Comparative Norm Design: The U.S. Rules Model and the German Standards Model in Criminal Justice and Beyond

Philip M. Bender

Abstract

This article suggests that comparative literature can gain valuable insights in turning to the design of legal norms. Building on and further developing the notional framework of Louis Kaplow with regard to rules versus standards, simplicity versus complexity, and structured decision-making versus free balancing, it introduces the rules-model and the standards-model as tools of comparative norm design. The article applies this approach in the area of criminal justice, comparing the systems of the United States and Germany. In doing so, it relativizes a common characterization of U.S. criminal justice as flexible and discretionary and of German criminal justice as rigid and rules-based. Indeed, a closer analysis of norm design in criminal procedure suggests quite the opposite: focusing especially on norms governing the exclusion of evidence, the impeachment of witnesses, sentencing, and plea bargaining, it will be possible to link the way in which the United States administers criminal justice to the rules-model and the German approach to the standards-model. Analyzing the respective vices and virtues of both models, the article further explains the described difference in norm design by reference to the prevailing concept of the judge: whereas the United States tends to underline the fallibility of judges, the German legal culture tends to idealize them. This comparative analysis harmonizes well with the broader context and can explain other areas of the law as well. Indeed, the proposed distinction of norm design (rules-model versus standards-model) can also explain differences in

contract law and aligns with the common-civil law divide and dominant strains of legal thought in both countries. In addition, the diverging concept of the judge (fallible versus idealized) can be contextualized by reference to the differences in the structure of authority, the concept of individuals, and the philosophical heritage.

About the Author

The author, LL.M. (Yale Law School), Maître en droit (Paris II/ Panthéon-Assas) is admitted to the bar in both New York and Germany. He is a lecturer and Ph.D.-candidate at the Ludwig Maximilians University of Munich. The article developed from a lecture delivered at the Universidad de Buenos Aires (2019) and at the German Southeast Asian Center of Excellence for Public Policy and Good Governance (2021). The author wishes to thank Martín D. Haissiner for valuable discussions.

Table of Contents

Introduction

We can compare legal fields of different systems under many aspects. For instance, we can take a descriptive stance, and point out differences in the content of the law. In that spirit, we would examine the presence or absence of certain institutions such as jury trials[1]. Another way of comparing systems from this descriptive viewpoint is to examine societal effects, such as the punitiveness[2] of a criminal justice system. These descriptive comparative contributions are important, but they do not provide us broader narratives with which we can understand a whole set of differences between legal systems. Thus, in the spirit of a broader – and quite common – narrative, we might try to make sense of legal differences between U.S. and German criminal justice in terms of the values and ends pursued. According to that approach, U.S. criminal procedure

1. *See, e.g.*, Hans-Heinrich Jescheck, *Principles of German Criminal Procedure in Comparison with American Law*, 56 Va. L. Rev. 239, 243–5 (1970) (seeing in the U.S. jury trial the main difference to Germany).

2. On the harshness of U.S. criminal justice, *see generally* James Q. Whitman, Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe (2003). *See also* Robert A. Kagan, Adversarial Legalism: The American Way of Law 65–6 (2001); Tatjana Hörnle, *Sentencing in US-American Jurisdictions: A Commentary from a German Perspective, in* Strafzumessung: Angloamerikanische und deutsche Einblicke [Sentencing: Anglo-American and German Insights] 183 (Kai Ambos ed., 2020).

is associated with the goal of fairness (procedural justice), while the German system is primarily concerned with truth (substantive justice).[3] However, this ends-based dichotomy is insufficient alone. In fact, both systems pursue truth and fairness as goals of the criminal process,[4] and many procedural institutions and doctrinal formulations can be explained in terms of both truth and fairness.[5] Another broader narrative focuses on the institutional context. To turn yet again to criminal procedure, we might think of the seminal work of Mirjan Damaška and his distinction between the hierarchical model (dominant in continental Europe) and the cooperative model (dominant in the United States).[6] In addition, we might turn to the institutional distinction between adversarial and bureaucratic legalism, coined by Robert A. Kagan.[7] As useful as the analysis

3. On procedural (U.S.) versus substantive (German) approaches in criminal procedure, *see* Elisabetta Grande, *Comparative Approaches to Criminal Procedure: Transplants, Translations, and Adversarial-Model Reforms in European Criminal Process, in* The Oxford Handbook of Criminal Process 67, 69 (Darryl K. Brown et al, eds., 2019) (objective versus interpretive truth); Thomas Weigend, *Continental Cures for American Ailments*, 2 Crime & Just. 381, 396 (1980); Claus Roxin & Bernd Schünemann, Strafverfahrensrecht: Ein Studienbuch § 15 para 6 (29th ed. 2017). *See also* John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 Cal. L. Rev. 541, 541–42 (1978) (associating adversarial procedures and justice as opposed to autocratic procedures and truth); Markus D. Dubber, *Criminal Process in the Dual Penal State: A Comparative-Historical Analysis, in* The Oxford Handbook of Criminal Process 3, 15 (Darryl K. Brown et al. eds., 2019) (pointing to German academia privileging substantive over procedural issues). On procedural and substantive legitimacy, *see generally* Thomas Christiano, *The Authority of Democracy*, 12 J. Pol. Phil. 266, 266 (2004). On the (parallel) distinction between output- and input-legitimacy Fritz W. Scharpf, Governing in Europe: Effective and Democratic? 6 (Oxford Academic ed., 1999), 7 *et seq*. (input-legitimacy), 10 *et seq*. (output-legitimacy).

4. Particularly clear Jescheck, *supra* note 1, at 240 („[. . .] the object of both trials is the same search for truth within the permissible legal framework."), 241 ("The difference between German and American procedural law does not lie, therefore, in the high ideals which have been set, but rather in the *methods* chosen to obtain them."). This aligns with a general tendency of comparative law to underline more the differences in means, *see* Konrad Zweigert & Hein Kötz, An Introduction to Comparative Law 40 (3rd ed. 1998). *See also* Mariana Pargendler, *The Role of the State in Contract Law: The Common-Civil Law Divide*, 43 Yale J. Int'l L. 143, 178 (2018).

5. I have analyzed that point elsewhere, *see* Philip M. Bender, *Same Ends, Different Means: Truth and Fairness in Criminal Procedure of the United States and Germany, in* Procedure Law and Procedure Law Reform in Comparative Perspectives (Henning Glaser ed., forthcoming 2022). *See also* Jescheck, *supra* note 1, at 240 ("The goal of the German proceeding, like that of the American, is the determination of the objective truth on the basis of and within the framework of the procedural forms which the law prescribes.").

6. *See* Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 Yale L.J. 480, 483–509 (hierarchical model), 509–23 (coordinate model).

7. *See* Robert A. Kagan, Aversarial Legalism: The American Way of Law 9–11 (Harvard Univ. Press 2001).. Often, instead of "bureaucratic," the term "inquisitorial" is used, *see, e.g.*, Jenia Iontcheva Turner, *Limits on the Search for Truth in Criminal Procedure: A Comparative View, in* Comparative Criminal Procedure 38 (Jacqueline E. Ross & Stephen C. Thaman eds., 2016); Thomas Weigend, *Is the Criminal Process about Truth?: A*

of these institutional aspects is – it is difficult to fully appreciate the doctrinal and blackletter differences in both systems in institutional terms alone. A detailed analysis of the prevailing norm design in both countries, i.e. of the formal structure of legal commands as opposed to their substantive content, is necessary to complete the comparative picture.

Looking at the design of legal norms in comparative law is not completely new. Damaška's study on the different structures of authority, for instance, incidentally dedicates some thought to what we could describe as issues of norm design. Damaška attributes to continental systems of criminal justice a "preference for precise and rigid normative directives over more flexible standards."[8] These systems, so the narrative goes, "insist [. . .] on guiding officials by precise standards, and are quite reluctant to be satisfied with vague principles and policies as guidelines for conduct."[9] German rigidity, one could say, meets U.S. flexibility.[10] In other contributions, the central place of discretion in U.S. criminal justice is underlined.[11] This normative structure is also supposed to have consequences for the complexity of both systems. The high level of abstraction of German rules seems to enable the criminal justice system to remain simple.[12] In contrast, U.S. criminal procedure is presented as highly complex, with its extensive protections of individual rights and the goal of doing justice to the specificities of each individual case.[13]

However, these findings are worth revisiting under a more rigid notional framework, which shows quite the opposite in many aspects.

German Perspective, 26 Harv. J.L & Pub. Pol'y 157, 158 (2003). *See also* John H. Langbein, Comparative Criminal Procedure: Germany 1 (1977) (criticizing "inquisitorial" due to its negative connotation). It is important to see that only the hearing of the main proceeding can be described as inquisitorial in Germany, not the overall criminal process. Indeed, also in Germany, the prosecution has to file an official accusation. Insofar, the court cannot proceed *ex officio*. On that, *see* Roxin & Schünemann, *supra*, note 3, at § 17 para 6.

8. Damaška, *supra* note 6, at 487.

9. Damaška, *supra* note 6, at 502.

10. Damaška, *supra* note 6, at 502–06 (on determinate rules in the continental systems), 517–21 (on flexibility in U.S. criminal procedure).

11. *See also* Kagan, *supra* note 7, at 72.

12. *See* Damaška, *supra* note 6, at 505–06 ("We can now begin to understand some intellectual habits of continental judges and the idiom of their debate. Both have struck outsiders as abstract, and yet capable of easily producing accurate answers. Where law is not interwoven with the tradition of deciding cases in all their intricacy, the knowledge of law is not necessarily a knowledge of details.").

13. *Id.* at 526–29; Kagan, *supra* note 7, at 72, 83. *See also* Weigend, *supra* note 3, at 411; John H. Langbein, *Land Without Plea Bargaining*, 78 Mich. L. Rev. 204, 205 (1979) [*hereinafter* Langbein, *Land*]; John H. Langbein, *Torture and Plea Bargaining*, 46 U. Chi. L. Rev. 3, 20 (1978); William T. Pizzi, *Soccer, Football and Trial Systems*, 1 Colum. J. Eur. L. 369 (1995).

Over the last decades, especially Louis Kaplow has examined the design of legal norms from an economic perspective. His work on the costs and benefits of a certain norm design can be summarized around three parameters: rules versus standards[14], simplicity versus complexity[15], and structured decision-making versus free balancing.[16] The first goal of this article is to build on and further develop his notional and economic insights and to introduce them into the field of comparative law. Indeed, not only the *content* of substantive, institutional or procedural rules but specifically their *norm design* allows us to gain valuable insights about the commonalities and differences of legal systems and their underlying societal assumptions. To facilitate the comparative undertaking, I summarize the three parameters of Kaplow's analysis in the juxtaposition of what I call the rules-model and the standards-model. The rules-model limits *ex ante* the information that legal decision-makers can consider (internal simplicity). These rules largely structure decision-making and require the participants of the legal process to be aware of the respective rules and counter-rules (external complexity). In contrast, the standards-model largely uses standards, which allow taking account of the specificities and intricacies of the case *ex post* (internal complexity). Relevant information is largely processed in a free balancing approach. Since little is defined *ex ante*, standards can keep the legal framework more accessible (external simplicity). In short: whereas the rules-model is based on externally complex but internally simple rules that structure decision-making *ex ante*, the standards-model is based on externally simple but internally complex standards that allow free balancing *ex post*. It is important to note from the very outset that both the rules-model and the standards-model can implement elements of discretion. They only do so in different ways. Part I is dedicated to the elaboration of this analytical framework.

The second overarching goal of the article is to make use of this framework of comparative norm design by comparing the United States and Germany. Focusing on the criminal justice system, I suggest in Part II that the United States is closer to the rules-model whereas Germany is closer to the standards-model. This position challenges the widespread narrative according to which the German system

14. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992).

