of these laws ostensibly address worthy social goals, or least plausible goals. But no one has actually gone back to see how law is actually working. Nor has anyone tried to organize it – the federal government, for example, has scores of separate teacher-training programs. Criminal law is found in thousands of federal, state and municipal statutes. The National Inventory of Collateral Consequences of

Conviction lists over 48,000 federal and state laws that impose collateral consequences for criminal convictions.

If you want to find out if something is lawful and what the consequences of violations are, you need to hire a lawyer, and even then, there will be uncertainty.

The natural consequence of this legal tangle is social paralysis. Maybe people can't cheat and pollute – a good thing – but at the cost to human initiative and freedom. Law makes lots of things unlawful, but doesn't protect conduct that should be lawful. Law is also a one-way ratchet; statutes and regulations get added every year but are rarely removed. Not surprisingly, government is unable to adapt to new challenges or, indeed, do anything other than what it did yesterday. Like sediment in a harbor, law has accumulated to the point where it's hard to get where we need to go. Political scientist Francis Fukuyama calls our system a "vetocracy" – anyone can find legal support to block almost anything. "Who governs?" is obviously an important question, political scientist Samuel Huntington observed. "Even more important, however, may be the question 'Does anybody govern?'"

What do we do about it? The answer is pretty basic: We need to create a legal structure that is deliberate, not ad hoc. Doing so requires drawing lines about risk, authority and acceptable conflict. Then we need to monitor and adapt this new system to make sure it is working as intended.

The goal of a deliberate legal system – blindingly obvious to nonlawyers – is actually not the tradition of American law. In the historical part of this book, James Maxeiner shows how the aspiration of the framers and others for organized legislative systems lost out to a kind of theology about the wisdom of the common law. Legislation was with us from the beginning, of course. It turns out that Jefferson took it upon himself to systematize most of Virginia law, and no less a personage than Madison was responsible for trying to get it adopted. But the common law ideal of doing justice case by case, and discerning law from countless judicial opinions, appealed to the individualist strain in America. Fairness would be decided case by case. The push for coherent codes such as the Napoleonic Code was demeaned as, well, European. The idea of a "civil code" was criticized as an effort to determine fairness in advance, without taking into account the circumstances.

As the agrarian society of the early republic blossomed into the industrial revolution, statutes were essential to deal with modern challenges: commerce, corporations, common schools and colleges, public lands, public health, navigation, taxation, elections, immigration and establishment of many government offices that we rely on including for police and national defense. But the ad hoc nature of the common law seems to have infected the enactment of

positive law. Most statutes enacted by legislatures do not aspire to being systemic codes such as the Uniform Commercial Code. Statutes are more like Band-Aids to a specific problem. When Congress in the 1970s discovered widespread neglect of special needs students, it passed a broad law giving disabled students the right to an "individualized education." How does that law fit with other statutes dealing with K–12 education? Congress doesn't even ask. As it turns out, federal special education laws have spawned a bureaucratic monster, pitting parents against educators, consuming a high percentage of total K–12 expenditures and burdening states and local school districts with most of those costs. It's hard to find a statutory program that isn't broken in significant ways. But Congress doesn't fix them because it treats old law as immutable, not a part of a working code that must be kept up to date and evaluated by how it works in practice.

This is no way to run a society. The waste is prodigious. The ineptitude is seen in regular breakdowns, such as the Oroville Dam. The populist outrage against Washington stems, at least in part, from the mindless dictates that ordinary citizens encounter daily in the workplace, schools and hospitals. The phoniness of Washington is perhaps the best evidence that no one, in fact, is making deliberate choices on how to run our society.

Making law work is not, in fact, rocket science. But, as Professor Maxeiner persuasively demonstrates, it requires a new goal: legal codes that strive to be organized and systematic, not a hodge-podge of programs piled on top of old programs. Germany and other countries do this just fine. The benefits will be huge: People will know what the law is, and will feel free to take initiative. Legal waste will be minimized. The law will be able to adapt to new circumstances, because government officials have the job of keeping it up to date. Democratic responsibility will not be empty rhetoric, but real – because the statutes lay out clear lines of authority and accountability. In helpful detail, Professor Maxeiner describes exactly how German law is structured to achieve these goals.

Systematic codes are hardly un-American. Find any area of American law that works well and you'll find a code that people feel they can rely upon. The Uniform Commercial Code, written in the 1950s, gave commerce a boost by bringing order to the mess of forty-eight different state contract laws. As it happens, the primary draftsman of the UCC was Professor Karl Llewellyn, who knew and admired German codes.