15. Louis Kaplow, *A Model of Optimal Complexity of Legal Rules*, 11 J.L Econ. Org. 150 (1995).

16. Louis Kaplow, *On the Design of Legal Rules: Balancing versus Structured Decision Procedures*, 132 Harv. L. Rev. 992 (2019).

is characterized by simple, rigid rules.[17] To illustrate my observations, I analyze exclusionary rules, the impeachment of witnesses, sentencing, and plea bargaining in both countries. The choice of these institutions is motivated by illustrating each of the different trial stages with one representative example: while the sentencing stage is in and on itself the object of analysis, the pre-trial stage is represented by exclusionary rules and the trial stage by the impeachment of witnesses. In addition, I aim at showing that my comparative framework is also valid for the "law in practice" so that plea bargaining completes the choice. I conclude Part II with some remarks on the level of discretion in the criminal justice system.

Part III endeavors to explain *why* the criminal justice system follows the rules-model in the United States and the standards-model in Germany. One possible reason is connected to the advantages and inconveniences of each model, which change depending on the assumption of how judges operate: in an idealized world of perfect judges, the standards-model seems superior. However, the advantages of the rules-model increase the more judges are conceived as fallible. Therefore, we can explain the differences in norm design by reference to a different conception of the judge. Whereas the German criminal justice system is based on the idea of perfect judges, the U.S. criminal justice system takes into account the fallibility of decision-makers to a larger extent.

Parts IV and V aim at broadening the picture. Indeed, the insights of comparative norm design have explanatory power beyond the criminal justice system. In that spirit, Part IV aims at generalizing the insights of Part II. It shows that the rules-model and the standards-model can also explain differences between the United States and Germany in contract law. It also outlines in what way this analysis of norm design harmonizes with the divide between common law and civil law and with legal realism and legal formalism as dominant strains of legal thought.

Just as Part IV tries to generalize the comparative analysis concerning the rules-model and the standards-model, Part V aims at generalizing the explanation of the differences through the concept of perfect or fallible judges elaborated in Part III. To that end, it shows how the differing conceptions of judges can be easily harmonized with the seminal work of Damaška on structures of authority in the United

17. Damaška, *supra* note 6, at 487, 502–06 (on determinate rules in the continental systems), 517–21 (on flexibility in U.S. criminal procedure). *See also* Kagan, *supra* note 7, at 72.

States and continental Europe.[18] It further claims that the different conceptions of judges align with the different conceptions of individuals in society and with the broader philosophical heritage of both legal systems.

I. The Analytical Framework of Comparative Norm Design: The Rules-Model and the Standards-Model

In this first part, I want to introduce the analytical framework of comparative norm design. To do so, I build on and further develop the insights of Louis Kaplow on (1) rules versus standards, (2) simplicity versus complexity, and (3) structured decision-making versus free balancing. I show (4) how these three issues are connected so that we can present a rules-model and a standards-model. To avoid misunderstandings, I also point out (5) that the main difference between these two models is the way in which norms are designed, not the degree of discretion they allow to implement in a legal system.

A. Rules versus Standards

Let us start with the distinction between rules and standards. Rules and standards can be analyzed from different perspectives.[19] We focus on the perspective of law and economics and work with the definition of Louis Kaplow, according to which rules give content to the law before the individual acts (*ex ante*) and standards thereafter (*ex post*).[20] Kaplow mainly seems to understand "individuals" as "private

18. *See* Damaška, *supra* note 6, at 483–509 (hierarchical model), 509–23 (coordinate model).

19. On rules and standards from a rule of law perspective, *see, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989); Dale A. Nance, *Rules, Standards, and the Internal Point of View*, 75 Fordham L. Rev. 1287 (2006); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807 (2002) (in favor of rules); Jamal Greene, *The Rule of Law as a Law of Standards*, 99 Geo. L.J. 1289 (2011) (in favor of standards). For a legal-sociological perspective, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1776 (1976); Marietta Auer, Materialisierung, Flexibilisierung, Richterfreiheit: Generalklauseln im Spiegel der Antinomien des Privatrechtsdenkens 43 (2005) (connecting rules to liberalism or individualism and standards to altruism or collectivism); Kathleen M. Sullivan & Akhil Reed Amar, *The Supreme Court 1991 Term – Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 58 (1992); John Hasnas, *The Myth of the Rule of Law*, 1995 Wis. L. Rev. 199, 213 (connecting standards to the dominant background ideology). For general theoretical accounts, see Pierre Schlag, *Rules and Standards*, 33 UCLA L. Rev. 379, 383–390 (1985) (presenting advantages and inconveniences of both rules and standards); Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (1991) [subsequent citations should refer to "Playing by the Rules, *supra* at . . . "]; Frederick Schauer, *Rules and the Rule of Law*, 14 Harv. J.L. & Pub. Pol'y 645 (1991) (generally favoring rules).

20. *See* Kaplow, *supra* note 14, at 559–60. *See also*, *e.g.*, (before him) Isaac Ehrlich &

actors" and to focus on the statutory legislator as *ex ante* regulator and on the judge as *ex post* regulator.[21]

However, this narrow understanding does not fully describe how rules and standards operate beyond this classical private law context: it is possible that the legislator uses standards which are concretized by administrative agencies even before the private individual acts. With the focus on the private individual, Kaplow's definition is blind for various steps of *ex ante* norm setting within the public realm. Thus, to avoid any confusion, one might simply define: *rules give content to the law at the moment of its enactment (ex ante), whereas standards defer the concretization of the precise content to a later moment*, which from the perspective of the private actor might be *ex ante* or *ex post*.

In addition, we should not understand "individual" as the private actor (of tort law or contract law) but rather more generally as the addressee of the legal command. In the area of criminal procedure, for instance, the addressees of the legal commands are the participants of the criminal process. If their conduct is regulated by a rule, some decision-maker external to them – via statutes or precedents – has previously given content to the law. If their conduct is regulated by a standard, the precise content is yet to be defined. The presiding judge normally undertakes this task of concretization. As far as her own conduct is concerned, she auto-defines the law for herself, subject to the control of higher courts.

B. Simplicity versus Complexity

Let us now turn to the issue of complexity. Complexity can have two different reference points. First, we can examine the issue of complexity with regard to how much information a legal norm or complex of norms can process. We will call this type of complexity *internal complexity*. Kaplow's definition of complexity plays on that level. According to him, whereas complex legal norms integrate a lot of information, simple commands are based on little information.[22] As Kaplow underlines, this distinction is independent of the qualification

Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. Legal Stud. 257 (1974) (in general); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 Yale L.J. 65 (1983) (specifically in administrative law). *See also*, *e.g.*, (after him) Russel B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 Or. L. Rev. 23, 43 (2000) (from a behavioral perspective); Kevin M. Clermont, *Rules, Standards, and Such*, 68 Buff. L. Rev. 751 (2020) (criticizing the distinction).

21. *See* Kaplow, *supra* note 14, at 568–70 (sketching out his analytical framework).

22. On this definition, *see* Kaplow, *supra* note 15. *See also* Kaplow, *supra* note 14, at 586–90. Building on that in the context of default rules, *see also* Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. Cal. Interdisc. L.J. 1 (1993).

of the norm as a rule or a standard.[23] Rules can be complex or simple, depending on how the legislator wishes to regulate the subject matter, with complexity avoiding over- and under-inclusiveness but implying higher costs on the drafting and application stage.[24] Likewise, standards can be complex or simple, depending on the way in which a judge gives content to the law – by considering all relevant aspects or focusing just on few criteria.[25] However, even though both rules and standards can be complex or simple, rules tend to be simpler than standards. In other words, there is no *necessary link* between rules and internal simplicity on the one hand, and standards and internal complexity on the other, but a certain *affinity*.[26] Indeed, the legislator has to regulate for a big number of unknown cases, and is, therefore, constrained to focus on few criteria, whereas the judge can focus on one known case and examine this case in all its aspects.

Second, we can examine the issue of complexity not only – as Kaplow does – with regard to the information processed by legal norms but also with regard to the accessibility of the *ex ante* available framework. The use of "complexity" in everyday language can often be paraphrased in this way – for instance when we describe a math problem as "complex". We will refer to this kind of complexity as *external complexity*. In a legal context, we can capture external complexity by asking how easy it is to find orientation in the many rules and standards that constitute an area of law such as criminal justice.

At some point, a model based on many internally simple rules might well become externally more complex than a model based on internally complex standards. This can occur if the indeterminacy of a single standard is less significant than the confusion that results from the jungle of rules and counter-rules, all of them captured by one single

23. *See* Kaplow, *supra* note 14, at 565–7, 586–593; Ayres, *supra* note 22, at 13.

24. *Cf.* Kaplow, *supra* note 14, at 59; Kaplow, *supra* note 15, at 151.

25. Kaplow, *supra* note 14, at 566 ("A standard that one not drive at excessive speed might well permit consideration of dozens of factors. But if ninety-nine out of a hundred juries make their decisions based on the same two or three factors, although the other factors are relevant in principle, the *de facto standard* might usefully be described as a rather simple one.").

26. *But see id.* at 595–96, who suggests that there is not such affinity at all and that the degree of complexity (only) depends on the frequency of the case to be regulated. This is overly simplistic. Kaplow's analysis compares the *factors*, which are relevant for the decision. But these factors do not exhaust the information required to take a decision. Additional information is needed that indicates which *weight* to give to each factor. Standards allow a nuanced approach to each factor. In this nuanced and unarticulated weighting of factors, standards tend to process more information than rules. On how complexity and the rules-standards issue interact, *see also* Ayres, *supra* note 22, at 13–5.

standard.[27] The mechanism of tort law might illustrate this point. Just imagine a hypothetical set of rules which tries to regulate *ex ante* how to behave in every single situation as compared to the current reasonable-person-standard and its potential to regulate behavior *ex post*.[28] The hypothetical *ex-ante*-regulation will probably be internally less complex than the reasonable-person-standard, because *ex post*, it is possible to take into account the specificities of a case that has been unforeseeable *ex ante*. However, even though internally less complex, the hypothetical *ex-ante*-regulation will be externally more complex, because the detailed set of rules is more difficult to access than the intuitive reasonable-person-standard.

C. Structured Decision-making versus Free Balancing

Kaplow's most recent economic study on norm design is dedicated to different ways in which we can balance conflicting goals.[29] Whereas in free balancing, all elements that favor and disfavor a certain outcome are balanced against each other according to their value and probability, structured decision-making introduces thresholds and cuts off the analysis if a certain threshold is not passed.[30] Kaplow illustrates this distinction in the area of U.S. tort law, which determines negligence in a structured way: the harm occurred and the potential benefit from the harmful conduct are balanced, if and only if both the plaintiff and the defendant pass a certain threshold according to their respective burden of proof.[31] A free balancing approach would immediately compare harms and benefits according to their respective probabilities.

Just as we considered it useful to distinguish two types of complexity, we will also introduce two types of structuring. Consider, for instance, that we have to determine whether A exceeds B or $A > B$. A is the product of a certain legal value (v_a) and the respective probability of v_a actually being the case (p_a), so that we can say: $A = v_a p_a$.[32] The same

27. *Cf.* Hanna Almlöf & Per-Olaf Bjuggren, *A regulation and transaction cost perspective on the design of corporate law*, 47 Eur. J.L Econ. 407, 417 (2019) (underlining the need to compare a standard to a whole set of legal rules).

28. On the reasonable person standard, *see* Vaughan v. Menlove, 132 Eng. Rep. 490, 493 (1837); 3 Bing. N.C. 468, 475. On the potential of *ex-ante*-regulation in tort law by using Big Data, *see* Omri Ben-Shahar & Ariel Porat, Personalizing Negligence Law, 91 N.Y.U. L. Rev. 627 (2016). For a critique of that proposal, *see* Hans Christoph Grigoleit & Philip Bender, *The Law Between Generality and Particularity, in* Algorithmic Regulation and Personalized Law: A Handbook 115 (Alberto Alemanno & Christoph Busch eds., 2021).

29. Kaplow, *supra* note 16.

30. *Id.* at 1382.

31. *Id.* at 993.

32. Taking into account the probability of a certain factor actually being the case is not only common in economics according to the Expected Utility Theory (*see generally*

is true for B, i.e. $B = v_b p_b$. The threshold that leads to a structured way of decision-making can attach to the value of the elements considered (*value-structuring*) or to the probability of each element actually being the case (*probability-structuring*).