As Professor Maxeiner demonstrates in this important book, the supposed conflict between common law and civil law is based on a misperception about how civil law systems work. Civil law systems do not dictate results in advance – like the common law, cases hinge on concepts of good faith and

reasonableness. Ironically, it is America's undisciplined approach to legislation that resembles mindless results – dictating all sorts of idiocies for no reason other than some regulation writer forty years ago thought it might be a good idea.

The American approach to legal organization of our society is unsustainable. Thousands of laws and regulations written by people long dead, piled on top of each other and rarely reviewed or reorganized, can only result in frustration, waste and progressive paralysis. What's needed is not broad deregulation, but a complete recodification. It's actually not impossibly hard, because codes that focus on goals, general principles and lines of authority and accountability are far simpler and less controversial. What's hard is to dictate choices in advance in thousand-page rulebooks. The benefits, as with the Uniform Commercial Code, will be immediate. As Professor Maxeiner demonstrates, many things could work better.

Preface

America's legal system is broken. Too many people, even with the aid of lawyers, cannot know the law that governs them. They cannot apply laws sensibly.

This book, through comparative perspective, shows that Americans are not compelled to suffer a broken system. Other systems based on legislated statutes and statutory methods work better.

America's legal professionals, however, do not learn from foreign examples. America, they say, is a common-law country based principally on judge-made case law and common-law methods. Statutory methods have little place in America's past or present.

This book, relying on newly available sources, asserts new observations that show that Americans have not been wedded to case law to the exclusion of statutes.

Besides the Introduction (Part I), it has two main Parts: Historical (Part II) and Comparative (Part III).

* * *

America's legal system is hardly a system at all. It is chaotic instead of systematic. America's people do not enjoy a government of laws, but suffer a rule of men.

A legal system consists of laws, precedents and procedures organized to work together in harmony and to present a consistent whole. Comparing our rules and practices with those of foreigners makes clear that ours is defective as a system to guide and judge peoples' behavior. The differences are not incremental but overwhelming. They jump out at anyone familiar with ours and with a successful system.

America's legal professionals have given up on a government of laws. They no longer support one of the most basic expectations of people for a legal system: that law consists of rules set down beforehand to apply to facts.

In the Comparative Part of this book (Part III) I compare America's legal system with that of one of the more successful of foreign legal systems, that of Germany.[1] I identify ways in which Germany's legal system by design makes rules knowable and susceptible to sensible application in five different areas of legal methods:

- Systematization and Simplifying Statutes
- Lawmaking for the Common Good
- Federalism and Localism
- Constitutional Review
- Law Applying

In each of these areas I show how America's legal system lacks intelligent design and suffers rules that are hard or impossible to know and apply sensibly. In short, I show how Germany has a working legal system – a working government of laws – and the United States has a deficient one.

* * *

Demonstrating the superiority of Germany's legal methods will not persuade America's jurists to adopt them. America's legal professionals have persuaded themselves of the superiority of their case-law methods.

They have, as David Dudley Field told them, "a superstitious reverence for the law of precedents."[2]

America's law schools indoctrinate first-year students in common law myths. They teach that judge-made case law and common-law methods are superior to statutes and statutory method and are an adequate substitute for a government of laws. They tell students that all American law is based on English common law

[1] In my generation, that of the baby-boomers, Germany's Nazi past made such a choice suspect. I try to dispel those suspicions in an appendix in an earlier book. James R. Maxeiner with Gyooho Lee and Armin Weber, Failures of American Civil Justice in International Perspective 272 (2011). In my children's generation, that of the Millennials, the idea is not suspect at all. With the United States apparently laying down the mantel of leader of the free world, many are looking to Germany or to the European Union as leading candidates to assume that role.

[2] *Address of David Dudley Field of New York, President of the Association*, Report of the Twelfth Annual Meeting of the American Bar Association Held at Chicago Illinois, Aug. 28, 29 and 30, 149, 232 (1889).

and that America had little to do with statutes until the 20th century. They thus inoculate their students against statute-based law reform.

This book dispels these myths.

The idea that case law can be an adequate substitute for a government of laws – as widely held as it is – is readily dispelled. I dispatch it in Chapter 3, Common Law is not an Option, of Part I. The principal challenge is to make legal professionals aware that their legal methods are not the only ones.[3]

The idea that America has always been a country of English and American common law to the exclusion of statutes, on the other hand, is more difficult to dispel. It has been gospel for more than a century. Owing to the peculiarity of legal publishing, its provenance coincides almost exactly with the contents of America's law libraries of the 20th century: case reports, textbooks and law school reviews published after 1880 (including reprints of cases decided before then). I show that it was not always so.