Let us first assume that there is no factual uncertainty ($p = 1$) and consider value-structuring. In this setting, the thresholds will concern the respective value (v_a or v_b) in the form of some legal qualifying requirements. In that case, we would consider A only if the value v_a exceeds a certain threshold t_a and B only if v_b exceeds a certain threshold t_b. First, we would inquire whether $v_a > t_a$ (step one). If not, we reach a solution (in favor of B). If yes, we would then examine whether $v_b > t_b$ (step two). If not, we would reach a solution (in favor of A). Only in a third step, we would balance A and B (step three). In contrast, free balancing would directly go to step three and compare the respective values at stake ($v_a > v_b$).

Let us now turn to a structured way of dealing with factual uncertainty and introduce probability-structuring. Probability-structuring would consider v_a and v_b only if p_a and p_b pass a certain threshold t. It would require to first determine whether $p_a > t_a$ (step one). If not, we would equal A with 0 and reach a solution (in favor of B). If yes, we would inquiry whether $p_b > t_b$ (step two). If not, we would put B equal 0 and reach a solution (this time in favor of A). Only if both thresholds are passed, we would now inquiry whether $v_a p_a > v_b p_b$ (step three). In contrast, free balancing would immediately inquire whether $v_a p_a > v_b p_b$. It is conceivable that even at this final stage, structuring persists so that only v_a and v_b are compared, deciding in favor of A if $v_a > v_b$. Once the probabilistic thresholds of steps one and two are passed, this extreme version of structuring would consider v_a and v_b in an all-or-nothing fashion at the final stage.[33] In that case, probability-structuring and free balancing could still lead to different outcomes even if step three is reached.

How is structuring connected to the previously introduced parameters of rules versus standards and complexity versus simplicity?

Richard A. Posner, Economic Analysis of Law 14 (9th ed. 2014)) but also in economically motivated legal reasoning (*see*, for instance, the so-called Learned Hand Test elaborated in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947), according to which the burden to prevent harm (B) is compared to the probability (P) and gravity (L) of the injury in order to determine negligence: $B < PL$).

33. To reference once more the so-called Learned Hand Test (*see supra*, note 32) to illustrate this point: extreme structuring would compare the gravity of harm (L) directly to the burden of preventing it (B) without multiplying it by the probability of injury (P), if this probability passes a certain threshold.

Whereas rules tend to pre-structure decision-making procedures, standards can either be filled in a free balancing way or by applying a structured decision-making process. Whereas, in principle, both procedures can rely on a high or low degree of internal complexity, structuring rules tend to limit the amount of information taken into consideration and, therefore, structuring tends to less internal complexity. The issue of external complexity depends on whether the structured decision-making takes the form of rules (high degree of external complexity) or standards (low degree of external complexity). When comparing legal systems in terms of structured decision-making and free balancing, it is important to keep in mind that subterfuges can exist, so that structured decision-making is *de facto* applied in a free balancing style.[34] The same is true the other way around. It is also possible that due to some biases, judges or juries engage in structured decision-making even though the law would allow free balancing.

D. The Rules-Model, the Standards-Model, and Discretion

Kaplow's studies suggest that the previously outlined parameters (rules versus standards, complexity versus simplicity, and structured decision-making versus free balancing) concern independent issues.[35] However, as we have seen, even though analytically independent, interconnections in the sense of affinities exist in between them: rules tend to keep internal complexity low where standards allow for high internal complexity; rules, if used excessively, tend to increase external complexity where standards can keep it low; rules tend to pre-structure decision-making where standards still keep the option for free balancing. Given these affinities, we can sketch out two different types of regulating an area of law, which I will call the rules-model and the standards-model: the rules-model is based on internally simple rules, which structure the decision-making process and lead to external complexity. In contrast, the standards-model relies on internally complex standards, which allow free balancing and lead to external simplicity.

Before applying the two models in a comparative setting, a final clarification is at place: the rules-model and the standards-model are models of norm design. They do not predetermine the overall degree of discretion in an area of law, but they incorporate it by different means.

34. *See* Kaplow, *supra* note 16, at 1062 (pointing to the fact that judges can engage in reverse engineering).

35. For rules versus standards and complexity, *see* Kaplow, *supra* note 14, at 595–96. In his article on structured decision-making versus free balancing, *see* Kaplow, *supra* note 16, he does not discuss the relationship to his previous studies.

The rules-model tends to allow discretion where the commands of the rule end. It adopts an all-or-nothing approach based on clear-cut rules. In contrast, the standards-model incorporates discretion by using vague notions. Thus, in an area of law that follows the standards-model, discretion is not addressed openly but hidden behind the presumably scientific task of concretizing a pre-given legal notion. Therefore, it is not the degree of discretion that distinguishes both models – it is the different way in which they implement discretion, i.e. the difference in norm design.

The distinction between the rules-model and the standards-model are not only a tool to understand a specific area of domestic law. It also provides a key to understand the differences that exist between legal systems. Indeed, comparative law should not only be concerned with the content of legal rules but also with the specificities of norm design – it should also be *comparative norm design*.

II. Comparative Norm Design in Action: The Criminal Justice System of the United States and Germany

In this part, I exemplify the approach of comparative norm design with regard to the norms governing criminal justice in the United States and Germany. Thus far, institutions of criminal justice have been compared mainly under angles other than norm design.[36] If issues of norm design played a role at all in this comparative analysis, authors tend to underline U.S. flexibility and German rigidity.[37] I want to relativize this overbroad characterization and suggest that the criminal justice system of the United States can be understood as following the rules-model, whereas German criminal justice is closer to the standards-model. Thereby, I analyze four different institutions of the criminal justice system in the United States and Germany, representing different stages of the trial and the "law in books" as well as "the law in practice"[38]: (1) exclusionary rules, (2) the determination of the credibility of witnesses, (3) sentencing, and (4) plea-bargaining. I conclude the outline by offering (5) a word on discretion in both systems.

A. Exclusionary Rules

The exclusionary rules of each legal system need to strike a balance between the costs (especially in terms of truth) and benefits

36. *See supra* notes 1–7.
37. *See supra* note 10.
38. On the choice of examples, *see supra* note 17 and accompanying text.

(especially in terms of fairness) of excluding evidence.[39] However, these same goals are pursued by slightly different means in terms of norm design.

1. U.S. Exclusionary Rule and Fruit of the Poisonous Tree Doctrine

According to the need to balance truth and fairness when excluding evidence, the U.S. Supreme Court conceives exclusionary rules as no automatism. Rather, it requires a balancing that depends on the culpability of the police and the potential of the exclusion to deter wrongful conduct, as well as the costs of excluding the evidence.[40] However, in practice, cases are normally solved by applying detailed exclusionary rules previously formulated in concretization of this balancing requirement. As a matter of principle, U.S. exclusionary rules assume that evidence obtained in violation of the rights of the defendant is inadmissible. In addition, according to the fruit of the poisonous tree doctrine, all evidence obtained based on information accessible only through the evidence illegally obtained is also inadmissible.[41]

This broad formulation of the exclusionary rule is relativized by several counter-rules. First of all, the exclusionary rule only excludes tainted evidence: if the evidence was obtained through an independent act with no link to the initial misconduct, this evidence will be admissible.[42] Evidence will thus be admissible if the causal link was attenuated by an intervening act or circumstance,[43] especially an intervening act of free will of the accused.[44] Second, it is important to note that its scope is quite limited: the fruit of the poisonous tree doctrine does not apply for violations of Miranda warnings[45] in that physical evidence

39. *See* Bender, *supra* note 5; Jescheck, *supra* note 1, at 240.

40. Herring v. United States, 555 U.S. 135, 141 (2009). *See also* United States v. Leon, 468 U.S. 897, 911 (1984).

41. Silverton Lumber Co. v. United States, 251 U.S. 385 (1920). *See also* Nardone v. United States, 308 U.S. 338 (1939); Wong Sun v. United States, 371 U.S. 471 (1963); Taylor v. Alabama, 457 U.S. 687 (1982).

42. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). *See also* Kenneth Harris, *Verwertungsverbot für mittelbar erlangte Beweismittel: Die Fernwirkungsdoktrin in der Rechtsprechung im deutschen und amerikanischen Recht*, 1991 Strafverteidiger [StV] 315, 316–7. One might well see this counter-rule as a restrictive reformulation of the exclusionary principle rather than an exception to it.

43. Brown v. Illinois, 422 U.S. 590 (1975). Of course, if the link is completely missing because the evidence was obtained from a completely independent source, it is admissible as well, *see* Murray v. United States, 487 U.S. 533 (1988).

44. Wong Sun v. United States, 371 U.S. 471 (1963). On the attenuation, *see also* Harris, *supra* note 42, at 315–6.

45. United States v. Patane, 542 U.S. 630 (2004).

derived from confessions obtained in violation of the Miranda warnings is admissible. A violation of the knock and announce rule in case of a search will also not lead to the exclusion of evidence.[46] Moreover, the exclusion of evidence requires a violation of federal constitutional rights of the criminal defendant and, therefore, does not apply to violations of state law[47] or internal agency rules.[48] The exclusionary rule is as well inapplicable in grand jury[49] or parole revocation proceedings[50] and it does not necessarily exclude the evidence for the purpose of witness impeachment.[51] The same is true for live witness testimony[52] and in-court identifications.[53] Third, the evidence will be admissible if legal discovery had been inevitable (inevitable discovery),[54] or if police officers acting in good faith relied upon a defective, but apparently authoritative judicial search warrant, judicial decision or statute (good faith exception).[55] Finally, to appeal a judgment based on prosecutorial misconduct, the defendant has to show how this affected the outcome to her detriment (harmless error test).[56] Given all these, one can ask whether it is still useful to formulate the fruit of the poisonous tree doctrine as the principle rather than the exception.[57] In any case, a set of rules and counter-rules formalizes the exclusion of evidence in U.S. criminal procedure.

2. German Balancing

Like in the United States, the German system recognizes the need to balance the costs and benefits of an exclusion of evidence. The German Federal Court of Justice (*Bundesgerichtshof*) points to the need

46. Hudson v. Michigan, 547 U.S. 586 (2006).

47. Virginia v. Moore, 553 U.S. 164 (2008).

48. United States v. Caceres, 440 U.S. 741 (1979).

49. United States v. Calandra, 414 U.S. 338 (1974). An exception applies for evidence obtained in violation of the federal wiretapping statute, Gelbard v. United States, 408 U.S. 41 (1972).

50. *See* Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357 (1998) (in general with regard to the exclusionary rule).

51. Harris v. New York, 401 U.S. 222 (1971); Oregon v. Hass, 420 U.S. 714 (1975); United States v. Havens, 446 U.S. 620 (1980).

52. United States v. Ceccolini, 435 U.S. 268 (1978).

53. United States v. Crews, 445 U.S. 463 (1980).

54. Nix v. Williams, 467 U.S. 431 (1984). *See also* Harris, *supra* note 42, at 317.

55. United States v. Leon, 468 U.S. 897 (1984); Massachusetts v. Sheppard, 468 U.S. 981 (1984). *See also* Herring v. United States, 555 U.S. 135, 142 (2009).

56. *See, e.g.*, Chapman v. California, 386 U.S. 18 (1967).

57. Similarly Joachim Hermann, *Neuere Entwicklungen in der amerikanischen Strafrechtspflege,* 54 Juristenzeitung [JZ] 602, 609 (1985) (especially with regard to the good faith exception and interpreting the many exceptions as a general tendency of being harsher on crime).

to balance the interest of society to determine the truth and the interest of the defendant in safeguarding her rights. This balancing also depends on the severity of the violation of the procedural rules by public officials.[58] Being reluctant to choose the all-or-nothing solution of exclusion, German courts also consider alternative paths of dealing with the procedural violation, such as a reduction in the punishment[59] or a stricter approach in appreciating the convincing nature of the evidence.[60] In contrast to U.S. criminal procedure, this balancing not only describes the rationale of exclusionary rules, but it is to be performed in each single case according to its specificities. There is no rule-like principle of exclusion, which requires detailed counter-rules. Of course, there are also some tendencies for typical cases. Typically, for instance, indirectly tainted evidence is not excluded (no fruit of the poisonous tree doctrine, i.e. no *Fernwirkung*).[61] This principle also has some rule-like exceptions, notably in areas that involve privacy issues[62] or in case the initial violation somehow persists (*Fortwirkung*)[63]. But in general, litigation revolves more around balancing the costs and benefits of excluding evidence in the light of the overall goals of criminal procedure (truth and fairness).[64] It is this balancing that characterizes the German way of dealing with the exclusion of evidence.