Through newly available sources – not before much used – I upend this 20th century gospel and show that it is no longer tenable in the light of these new sources.

The common-law gospel rests on a blinkered view of history: case reports, textbooks and law school law reviews. These were not, however, the principal venues for legal discussion and instruction for most of the 19th century. Pamphlets, addresses, general interest journals and books, legislative debates, committee reports and so on were. These materials tell a different story from the conventional one.

Once, to find and access these materials was very difficult, although possible with perseverance.[4] With the digitization of America's historic legal literature in this century, no longer are these materials inaccessible or unusable. They refute the conventional wisdom of common law exclusivity.

* * *

I wrote this book for the many Americans who believe that their government is broken and who would like to find ways to fix it. I suggest, but do not prescribe, some ways toward solving some problems. I assume no political agenda. I hope that conservatives and liberals, Republicans and Democrats, all will find something of value here. I do assume the goal of a government of laws; I am looking for ways to make those laws function well as rules.

[3] *See* James R. Maxeiner, *U.S. "methods awareness" for German Jurists*, *in* Festschrift für Wolfgang Fikentscher, 114 (Bernhard Großfeld *et al.*, eds., 1998).

[4] *See, e.g.*, James R. Maxeiner, *Bane of American Forfeiture Law – Banished at Last?*, 62 Cornell L. Rev. 768 (1977).

I wrote this book for general readers interested in fixing America's broken legal system. By general readers, I mean people who are not in the legal professions (i.e., lawyers, judges, law professors). I assume, however, that these general readers have a keen interest and some knowledge of law and legal systems. I have tried, at least to some small extent, to bring to the book the perspective of people subject to laws.[5]

I have not written this book for experts in comparative law or in legal philosophy. They may find some of what I say simplistic or insufficiently rigorous in description. Still, I hope that they will find thoughts here that challenge them. What I have to say about German law is not controversial. I have accordingly limited my citations to German-language materials to publications that make particular points that are less commonly discussed or that help find other materials. Where English-language materials exist, I have sought to cite those that are more substantial and relatively recent.

I apologize to historians who would prefer that I had written an historical monograph. In writing about the past, I am not so much writing a history as I am working to disestablish common-law untruths and myths of today. I am not establishing an alternative statutory reality. I seek as much to show how things were *not*, as to show how they were.

I encourage historians, and their students, to investigate America's legal history anew. For their sakes, I have referred generously to primary source examples of the importance of statutes. I have not, however, tried to be exhaustive. Digitization means I am constantly finding new examples. I have hardly begun to look at newspaper accounts. l refer less generously to the growing body of secondary works in legal history since little of the new work addresses the issues on which I focus.

I apologize to law reformers who would like plans for a new legal system. I identify system failures in the United States and system successes in Germany, but I do not go on to prescribe a new system for America. I do not have strength or the political acumen to do that. Legal system changes depend on practical political possibilities. I hope here to make the environment more welcoming for such change and to encourage reformers to seek it.

Finally, I make no apology to America's law professors for encouraging a "best practices" approach to comparative law. I regret that most American law professors pay comparative law no mind and many of the few who do have turned from law reform to the milquetoast of "learning valuable lessons" from abroad. My own teacher, Rudolf B. Schlesinger, saw in best practices the first

[5] This idea does not come easily to the legal professions. *See* Dennis Jacobs, *The Secret Life of Judges*, 75 Fordham L. Rev. 2855 (2007).

of all uses of comparative law. My colleagues will spot in this book my impatience with the idea of a common law–civil law divide that precludes adaption of practices that work.

As this book was in press, in the fifty days between November 2 and December 22, 2017, the United States adopted the most sweeping changes in its tax laws in thirty years, the Tax Cuts and Jobs Act, Public Law 115-97. Time did not allow consideration of the process and substance here. Readers skeptical of my criticisms of contemporary American methods of lawmaking are encouraged to read about it and its passage.

James R. Maxeiner
Bronxville NY
The 500th Anniversary of the Reformation

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Summary

A GOVERNMENT OF LAWS, NOT MEN: AMERICANS' EXCEPTIONAL IDEAL REALIZED ABROAD BUT NOT AT HOME

In 1776 on the eve of the Independence of the United States of America John Adams set out his *Thoughts on Government* on what he thought America's new government should look like. The best of governments, Adams wrote, was a republic, and "the form of government which is best contrived to secure an impartial and exact execution of the laws, is the best of republics." In other words, "good government is an empire of laws." It is not a government of men.