58. *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 11, 1998, 1999 Neue Juristische Wochenschrift [NJW] 959, 961. *See also* 51 Entschedungen des Bundesgerichtshofes in Strafsachen [BGHSt] 285 (para. 20); Harris, *supra* note 42, at 318.

59. *See* 51 BGHSt 52, 55 *et seq*. (so-called *Vollstreckungslösung*).

60. *See* 46 BGHSt 93 (so-called *Beweiswürdigungslösung*).

61. On that, *see, e.g.*, 31 BGHSt 304, 308–09; 48 BGHSt 240, 248. *See also* 27 BGHSt 355, 357; 34 BGHSt 362, 364; Roxin & Schünemann, *supra*, note 3, at § 24 ¶¶ 59–60. In the end, however, and as we will see, this depends on pondering different factors. One aspect here is—like in U.S. criminal procedure—the question of whether the evidence hypothetically could have been obtained legally. On that, *see* 32 BGHSt 68; Harris, *supra* note 42, at 320–21.

62. *See*, *e.g.*, 27 BGHSt 244, 247: not only is the information obtained through illegal wiretapping inadmissible but also all further evidence obtained on the basis of this information. *See also* Strafprozessordnung [StPO] [German Code of Criminal Procedure], § 100d, para. 2, sentence 1 (Ger.), *translation at http://www.gesetze-im-internet.de/englisch_stpo/*. The same is true for information that belongs to the core of privacy, which cannot be used, even if obtained in the context of *legal* wiretapping. On the constitutional background, which requires its interpretation in the sense of the fruit of the poisonous tree doctrine, *see* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 109 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 279, 331–33. Inadmissibility even applies in the case of *legal* behavior of authorities, which shows that sanctioning authorities is not the goal here. On that point, *see also* Harris, *supra* note 42, at 318.

63. On that, *see* 31 BGHSt 304, 308–09; 48 BGHSt 240, 248.

64. Bender, *supra* note 5.

3. Comparison in the Light of the Rules-Model and the Standards-Model

After the previous outline of exclusionary rules in the United States and Germany, we can turn to the parameters introduced in Part I and show how, as a matter of tendency, U.S. exclusionary rules can be interpreted in the light of the rules-model and German norms governing the same issues in the light of the standards-model.

Rules versus standards. With regard to the first parameter, we can observe that the United States starts with a rule (exclusion of tainted evidence) and carves out exceptions for specific situations (for instance, admission in case of inevitable discovery).[65] In contrast, the German system is – also on the application level – dominated by the broad balancing test, which is based on standards such as "intensity of violation of defendant's rights."[66] Thus, we can relativize comparative scholarship that thinks of European systems of criminal procedure as rule-like.[67]

Complexity versus Simplicity. With regard to the issue of complexity, we could observe that the U.S. exclusionary rules limit the factors a judge can consider when deciding on whether to exclude evidence or not (low *internal complexity*). But the many rules and counter-rules require a big information effort by the participants of the criminal process (high external complexity). German balancing is open to include more information (high *internal complexity*) but requires legal participants to know fewer rules (low *external complexity*).

Structured Decision-making versus Free Balancing. Analyzing exclusionary rules under the aspect of the third parameter, it might be possible to interpret U.S. exclusionary rules as a form of value-structuring concerning the balancing of benefits in terms of fairness (A) and costs in terms of truth (B) of the exclusion of evidence. In simplistic terms, we could restate U.S. exclusionary rules in the following way: on a first level, determine whether constitutional law (as opposed to other types of law such as, for instance, state law[68] or the law constituted by internal agency rules[69]) has been violated. This requirement can be conceptualized as a qualitative threshold attaching to the value of the violation ($v_a > t_a$). On a second level, determine whether an

65. *Supra* note 54.

66. *Supra* note 58.

67. *See, e.g.*, Damaška, *supra* note 6, at 487 ("preference for precise and rigid normative directives"), 502 ("quite reluctant to be satisfied with vague principles and policies as guidelines for conduct").

68. *Moore*, 553 U.S.

69. *Caceres*, 440 U.S.

exception applies, such as inevitable discovery[70] or good faith in the warrant-context[71] ($v_b > t_b$). If yes, the evidence is not excluded. On a third level, there might be some background balancing, if there is a qualified violation without a qualified exception ($v_a > v_b$).[72] But at least in practice, many cases will have already been decided based on previously applicable threshold rules. In contrast, even though we also find some typification in Germany, the interest of society to punish and the severity of the violation of the rights of the defendant are more or less freely balanced.[73] Aspects that became rules in the U.S. are only considered as factors within this free balancing.

A final word on structuring might further underline the differences between the United States and Germany. Indeed, we might find *de facto* free balancing in German criminal procedure, even if legal structures exist. For instance, in both countries, inadmissible evidence cannot serve as the basis for conviction. However, in the United States, these procedural structures have an institutional safeguard: in principle, the jury never sees inadmissible evidence because the judge decides on the issue in pre-trial hearings.[74] This is true for the above-mentioned exclusionary rule due to violations of procedural safeguards, but it also applies to other reasons for excluding evidence, such as unduly inflammatory evidence[75]. In Germany, these institutional safeguards do not exist: the same judge decides on the admissibility of evidence and guilt in one hearing. It is at least possible that unconsciously, the knowledge of inadmissible evidence influences how this judge evaluates the credibility of witnesses. Thus, even if we find *de jure* elements of structured decision-making, German criminal procedure might tend *de facto* to free balancing.

B. Determination of the Credibility of Witnesses

Let us now examine how the credibility of witnesses is dealt with in both systems of criminal justice. As we will see, both systems grant the decision-maker broad discretion in its appreciation of the evidence. But the procedural rules that guide the decision-maker on its path to

70. *Nix*, 467 U.S.

71. *Herring*, 555 U.S. at 142.

72. *Supra* note 40.

73. *Supra* note 58.

74. *See* Jescheck, *supra* note 1, at 243 (underlining the absence of the jury in Germany as the main difference between to U.S. criminal procedure).

75. *See* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

taking the decision reveal differences which – again – can be explained in terms of the rules-model and the standards-model.

1. The U.S. Impeachment Procedure

In the U.S. criminal system, it is the jury that determines the credibility of a witness without any need to state reason.[76] Considering the totality of admitted evidence,[77] the jurors have to be convinced of a certain story beyond reasonable doubt.[78] However, a whole set of detailed rules of evidence formalizes the issue of credibility previous to the decision-making.[79] According to these rules, a witness can be impeached in certain cases. These cases include prior inconsistent statements,[80] the character of truthfulness of the witness in a broad sense,[81] determined through certain prior convictions[82] or bad reputation or opinion,[83] and specific case-related information such as bias, interest or motive.[84] If one party tries to impeach the witness, the other party can react and seek to rehabilitate her, e.g. by pointing to prior consistent statements[85] or by proofing her good character for truthfulness.[86] The result of a successful impeachment is not the exclusion of the witness. Impeachment simply affects the credibility of the witness.[87] But the factfinder is likely to give significant weight to a successful impeachment – not only due to the legal importance of this procedural tool[88] but also because jurors might be subject to behavioral anchoring concerning the untrustworthiness of the witness.[89]

76. *See* Kagan, *supra* note 7, at 87; *see also* Damaška, *supra* note 6, at 492.

77. Emblematically for the German system, *see* StPO, § 261.

78. On the standard of proof "beyond reasonable doubt," *see, e.g.*, Coffin v. United States, 156 U.S. 432 (1895); In re Winship, 397 U.S. 358 (1970).

79. On witnesses, *see* Fed. R. Evid. 601–15.

80. *See* Fed. R. Evid. 613. In detail Steven Lubet, *Understanding Impeachment*, 15 Am. J. Trial. Advoc. 483, 482 *et seq.* (1992). *See also* Mason Ladd, *Some Observations on Credibility Impeachment of Witnesses*, 52 Cornell L. Rev. 239, 245–255 (1967).

81. Lubet, *supra* note 80, at 530–35.

82. *See* Fed. R. Evid. 609.

83. Fed. R. Evid. 608(a).

84. Lubet, *supra* note 80, at 535–39.

85. Ladd, *supra* note 80, at 225–26.

86. *See* Fed. R. Evid. 608(a

87. On this consequence of impeachment, *see* Lubet, *supra* note 80, at 485.

88. This importance is illustrated by the case Jencks v. United States, 353 U.S. 657 (1957), in which the U.S. Supreme Court ordered a new trial because relevant documents were not disclosed. On that, *see* Ladd, *supra* note 80, at 256.

89. On anchoring, *see* Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 Sci. 1124, 1128–30 (1974). *See also* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 Cal. L. Rev. 1051, 1100–02. (2000); Richard H. Thaler & Cass R. Sunstein, Nudge: Improving Decisions About Health, Wealth, and

2. The German Lack of Procedural Rules of Impeachment

In German criminal procedure, no such rules of impeachment exist.[90] The court might take all of the mentioned grounds of impeachment into consideration, but it determines the credibility of the witness according to the general principle of German Code of Criminal Procedure (*Strafprozessordnung [StPO]*), § 261: "at its [the court's] discretion and conviction based on the entire content of the hearing."[91] It also has to be convinced of a story beyond reasonable doubt,[92] and it decides discretionary, like the jury. But it does so without having a set of rules that procedurally capture the determination of credibility and that might lead to anchoring. If one were to find an equivalent of the impeachment procedure, it would simply be the right of the parties to ask questions (German Code of Criminal Procedure, § 240 para. 2) and especially to make their concluding remarks (German Code of Criminal Procedure, § 258), in the context of which they could point out to the circumstances which in the U.S. constitute grounds of impeachment.

3. Comparison in the Light of the Rules-Model and the Standards-Model

Let us now examine the procedural rules that precede the discretionary appreciation of the probatory value of the evidence in light of the rules-model and the standards-model, analyzing its three parameters.

Rules versus Standards. In U.S. criminal procedure, precise rules govern the process of impeachment.[93] Of course, the factfinder might still give the testimony some weight[94] – just like the balancing latently persists in the background of exclusionary rules.[95] But thinking goes much more in terms of rules and counter-rules. We start the reasoning with the credibility of the witness (rule), impeach the witness by showing that she made a prior inconsistent statement[96] (counter-rule),

---

Happiness 23–4 (2d ed. 2009); Andreas Bernecker, Essays in Empirical Political Economy 96–117 (2014) (Ph.D Dissertation, Universität Mannheim).

90. In general on the absence of rules of evidence in Germany, *see* Jescheck, *supra* note 1, at 244–45; Damaška, *supra* note 6, at 526.

91. On that, *see also* Roxin & Schünemann, *supra* note 3, at § 45 ¶ 43.

92. In Germany, the court needs to be convinced of the facts, *see* Roxin & Schünemann, *supra* note 3, at § 45 para. 43. "Mathematical certainty" is not required, *see* BGH, 1951 NJW 83. Like in the United States, it is enough that "reasonable doubts" do not persist.

93. *See e.g.*, Fed. R. Evid. 601–15.

94. *Supra* note 87.

95. *Supra* note 40.

96. *Supra* note 80.

and allow rehabilitation through prior consistent statements[97] (counter-counter-rule). This sharply contrasts with German Code of Criminal Procedure, § 261, which simply refers to the "discretion" and "conviction" of the judge, and the rights of the parties to ask questions or make their final remarks.

Complexity versus Simplicity. Using the terminology introduced before that distinguishes between internal and external complexity[98], we can again relativize the mainstream tendency associating the U.S. system with complexity and the German system with simplicity.[99] Rather, we can confirm the observation gained with regard to exclusionary rules and describe U.S. rules as internally simple and only externally complex. Indeed, U.S. rules on the impeachment of witnesses are based on only a few aspects that will bias the jury in one direction or the other. The German discretionary approach is, from the very outset, open to considering more aspects than those captured by the rules of impeachment. However, even though *internally* less complex, U.S. rules of impeachment are *externally* more complex than the corresponding German standard. Indeed, they have to frame the relevant information in the form of rules and counter-rules *ex ante*, where we only have to deal with one statutory standard in Germany.[100]

Structured Decision-making versus Free Balancing. We can now examine the rules of impeachment as a *de facto* example for probability-structuring. In theory, the jury verdict allows for free balancing.[101] However, as pointed out before, the adversarial impeachment procedure might invite jurors to think in an all-or-nothing approach, because the mere denomination of a procedure as "impeachment" and its elements aiming at showing untrustworthiness might strongly bias jurors in one direction or the other.[102] *De facto*, impeachment might lead to some sort of structuring, with step one consisting, for instance, in the determination of whether a prior inconsistent statement was made ($p_a > t_a$), step two in whether a prior consistent statement was made ($p_b > t_b$), and step three in balancing inconsistent and consistent statement against each other. In the extreme case of structuring, the jury would disregard any factual uncertainty and assume that both elements at this last step

97. *Supra* note 85.

98. *Supra* notes 22–27.

99. *Supra* notes 12–13.

100. For a discussion on the complexity of the U.S. legal system (which we can– in our terminology– describe more precisely as external complexity), see Kagan, *supra* note 7, at 12. See also Damaška, *supra* note 6, at 526.

101. *Cf.* Kagan, *supra* note 7, at 73, 87.

102. On anchoring, *see supra* at 89.

are certain (p = 1), since they already passed the thresholds of step one and two. Then, it would simply inquiry, whether $v_a > v_b$. The thinking of a German judge cannot anchor at these procedurally defined steps of impeachment because they do not exist. Thus, the German judge might be more likely to directly engage in free-floating balancing. After having heard all witnesses, she will determine, in the retrospective, which witness is credible, depending on whether $v_a p_a > v_b p_b$.

C. Sentencing

Let us now have a brief look at the sentencing stage. The sentencing area has previously received scholarly attention, underlining the broad discretion of the German judge[103] as compared to the guidance that is provided for U.S. judges.[104] We revisit these results based on the rigid notional framework of comparative norm design.

1. U.S. Sentencing Enhancement Statutes and Federal Sentencing Guidelines

In the United States, sentencing enhancement statutes and sentencing guidelines largely limit the discretion of the judge.[105] Sentencing enhancement statutes mandate the judge to pronounce a previously specified punishment. Most (in)famously, the California "three strikes and you are out" statute, inspired by the criminological approach of selective incapacitation,[106] obliges the judge to pronounce a prison sentence of 25 years to life if the defendant is convicted of three violent or

103. *See* Tanja Hörnle, *Moderate and Non-Arbitrary Sentencing Without Guidelines: The German Experience*, 76 L. & Contemp. Probs. 189 (2013). *Contra* Johannes Kaspar, *Sentencing Guidelines vs. Free Judicial Discretion – Is German Sentencing Law in Need of Reform? In* Strafzumessung/Sentencing: Angloamerikanische und deutsche Einblicke/Anglo-American and German Insights 338–341 (Kai Ambos ed., 2020).

104. *See* Kaspar, *supra* note 103, at 345–347 (2020); Kagan, *supra* note 7, at 85 [proposition is weakly supported]; William T. Pizzi, *Sentencing in the US: An Inquisitorial Soul in an Adversarial Body? in* Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška 65–80 (John Jackson et al., eds., 2008). *See also* Ely Aharonson, *Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in the Regulation of Sentencing Discretion*, 76 L & Contemp. Probs 161, 166–172 (2013). For an overview, underlining the diversity in sentencing in different states, see Rhys Hester, *Sentencing in US-American Jurisdictions, in* Strafzumessung: Angloamerikanische und deutsche Einblicke [Sentencing: Anglo-American and German Insights] 151 (Kai Ambos ed., 2020).

105. *See* Kagan, *supra* note 7, at 83. In detail on sentencing guidelines in the United States, *see* Kaspar, *supra* note 103, at 345–47.

106. *See* Kathleen Auerhahn, *Selective Incapacitation, Three Strikes, and the Problem of Aging Prison Populations*, 1 Crim. & Pub. Pol'y 353, 358 (2002); Lisa Solzenberg & Stewart J. D'Alessio, *"Three Strikes and You're Out": The Impact of California's New Mandatory Sentencing Law on Serious Crime Rates*, 43 Crime & Delinq. 457 (1997).

serious felonies.[107] Federal sentencing guidelines are not binding for the judge.[108] Nonetheless, they lead to anchoring because judges will tend to stick to these punitive benchmarks.

2. The German Lack of Binding or Guiding Sentencing Rules

The previously outlined, rule-like U.S. approach contrasts with German judicial discretion in sentencing.[109] There are no sentencing enhancement statutes, which would very likely be viewed as contrary to the German constitutional principle of culpability or guilt-adequacy (*Schuldprinzip*). According to this principle, which even originates in human dignity, the corner stone of the German constitution, the punishment has to be proportionate to the individual guilt of the criminal defendant.[110] There are even hardly any non-binding sentencing guidelines.[111] Instead, each criminal offense indicates a very broad scope within which the punishment is determined at the discretion of the judge.[112] The offense of inflicting bodily harm on someone – the equivalent of assault and battery – might illustrate this point. German Penal Code (*Strafgesetzbuch [StGB]*), § 223, which contains the said offense, reads as follows: "Whoever physically assaults or damages the health of another person incurs a penalty of imprisonment for a term not exceeding five years or a fine." If the offense is qualified as dangerous, e.g.

107. *See, e.g.*, Cal. Penal Code, § 667(e)(2)(A) (2020).

108. *See* U.S. v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004) (the guidelines published by the U.S. Sentencing Commission are considered *de jure* advisory only).

109. *See also* Hörnle, *supra* note 2, at 188 (describing German sentencing as a "black-box system"). *Contra* Kaspar, *supra* note 103, at 338–41.

110. On the foundation of the principle of culpability (*Schuldprinzip*) in German constitutional law, more precisely in human dignity, autonomy, and the rule of law, *see, e.g.,* Thomas Grosse-Wilde, *Criminal Sentencing in Canada and Germany: Law without Order? A Commentary from a German Perspective, in* Strafzumessung: Angloamerikanische und deutsche Einblicke [Sentencing: Anglo-American and German Insights] 282 (Kai Ambos ed., 2020). On sentencing enhancement statutes likely being unconstitutional in Germany, *see* Jörg Frick & Philipp Wissmann, *Strafzumessungsüberlegungen im Steuer und Zollstrafrecht: Das ewige Ärgernis*, 2018 Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht [NZWiSt] 438, 440; Franz Streng, *Sentencing in Germany: Basic Questions and New Developments*, 8 German L.J. 153, 154 (2007); Clara Herz, *Striving for Consistency: Why German Sentencing Needs Reform*, 21 German L.J. 1625, 1647 (2020). On constitutional issues related to minimum sentences in the Canadian context, see Benjamin L. Berger, *Judicial Discretion and the Rise of Individualization: The Canadian Sentencing Approach, in* Strafzumessung: Angloamerikanische und deutsche Einblicke [Sentencing: Anglo-American and German Insights] 259 (Kai Ambos ed., 2020).

111. *See* Herz, *supra* note 110, at 1625–26 (only for certain minor infringements against coronavirus or road traffic regulations, non-binding guidelines for fines exist).

112. In general, on these broad statutory sentencing ranges and judicial discretion in German sentencing, *see id.* at 1630–32 (criticizing the resulting disparity in sentencing practice).

because a weapon or another tool was used, the range of imprisonment goes from six months to ten years.[113] The judge is supposed to fill this immense discretionary field by reference to the rather vague notions of German Penal Code, § 46 para. 1: "The offender's guilt provides the basis on which the penalty is fixed. The effects which the penalty can be expected to have on the offender's future life in society are to be taken into account."

3. Comparison in the Light of the Rules-Model and the Standards-Model

Once more, the rules-model and the standards-model can explain the differences in norm design quite plausibly. The three parameters of the rules-model and the standards-model specify in what way exactly German discretion at the stage of sentencing plays out.

Rules versus Standards. Sentencing enhancement statutes lead to a *de jure*, federal sentencing guidelines to a *de facto* rulification in the United States. In contrast, German sentencing law is based on the vague standard of guilt-adequacy, contained in German Penal Code, § 46 para. 1. As we have seen, the proportionate relation between the punishment and the individual guilt of the criminal defendant is even a constitutional principle under German law.[114]

Complexity versus Simplicity. Sentencing enhancement statutes and sentencing guidelines decrease internal complexity, because they limit the number of factors to be considered to the level of information available and digestible *ex ante*. German guilt-adequacy is standard-like precisely because no such limitation is wanted. The judge shall decide *ex post* by considering as much information as possible. As to external complexity, the picture is different. Those that want to gain an overview of sentencing law in both countries find a plethora of norms in the U.S., whereas they only find some vague standards in Germany. In conclusion, sentencing confirms the observation gained before: Germany combines high internal complexity with low external complexity, the U.S. low internal complexity with high external complexity.

Structured Decision-making versus Free Balancing. U.S. sentencing enhancement statutes cut off all possibility of balancing. Instead of structured balancing, we find no balancing at all since there is no step three. The decision-making simply consists in the application of certain

113. On that, *see* Strafgesetzbuch [StGB] [Criminal Code] § 224 (Ger.), http://www.gesetze-im-internet.de/englisch_stgb [https://perma.cc/KA2T-L37N].

114. *See supra* note 110.

binding rules.[115] Federal sentencing guidelines are not binding: the judge can deviate *de jure*, but *de facto*, they lead to anchoring and also structure decision-making.[116] In that sense, they have similar effects as the procedural rules of impeachment.[117] In contrast, sentencing is the stage where German judges probably enjoy the most discretion, pondering and balancing all sorts of aspects.

Just as we can see sentencing guidelines as an element of *de facto* structuring in the United States, we can again point to further elements of *de facto* free balancing in Germany, which are due to the lack of a jury trial. Indeed, whereas in the United States, two different institutions determine guilt (jury) and punishment (judge)[118], the German judge decides on the admissibility of evidence, guilt, and the final punishment in the very same hearing.[119] Thus, it is at least possible that other factors than those indicative of culpability play a role in how harsh the final sentence is. For instance, persisting "unreasonable" doubt as to whether the accused really did what she is accused of might incline the judge to give a more lenient sentence.

D. Plea Bargaining

In the United States, the biggest part of litigation is disposed of by plea bargaining. This fact can be seen as a consequence of the rules-model. Indeed, as we have seen, the rules-model is characterized by a high degree of external complexity. To avoid the significant costs of this external complexity, parties tend to "contract" around the U.S. adversarial criminal justice system.[120] Thus, the importance of plea bargaining in the United States confirms the previous analysis, notably the issue of external complexity: plea bargaining is a substitute of the black letter rules-model. In the following lines, however, I do not only want to show that the rules-model and plea bargaining are connected in this specific way. I want to suggest that plea bargaining as it is practiced in the United States itself largely follows the characteristics of the rules-model. Similarly, the German equivalent – confession

115. *Supra* notes 105–07.

116. *Supra* note 108.

117. On anchoring in the context of impeachment, *see supra* note 89.

118. On this central feature of the U.S. criminal justice system, *see* Jescheck, *supra* note 1, at 243–45. On the constitutional origins of the right to trial by jury in criminal cases, *see* U.S. Const. art. 3, § 2; *id.* at amend. VI. This right does not apply to petty offenses, where imprisonment is for six months or less, *see* Baldwin v. New York, 399 U.S. 66 (1970); District of Columbia v. Clawans, 300 U.S. 617 (1937).

119. In the United States, the only way to create a relationship between the determination of guilt and punishment is through plea bargaining.

120. *See* Langbein, *Land, supra* note 13.

bargaining – exhibits several traits which can be explained using the standards-model.