Adams built the ideal of a government of laws, not of men, into the *Massachusetts Constitution or Frame of Government* of 1780, which he drafted. It governs today. 125 years later in 1905 Katherine Lee Bates added law to her iconic poem *America The Beautiful*:

> America ! America !
> God mend thy every flaw.
> Confirm they soul in self-control,
> Thy liberty in law![1]

Through the 19th century, when Americans spoke of law, they had in mind legislatively adopted statutes. A government of laws, not men, meant laws that men could understand. At constitutional conventions, in state legislatures, in public gatherings and in civics instruction, law meant laws. People expected that laws would be well-ordered and understandable statutes. All states established regular publication of their laws. All states compiled their statutes. All states revised their statutes. Of common law, of judicial lawmaking, few

[1] Katherine Lee Bates, *America the Beautiful*, 78 The Home Missionary 375 (Mar. 1905).

people other than members of the legal professions had much to say that was anything other than pejorative.

At the nation's Centennial in 1876 Americans identified the drive toward systematized law as American exceptionalism. Progress in law meant progress in getting rid of oppressive common law and substitution of modern statutes. In systematizing their laws, results were mixed. Compiling laws was not controversial. Revising laws was. Some revisions were little more than compilations. Some were nearly codes.

By the turn of the 20th century when Bates revised "America the Beautiful," the legal professions had turned the country away from modern legal methods. In the last quarter of the 19th century the legal professions established themselves. At first, many leaders of the new professions sought the government of laws their ancestors had longed for. But by century's end judges assumed supremacy over statutes and constitutional interpretation; lawyers and law professors favored litigation over legislation.

Ironically, legal professionals claimed primacy of judge-made law just as America was entering what their successors now call the "age of statutes." Instead of cultivating a government of laws, the professionals promoted a "rule of law" that they imported from Victorian England to displace Adams' government of laws.

Today the United States of America has, says Geoffrey C. Hazard, Jr., a "Rule of Legal Rhetoric: political pushing and shoving, conducted in legal terminology . . . a complicated combination of multiple public authorities and decentralized private initiatives." It amounts to, says Walter K. Olson, "The Rule of Lawyers." It is not a proper government for the people, Philip K. Howard says, but "A Rule of Nobody."

AMERICANS DESERVE A GOVERNMENT OF LAWS

It does not have to be that way. Instead of consigning the United States to a rule of lawyers, Americans might better think about building a government of laws. The ideal has not been abandoned elsewhere, but is there embraced and achieved. Foreign examples show how that can be done.

Five German Advantages[2] in Realizing a Government of Laws

1. Germany's laws are systematized and simplified. They coordinate one with another. They are counted in scores. They present people with one consistent set of directions. America's laws are little systemized. They

[2] John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 (1985).

frequently conflict with one another. They are counted in thousands. They present people with inconsistent directions (Chapter 9: Systematizing and Simplifying Statutes).

2. Germany's laws are made by processes designed to involve the whole people in order to serve the common good. They are professionally crafted to coordinate one with another. They are presented for public discussion before enactment. America's laws are made by "those who show up." They reflect the interests of their sponsors and not the interests of the common good. They are adopted before the public has opportunity to critique them (Chapter 10: Lawmaking for the Common Good).
3. In federalism, federal, state and local governments share power and authority. Germany's federalism is designed to present the people with one overall government of laws. Federalism serves the common good and the people's interest in laws administered close to home. America's federalism ("our federalism") is not designed to present the people with one overall government of laws. It assumes the opposite: that different sovereigns may adopt laws at conflict with one another. States' rights, not the common good, are often thought the justification of federalism (Chapter 11: Federalism and Localism).
4. Constitutional review assures that people are subject only to laws legitimately adopted that are consistent with their respective constitutions. Germany's methods of constitutional review do this in such a way as to minimize uncertainty resulting from review. Only specially qualified judges are authorized to put laws out of force. America's methods, on the other hand, produce substantial uncertainty as to the validity of laws in time and space. Inferior judges of no special constitutional qualification put laws out of force (Chapter 12: Constitutional Review).
5. Germany's methods of crafting and applying laws facilitate sensible application by people and courts in individual cases to promote actions consistent not only with law but also with justice and policy, without upending democratic legitimacy. America's unsystematic crafting of laws leads legal professions to turn laws in their application upside down to the detriment of law, justice and policy (Chapter 13: Applying Laws).