1. U.S. Plea Bargaining

In the United States, the defendant can plead guilty and thereby avoid the jury trial, which determines the guilt in case the defendant pleads not guilty.[121] The plea is based on the consent of the defendant. This guilty plea can be part of an agreement between the defendant and the prosecution, according to which the prosecution agrees to one of three possible things: (i) not to bring or to move to dismiss other charges[122] (*charge agreements*), (ii) not to oppose a certain sentence request[123] (*sentence agreement* not binding the court), or (iii) even agree on a certain sentencing request[124] (*sentence agreement* binding the court). Also a mix of these agreements is possible (*mixed agreement*).[125] The Federal Rules of Criminal Procedure dedicate relatively few norms to plea bargaining. The scope of what can be part of an agreement is very broad. Even sentencing guidelines normally applicable can be set aside.[126] The Justice Manual of the U.S. Department of Justice specifies how the prosecution side should act.[127] But substantive provisions of review are generally lacking.

2. German Confession Bargaining

In Germany, things are quite different. Initially, German criminal procedure did not mention any form of dealing or bargaining at all – to the point that Germany could be described as "land without plea bargaining."[128] The judge was supposed to decide on the basis of law and evidence alone. In that vein, even a confession does not relieve the judge of the duty to investigate what really happened.[129] Even in

121. For the sake of plea bargaining, guilty pleas and nolo contendere pleas largely have the same effects, namely to cut off the jury trial. For the sake of simplicity, we will concentrate on guilty pleas. On the different options, *see* Fed. R. Crim. Proc. Rule 11(a).

122. Fed. R. Crim. Proc. Rule 11(c)(1)(A).

123. Fed. R. Crim. Proc. Rule 11(c)(1)(B).

124. 18 U.S.C. App. Fed. R. Crim. Proc., Rule 11(c)(1)(C).

125. On charge, sentencing and mixed agreement, *see* U.S. Dept. of Just., Just. Manual § 9–27.400.

126. Indeed, according to U.S. Sent'g Guidelines Manual § 6 B1.2.(b)(2), (c)(2) (U.S. Sentencing Comm'n 2012), the court may accept the agreement if the court is satisfied that the agreed sentence is outside the applicable guideline range for a justifiable reason and those reasons are set forth with specificity in the statement of reasons form.

127. U.S. Dept. of Just., Just. Manual § 9–16.000.

128. Langbein, *Land, supra* note 13. *See also* Bender, *supra* note 5 (on the following outline).

129. Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 Harv. Int'l

the German system, however, cooperation by the defendant with the prosecution, e.g. by confessing, has always been a well-established mitigating factor in determining the punishment.[130]

Now, the picture is not as simple anymore. An article from 1982, published under a pseudonym, drew attention to informal dealing in the German criminal system at least since the seventies.[131] Instead of the guilty plea, the defendant offers a confession,[132] and it is the active court of the German system that takes a central place in these negotiations, not only the parties as in the United States.[133] Even though the German confession-dealing adapted to the specificities of German criminal procedure and takes quite different forms from U.S. plea bargaining, frictions and irritations remain.[134] Isn't there an irreconcilable tension between the deal and the idea of seeking truth, if the very nature of the deal is to economize on investigative efforts (truth-problem)?[135] Moreover, isn't there a conflict between the idea of achieving a punishment proportionate to the guilt of the defendant, if it is inherent to the deal that punishment deviates from guilt? In case the defendant actually

L.J. 1, 11, 37 (2004). *See also* Jescheck, *supra* note 1, at 247–48.

130. *See, e.g.,* Langbein, *Land, supra* note 13, at 221 (relativizing his earlier claim that there is no reduction in punishment for a confession); Langer, *supra* note 129, at 42. The legal basis is StGB, § 46(2), point 7, which authorizes the court to take the offender's conduct in the period following the offense into consideration. The rewarded cooperation does not only concern the defendant's own proceedings. If she helps to uncover other crimes, the option to reduce punishment is even more official and substantial, recognized by StGB, § 46b. In addition to the sentencing proceeding, this mitigating aspect of cooperation can also explain the greater leniency towards the accused in alternative proceedings to the trial hearing, such as the penal order proceeding (*Strafbefehlsverfahren*) or disposition of the case according to limited prosecutorial discretion, e.g. against payment of a fine. On the Penal Order Proceeding, *see* Langbein, *Land, supra* note 13, at 213–18. On the limited role of the principle of expediency (*Opportunitätsprinzip*) for the disposition of petty crimes, *see* Langbein, *Land, supra* note 13, at 223–24 (at 224 referring to StPO, § 153a, as "a mild form of plea bargaining").

131. Detlef Deal, *Der strafprozessuale Vergleich*, 1982 StV 545. The real name of the author is Hans-Joachim Wieder.

132. Langer, *supra* note 129, at 40.

133. *Id.* at 40–41. *See also* Gwladys Gilliéron, *Comparing Plea Bargaining and Abbreviated Trial Procedures, in* The Oxford Handbook of Criminal Process 713 (Darryl K. Brown, Jenia I. Turner & Bettina Weisser eds., 2019).

134. On irritations caused by legal transplants, *cf.* Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 Mod. L. Rev. 11 (1998). According to Langer, *supra* note 129, at 39, the German deal rather developed due to the practical needs of the German system than due to the (foreign) influence of American criminal procedure. It is still an institution that is atypical for the German system, and, thus, cannot be explained without taking notice of some "irritations" typical for migrating legal institutions.

135. On this conflict, *see* Roxin & Schünemann, *supra* note 3, at § 17 para 20; Langer, *supra* note 129, at 39.

committed the crime, she should receive no reduction in punishment; in case she didn't, she should receive no punishment at all (proportionality-problem).[136] Finally, isn't the deal incompatible with the active, inquisitorial judge of the German system, whose dominant procedural position was designed to lead an inquisitorial proceeding, not to be a part of the deal at a level playing field (dominant-judge-problem)?[137]

At first, the German Court of Justice (*Bundesgerichtshof*) tried to mitigate problems arising from frictions with well-established principles of German criminal procedure.[138] Then, in 2009, the legislator officially recognized the negotiated agreement (*Verständigung*)[139] and codified requirements of legality in a bunch of provisions – most notably, but not only, in German Code of Criminal Procedure, § 257c. This § 257c, para. 1, sentence 2, states that the obligation to investigate the truth remains unaffected, presumably solving the truth-problem. According to § 257c(4), sentence 1, the court ceases to be bound to the punishment agreed upon if it believes the punishment no longer corresponds to the guilt of the defendant, presumably solving the proportionality-issue. For that case, § 257c(4), sentence 3 orders the inadmissibility of the confession, presumably limiting the power of the inquisitorial judge and solving the dominant-judge-problem.[140] Furthermore, according to German Code of Criminal Procedure, § 302, para. 1, sentence 2, a waiver of appellate remedies is without effect if a negotiated agreement

136. Roxin & Schünemann, *supra* note 3, at § 17 para. 21, § 69 para. 1.

137. *See id.* at § 17 para. 24, 29, § 69 para. 1.

138. Notably the decision of the fourth senate of the German Federal Court of Justice (*Bundesgerichtshof [BGH]*) from 1997, 43 BGHSt 195, 201 *et seq. See also* 50 BGHSt 40, 63 (decision of the joint senate from 2005) pointing to the need for statutory regulation. From the decisions of the German Federal Constitutional Court (*Bundesverfassungsgericht [BVerfG]*), *see* BVerfG, 1987 Neue Zeitschrift für Strafrecht [NStZ] 419.

139. Initially, the agreement was commonly referred to as *Absprache*, *see, e.g.,* Langer, *supra* note 129, at 39–46, which is close to the meaning of deal. The statutory provision uses the more positive term of negotiated agreement (*Verständigung*), *e.g.* StPO, § 35a, sentence 3, § 257c, § 273, para. 1a, sentence 1, and § 302, para. 1, sentence 2. These negotiated agreements are the product of previous discussions (*Erörterungen*), possible at every stage of the proceeding, *see* StPO, § 160b, § 202a, § 212, and § 243, para. 4, sentence 1.

140. The appellate court is not bound by the agreement and therefore, it is neither bound by the prohibition to use the confession of the accused despite the withdrawal of the lower court from the deal. But nonetheless, it cannot inflict a harsher judgment on the accused based on the confession. If only the accused appealed, this follows from the prohibition of harsher punishment contained in StPO, § 331 (so-called interdiction of *reformation in peius*). If the prosecution appealed as well, StPO, § 331, does not help. But the fair trial principle of European Charter of Human Rights, art. 6, is mainly interpreted in that the higher court has to feel bound by the previously negotiated agreement, *see, e.g.*, OLG Karlsruhe, 2014 NStZ 294; OLG Düsseldorf, 2011 StV 80. Differently OLG Nürnberg, 2012 Neue Zeitschrift für Strafsachen – Rechtsprechungsreport [NStZ-RR] 255. Details are far from being settled.

preceded the judgment, thereby guaranteeing the control of the active and dominant judge by higher courts.[141]

Of course, for critics, this statutory regulation is nothing but lip service, unable to rescue the German criminal proceeding from its decline.[142] In 2013, the German Federal Constitutional Court (*Bundesverfassungsgericht*) declared the deal-regulation nonetheless constitutional if the statutory requirements are scrupulously respected[143] – which it had to emphasize since it diagnosed heavy shortcomings in the enforcement of the law and continued secret dealing.

3. Comparison in the light of the rules-model and the standards-model

Let us now examine how we can make sense of these differences in the light of the rules-model and the standards-model.

Rules versus Standards. The regulation of plea bargaining is quite clear-cut in the United States. No vague notions allow to review the agreement reached between the defendant and the prosecution. To a large extent, the validity of the agreement is clear due to legislative regulation *ex ante*. As soon as it does not contradict the few legislative requirements, the agreement is in itself a rule-like regulation binding the judge – if concluded in a binding way.[144] In contrast, in Germany, the central provision of German Criminal Code, § 257c, is full of standards such as truth- or guilt-adequacy, largely attributing the power to determine the validity of the agreement to an adjudicator *ex post*. The participants of the criminal process can exercise discretion in both cases – with the difference that the discretion in the rules-model is openly conceded whereas in the standards-model, it is the consequence of the use of vague standards.

---

141. StPO, § 35a, sentence 3 (stating the convict is to be informed that she can always appeal the decision).

142. Notably Roxin & Schünemann, *supra* note 3, at § 17 para. 19–32, § 69 para. 1–3. Already before the legislative change with regard to jurisprudential rules. Bernd Schünemann, Wetterzeichen vom Untergang der deutschen Rechtskultur: Die Urteilsabsprachen im Strafprozess als Abgesang auf die Gesetzesbindung der Jusitz und den Beruf unserer Zeit zur Gesetzgebung (2005); Bernd Schünemann, Absprachen im Strafverfahren? Grundlagen, Gegenstände und Grenzen (Gutachten B für den 58. Deutschen Juristentag 1990); Bernd Schünemann, *Die Verständigung im Strafprozess – Wunderwaffe oder Bankrotterklärung der Verteidigung?* 1989 NJW 1895.

143. 133 BVerfGE 168, especially 225–8 (paras. 102–6) (on the compatibility with the constitutional requirement of proportionality of punishment according to the guilt, and the connected obligation to investigate the material truth). *But see also* 234 (para. 119) (pointing to the deficient implementation of the statutory provision [*Vollzugsmangel*]).

144. Indeed, there are also non-binding agreements, *see supra* text to note 123.

Complexity versus Simplicity. Also the issue of internal complexity confirms the previous analysis. In the United States, the judge is bound by a binding agreement that results from plea bargaining. Since she does not have the power to review it, very little information is required for the decision (internal simplicity). One might also say: the internal complexity is outsourced to the parties that can process it in a contractual way. In Germany, things are different. The judge has to determine, either as a party to the agreement or as a higher court reviewing it, whether all vague notions have been respected and, therefore, process much more information (internal complexity).

The issue of external complexity requires a nuanced answer. At first glance, the very limited internal complexity of legislative regulation concerning plea bargaining in the United States also keeps its external complexity quite low. However, to understand the dynamics of plea bargaining in action, one also has to be acquainted with the Justice Manual of the U.S. Department of Justice.[145] The manual guides the prosecution as to when it should accept or reject an offer to agree on a dismissal of certain charges of a specific sentence. In addition, one has to know the relevant part of the U.S. Sentencing Guidelines.[146] This second layer of non-legislative *ex ante* regulation significantly increases the external complexity. The German regulation on confession bargaining is quite short. Most of the relevant requirements one has to respect are contained in German Criminal Code, § 257c. However, given the fact that some other elements of regulation are placed in other parts of the code, e.g. German Criminal Code, § 302 para. 1, the external complexity of these deal-regulating norms is probably higher than usual in the German criminal justice system. Thus, even though the issue of external complexity still reflects the general structure of the rules-model and the standards-model, the new German deal-regulation also reflects a certain increase in external complexity.[147]

Structured Decision-making versus Free Balancing. With regard to the third parameter of the rules-model and the standards-model, one

145. See *supra* at 125, 127.

146. See *supra* at 126.

147. In general on the increase in (we would say: external) complexity in the German legal system, *see* critically Paul Kirchhof, *Allgemeiner Gleichheitssatz, in* HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND: GRUNDRECHTE: WIRTSCHAFT, VERFAHREN, GLEICHHEIT 697, 796–7 (vol. 8, Josef Isensee & Paul Kirchhof eds., 3rd ed. 2010); Wilfried Braun, *Offene Kompetenznormen – ein geeignetes und zulässiges Regulativ im Wirtschaftsverwaltungsrecht? Neues zur Rollenverteilung zwischen*

Exekutive, Legislative und Judikative im wirtschaftsgestaltenden Sozialstaat, 76 VERWALTUNGSARCHIV [VERWARCH] 24, 39–40 (1985).

might say that the whole plea bargaining is a consequence of institutionally structured decision-making in the United States. The pre-trial proceedings, the determination of guilt, and the determination of the sentence are separate steps of the procedure with different legal actors. Only in that way it is possible to dispose of one element – guilt – in such a clear-cut way: if you have a guilty-plea, proceed to the sentencing stage; if you have a no guilty-plea, proceed to the jury-trial and ponder in all different elements. In the German system, the confession is not institutionally separated through the guilty plea. Instead, it always remains but one factor to determine guilt. Even if the confession is part of an agreement, the court still has to check and balance other factors as well.

E. A Final Word on Discretion

We showed that the rules-model can explain large parts of the U.S. criminal justice system, whereas the standards-model can deepen the understanding of German criminal justice. As we have underlined in the abstract presentation of the rules-model and the standards-model in Part I, these models concern the design of legal norms and do not predetermine the overall degree of discretion. Thus, also the criminal justice systems of both the United States and Germany contain discretion, but they incorporate it by different means: the U.S. rules-model allows discretion where the commands of the rule end, in an all-or-nothing style. It embraces discretion openly as soon as no clear-cut rules guide the decision-maker.[148] For instance, if exclusionary rules and the rules of impeachment have been respected, there are no further constraints for the jury. The jurors then determine the guilt in a discretionary way, without the need to state reason.[149] In contrast, the standards-model incorporates discretion by using vague notions. The German judge has to motivate the concretization of these standards and explain why she believes this or that witness,[150] but the possibilities of review are limited.

148. This openness may be a reason why the U.S. model is associated to such an extent with discretion, *see, e.g.,* Kagan, *supra* note 7, at 96, even though other systems, notably the German one, also contain discretionary elements.

149. *Cf.* Damaška, *supra* note 6, at 519–21; Kagan, *supra* note 7, at 63. *See also* McCleskey v. Kemp, 481 U.S. 279, 297 ("Implementation of these [criminal] laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.").

150. *See* StPO, § 267; *see also* Kagan, *supra* note 7, at 87.

The same is true at the prosecutorial stage. The U.S. approach to criminal prosecutions openly embraces prosecutorial discretion as soon as no clear rules exist.[151] In contrast, the German prosecution office is bound by the principle of legality (*Legalitätsprinzip*),[152] even though in many aspects, the German system also embraces the principle of expediency (*Opportunitätsprinzip*).[153] What is relevant here, however, is that without officially constituting an exception to the principle of legality, the power to determine whether there are "sufficient factual indications" (a standard-like formulation) *de facto* grants quite significant discretion even if the principle of expediency does not apply. In theory, the determination of sufficient factual indications is reviewable[154], but very rarely remedies against prosecutorial decisions are used or successful.[155]

In conclusion, both systems rely on discretion in all stages of the procedure to some degree. The U.S. rules-model embraces discretion openly as soon as no clear-cut rules guide the decision-maker. The German standards-model incorporates discretion through vague standards. This does not mean that the degree of discretion does not differ at all. In the United States, we will probably find more prosecutorial discretion and less discretion in sentencing. But discretion does not characterize one or the other system. The difference in norm design does.

III. The Different Concepts of the Judge as Explanation

How can we make sense of this difference in norm design between the United States and Germany? One way of explaining the difference is by reference to the prevailing concept of the judge (understood broadly as decision-maker). Whereas the U.S. system is based on the concept of fallible judges, German criminal procedure tends towards idealizing them. Indeed, (1) in a world of perfect judges, the standards-model has significant advantages; (2) the more judges are fallible, the bigger the advantages of the rules-model.

151. Damaška, *supra* note 6, at 517–19.

152. *See* StPO, § 152 para 2. *See also* Damaška, *supra* note 6, at 503; Langbein, *Land*, *supra* note 13, at 210; Roxin & Schünemann, *supra* note 3, at § 14 para. 4.

153. *See* StPO, §§ 153–154f. *See also* Damaška, *supra* note 6, at 504 (principle of expediency); Langbein, *Land*, *supra* note 13, at 210–11 ("counterprinciple of discretionary nonprosecution"), 224 (referring specifically to StPO, § 153, as "a mild form of plea bargaining."). For a detailed, systematic overview, *see* Roxin & Schünemann, *supra* note 3, at § 14 paras. 5–27.

154. *See* Damaška, *supra* note 6, at 504 n.54.

155. In less than 1 percent, the prosecutorial determination of insufficient factual indications is attacked, and in case of an attack, the success rate is again below 1 percent, *see* Roxin & Schünemann, *supra* note 3, at § 41 para. 3.

A. Advantages of the Standards-Model in a World of Perfect Judges

Let us assume a world of perfect judges. In this world, the German standards-model has significant advantages. We illustrate this point by focusing on two core advantages of standards, which concern their relationship to complexity and structured decision-making.[156]

The first advantage of standards consists in the possibility to increase internal complexity without at the same time increasing external complexity. This is so because standards substitute a whole set of rules and counter-rules.[157] Therefore, despite its external simplicity, the standards-model can tailor limitations of freedom to the strictly necessary degree (freedom-dimension),[158] and not only treat like cases alike but different cases differently (equality-dimension)[159]. The legal means used will be perfectly tailored to the ends pursued. Simple rules, in contrast, tend to be over-inclusive or under-inclusive.[160] For instance, a system, which formulates a flexible exclusionary norm based on the

156. For an overview of the literature on rules and standards, *see supra* at 19–20.

157. *Supra* at text to note 27.

158. For the principle of proportionality (with its element of necessity) in German constitutional law, *see* Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] July 14, 1999, 100 BVerfGE 313, 375. For E.U. law, *see* European Charter of Fundamental Rights, art. 52, ¶ 1, 26 October 2012, 2012/C 326/02 ("limitations may be made only if they are necessary [. . .]). For U.S. Constitutional law, one might consider the requirement of narrow tailoring in the context of the First Amendment, *see* Frisby v. Schultz, 487 U.S. 474 (1988).

159. On these two prongs of the principle of equality in German constitutional law, *see* 4 BVerfGE 144, 155; 86 BVerfGE 81, 87; 101 BVerfGE 275, 290. For E.U. law, *see* Case C-149/10, Chatzi v. Oikonomikon, 2010 E.C.R. I-08489, ¶ 64; Case C-306/93, SMW Winzersekt GmbH v. Land Rheinland-Pfalz, 1994 E.C.R. I-05555, ¶ 30; Case C-217/91, Spanien v. Kommission, 1993 E.C.R. I-03923, ¶ 37. Similarly, the Equal Protection Clause in the U.S. Constitution can require making distinctions, because strict scrutiny requires narrow tailoring, *see, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003). From the literature, *see* Philipp Hacker, *Personalizing EU Private Law: From Disclosure to Nudges and Mandates*, 25 Eur. Rev. Priv. L. 651, 659–60 (2017) [hereinafter Hacker, *Personalizing*]; Philipp Hacker & Bilyana Petkova, *Peining in the Big Promise of Big Data: Transparency, Inequality, and New Regulatory Frontiers*, 15 Nw. J. Tech & Intell. Prop. 1, 7–8 (2017); Philipp Hacker, *The Ambivalence of Algorithms: Gauging the Legitimacy of Personalized Law, in* Personal Data in Competition, Consumer Protection and Intellectual Property Law 85, 98 (Mor Bakhoum et al. eds., 2018) [hereinafter Hacker, *Ambivalence*]; Andrew Verstein, *Privatizing Personalized Law*, 86 U. Chi. L. Rev. 551, 556–57 (2019); Philip M. Bender, *Limits of Personalization of Default Rules – Towards a Normative Theory*, 16 Eur. Rev. Cont. L. 366, 402, 406 (2020).

160. On over- and under-inclusiveness, *see generally* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 348 (1949); Schauer, *supra* note 19, at 31; Schauer, *supra* note 19, at 685. *See also* Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 Mich. L. Rev. 1417, 1454 (2014); Hacker, *Personalizing*, *supra* note 159, at 658; Omri Ben-Shahar & Ariel Porat, *Personalizing Mandatory Rules in Contract Law*, 86 U. Chi. L. Rev. 225, 262–63 (2019). *But see* Bender, *supra* note 159, at 403, 405.

standard of the public interest in excluding the evidence, is open to balance the gravity of the procedural violation (A) and the punitive interest of society (B) according to all relevant aspects. It enables the judge to consider a_1, a_2, and a_3 as relevant factors to determine A, and b_1, b_2, and b_3 as relevant factors to determine B. a_1 might be the fact that U.S. constitutional law has been violated, a_2 the good faith of the officer, and a_3 could be the aspect of inevitable discovery. b_1 might be the nature of the crime, b_2 the actual harm that occurred, and b_3 could be the frequency in which this crime occurs in society. Now, if we design an overly simple rules-model, which requires exclusion of the evidence only in case U.S. constitutional law was violated, except if the officer acted in good faith, we would take into consideration only a_1 and a_2, omitting the likewise relevant information of a_3, b_1, b_2, and b_3. Capturing all relevant information in rules and counter-rules has its limits, because there is not only a_1 to a_3 and b_1 to b_3, but there is a_1 to a_n and b_1 to b_n, with n being impossible to predict for all cases *ex ante* (at the moment the statute or the precedent is produced).

The second advantage of the standards-model consists in being able to avoid the costs of structured decision-making.[161] Indeed, structured decision-making cuts off relevant information at an early stage if a certain threshold is not passed. In terms of the purpose of the rules concerned, it will, therefore, lead to a similarly suboptimal result as over-inclusive- or under-inclusiveness. Consider, for instance, our example of exclusionary rules and value-structuring. As we have seen, each legal system has to balance requirements of fairness, i.e. the gravity of the violation of procedural safeguards (A) and the objective of truth, i.e. the punitive interest of society (B). In the previously described model of structured decision-making, we will consider A only if the violation is qualified as a violation of the constitutional rights of the criminal defendant, i.e. if it passes a certain threshold ($v_a > t_a$). Even though it might be the case that $v_a > v_b$, so that A (exclusion of evidence) would be the adequate outcome, we will still decide in favor of B (admission of evidence), because the U.S. constitutional law threshold was not passed ($v_a < t_a$). We can observe similar distortion effects when probability structuring occurs, which we have illustrated by the rules of impeachment of witnesses. If we determine the credibility of witnesses in a structured way according to the rules of impeachment, we will consider the prior consistent statement (step one) and

161. On structured decision-making, *see* Kaplow, *supra* note 16; *see also supra* notes 29–32.

the prior inconsistent statement (step two) only if they pass a certain probabilistic threshold. However, even though p_a does not pass the threshold, it might still be the case that the product of p_a and v_a exceeds the product of p_b and v_b. This situation can occur in case the prior inconsistent statement is not likely but highly indicative of untrustworthiness, whereas the prior consistent statement is very likely but not too indicative of trustworthiness. Therefore, even if both systems rely on the same amount of information (are based on the same degree of internal complexity), probability structuring can still distort the outcome. A free balancing approach allows to determine the credibility of the witness without these distortions, because the judge can simply inquiry whether $v_a p_a > v_b p_b$.

Of course, neither of both systems proceeds in terms as simplistic as sketched out here. I only aim at showing some tendencies. In tendency, the U.S. rules-model leads to over-inclusive- and under-inclusiveness and to distortions due to structured decision-making, while at the same time increasing external complexity. The German standards-model can avoid these inconveniences because standards allow a high degree of internal complexity while keeping external complexity low. In addition, standards are open for free balancing. Therefore, if standards are applied correctly, with all relevant information taken into consideration and free balancing being performed correctly, the standards-model has significant advantages. In a world of perfect judges, it is superior.

B. Advantages of the Rules-Model in a World of Fallible Judges

Let us now have a look at the advantages of the rules-model in a world in which judges are fallible. I understand "fallibility" as any kind of deviation from perfection. In that sense, the notion describes a continuum and represents a variety of degrees of imperfection. Since the rules-model clearly defines boundaries, it limits the harmful effects of fallibility.[162] Therefore, the more judges are fallible, the U.S. rules-model has significant advantages in terms of equality, control, costs, and communication. I briefly outline each of these points.

If judges are perfect, they think in the same way. Giving them broad discretion in pondering elements, in determining their value and their probability, does not threaten equality. After all, they will all perform their task in the way required by the facts of the case. However, if judges are imperfect, each judge will give slightly different weight to

162. *Cf.* Schlag, *supra* note 19, at 384–85.

different factors and will evaluate their probability differently. Unguided discretion risks becoming arbitrariness.[163] Providing simple rules that structure their thinking can, therefore, be a means to guarantee equal treatment of criminal defendants.[164]

If judges are perfect, they make no mistakes. The issue of control is irrelevant. However, if judges are imperfect, if they make mistakes or even bend the law according to their interests or bribes, the issue of control becomes of utmost importance.[165] Simple rules that structure the decision-making facilitate the control by higher courts.[166] Clear rules of evidence, one could say, limit the discretionary and sibylline factfinding procedure.

If judges are perfect, they have the relevant information to apply highly complex standards in a free balancing approach. However, if judges are imperfect, the application of these highly complex standards becomes time-consuming. After all, the judge has to gather information and design the rule according to which she wants to decide the case. Therefore, standards lead to higher application (enforcement) costs than rules.[167] In addition, highly complex standards will increase error costs if judges are not perfect.[168] Finally, rules can direct the error in directions where we are more prone to accept error. An underinclusive simple rule, for instance, might always miss cases it should include, but we are happy to incur these costs because it would be much worse if only one case was included that should have been excluded.

163. Scalia, *supra* note 19, at 1182.

164. On rules and equality *see, e.g., id.*

165. *See* Schlag, *supra* note 19, at 385, 400 (pointing to the vice of "manipulability" associated with standards). Similarly, see Schauer, *supra* note 19, at 691 (explain that "[r]ules make it harder rather than easier to assert the specialness of the asserter, and make it harder for a decisionmaker to cast aside the decisions of others in order to take full control of the situation."). *See also* Hans-Bernd Schäfer, *Rules versus Standards in Developing Countries: the Case for Clear and Precise Legal Norms on Eminent Domain Power*, 12 Law & Dev. Rev. 425 (2019) (favoring rules in developing countries); Kaplow, *supra* note 16, at 1059–60 (working within a context of structured decision-making limited to some special situations).

166. Similarly Schlag, *supra* note 19, at 386 (pointing to the advantages of rules in situations of delegation). *See also* Schauer, *supra* note 19, at 691.

167. *See* Kaplow, *supra* note 14, at 562–3.

168. On standards and errors by imperfect decision-makers, *see* Schauer, *supra* note 19, at 685 (explaining that "[i]n a world of non-ideal decisionmakers, therefore, one should calculate the virtues of ruleness based not only on an assessment of the costs of errors of under- or over-inclusion, but also on an assessment of the incidence and consequences of those errors that are more likely when decisionmakers are not constrained by rules."). *See also* Schauer, *supra* note 19, at 150; Schäfer, *supra* note 165.

Setting the burden of proof "beyond reasonable doubt" can be explained in that vein.[169]

If judges are perfect, they can communicate also the most complex norms in terms the participants of the legal process understand (even though this also presupposes some perfection of these participants). If not, however, black-box-like standards might hamper the communicative or expressive function of law.[170] The convict might be more willing to accept the punishment if it can be explained why a certain incriminating piece of evidence was not excluded.[171] "Bad simplistic rule," she might say, "but at least I understand why." In a system of complex standards and free-floating balancing, non-transparency might be a bigger problem.

In sum, the rules-model, which reduces internal complexity and structures decision-making in important aspects, has significant advantages if judges are fallible, but it also has certain flaws. It is not – like the standards-model – at least "theoretically perfectible".[172] Given the vices and virtues of the rules-model and the standards-model, we can explain the differences of norm design in the criminal justice system of the United States and Germany by reference to a differing concept of the judge. In what follows, we examine whether both the observed difference in norm-design and the explanation of this difference in terms of the prevailing concepts of the judge fits the broader picture.

IV. Contextualizing the Difference in Norm Design

Criminal procedure differs in the United States and Germany in terms of norm design. As we will see, this observation aligns with the

169. For an interpretation of this legal standard in the United States, *see supra* at 78. For an interpretation of the standard in Germany, *see id.* at 92. *But see* Barton L. Ingraham, *The Right of Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal*, 86 J. Crim. L. & Criminology 559, 579 (1996) (arguing that deciding cases depends more on how society balances false positives and false negatives).

170. On the expressive function of law, *see* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996). *See also* Hacker, *Ambivalence*, *supra* note 159, at 105 (discussing the personalization of law); Philip M. Bender, *Ambivalenz der Offensichtlichkeit*, 23 ZEuS 409, 415 (2020) (in constitutional law); Philip M. Bender, *Ambivalence of Obviousness*, 27 Eur. Pub. L. 285, 295 (2021) (expanded English version).

171. On "transparency and openness" as a source of empirical legitimacy (legitimacy as acceptability), *see* Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 Psych. Pub. Pol'y & L. 78, 82 (2014). On the importance of procedural justice (fairness) for empirical legitimacy, *see generally* Tom R. Tyler, Why People Obey the Law (1990).

172. *Cf.* Guido Calabresi & Philip Bobbit, Tragic Choices 47 (1978) ("We are very often, in tragic situations, faced with the choice between a device which allocates well, but whose flaws are also certain, and a device which does less well, but which is theoretically perfectible.").

broader context of both legal systems. Indeed, the rules-model and the standards-model can explain (1) a whole set of differences in contract law. Furthermore, (2) the common-civil law divide and (3) differences in legal thought harmonize with the association of the rules-model to the United States and the standards-model to Germany.

Parallels in Contract Law

Let us start by having a look at contract law. At first glance, contract law in the United States is much more flexible than in Germany.[173] After all, the German Civil Code (*Bürgerliches Gesetzbuch [BGB]*) contains a detailed enumeration of "types of contracts," whereas U.S. contract law is based on a few general principles of the common law and the Uniform Commercial Code.[174] The German standards-model in criminal procedure, one might say, must be a strange exception.

This, however, is overly simplistic, for an evaluation needs to look at concrete doctrines. On that doctrinal level, we find much more rigidity in U.S. contract law than in Germany. Consider, for instance, the parol evidence rule of the common law, which – as a matter of principle – requires courts to focus on the "four corners of the contract," not on extrinsic evidence beyond the written agreement. Nowadays, the parol evidence rule is not conceived as mandatory, requiring the exclusion of extrinsic evidence,[175] but rather as a default position describing the presumed intent of the parties.[176] Still, it shows that the construction of the contract is approached in a rule-like manner. Besides, in the state of New York, the mentioned intent of the parties is also determined in a rule-like manner, by simply checking whether the contract contains a merger clause.[177] In contrast, in Germany, courts shall investigate the "true meaning" of the parties according to the principles of good faith,[178] without any mandatory or default rules guiding this endeav-

173. On this common characterization, *see, e.g.*, Kagan, *supra* note 7, at 103.

174. *See* Pargendler, *supra* note 4, at 153–60.

175. For the more objective and formalistic older version, *see* Ferguson v. Koch, 204 Cal. 342, 346 (1928).

176. *See* U.C.C. § 2–202(b) (Am. Law Inst. & Unif. Law Comm'n 1977); Restatement (Second) of Contract Law § 209(3) (Am. L. Inst. 1981). From the literature, *see* Arthur L. Corbin, *The Parol Evidence Rule*, 53 Yale L.J. 603 (1944). *See also* Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. Pa. L. Rev. 533, 534, 547 (1998) (distinguishing hard and soft versions of the parol evidence rule, and later analyzing it under the angle of default rules).

177. *See, e.g.*, Indep. Energy v. Trigen Energy Corp., 944 F.Supp. 1184, 1196 (S.D.N.Y. 1996). *See generally* Ian Ayres & Gregory Klass, Studies in Contract Law 669 (9th ed. 2017).

178. *See* Bürgerliches Gesetzbuch [BGB] [German Civil Code], §§ 133, 157 (Ger.). On the interplay of both standards, see the seminal contribution of Karl Larenz, Die Methode der Auslegung des Rechtsgeschäfts: Zugleich ein Beitrag zur Theorie

or and without distinguishing construction and interpretation. This broad, standard-like judicial power is accompanied by a large number of provisions that allow courts to rewrite contracts, most notably German Civil Code, § 313, which embraces a modern version of *clausula rebus sic stantibus*.[179] The fact that the standard of good faith guides the interpretation of contracts points to another important difference. Good faith does not only apply in the context of performance of contractual obligations.[180] Even in the course of the dealing, parties have to "take account of the rights, legal interests and other interests of the other party."[181] In contrast, the principle of good faith was originally absent in the common law.[182] It is now largely recognized,[183] but especially reluctantly at the pre-contractual stage.[184]

der Willenserklärung (1930). On the higher level of court activity of civil law courts in interpreting contracts, *see* Pargendler, *supra* note 4, at 162–63.

179. On the greater inclination of civil law countries to rewrite contracts, *see id.* at 160–62.

180. For that stage, *see* Bürgerliches Gesetzbuch [BGB] [German Civil Code], § 242, *https://www.gesetze-im-internet.de/bgb/__242.html* (Ger.) ("An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.").

181. This obligation is contained in Bürgerliches Gesetzbuch [BGB] [German Civil Code], § 241, ¶ 2, https://www.gesetze-im-internet.de/bgb/__242.html (Ger.), and according to Bürgerliches Gesetzbuch [BGB] [German Civil Code], § 311, ¶ 2, https://www.gesetze-im-internet.de/bgb/__311.html (Ger.), it also comes into existence by "the commencement of contract negotiations" (no. 1), "the initiation of a contract" (no. 2), or "similar business contacts" (no. 3). On the origins of these precontractual obligations in civil law countries, *see* Pargendler, *supra* note 4, at 164–5.

182. On that, *cf.* Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 Mod. L. Rev. 11, 11 (1998) ("Good faith is irritating British law").

183. *See* U.C.C. § 1–203 (Am. L. Inst. & Unif. L. Comm'n 1977), or Restatement (Second) of Contract Law § 205 (Am. L. Inst. 1981). On the recognition of the principle of good faith in U.S. contract law and the German influence on it, *see* Auer, *supra* note 19, at 180–91. However, even in the performance phase, it plays a more dominant role in civil law countries, *see* Pargendler, *supra* note 4, at 150–1. On the significant differences between common and civil law countries in terms of good faith, *see generally* Reinhard Zimmermann & Simon Whittaker, Good faith in European contract law: surveying the legal landscape (Reinhard Zimmermann & Simon Whittaker eds., 2000); Claire A. Hill & Christopher King, *How Do German Contracts Do as Much with Fewer Words?*, 79 Chi.-Kent L. Rev. 889, 908–11 (2004).

184. For an examination of U.S. equivalents to the precontractual standard of good faith, *see* Friedrich Kessler & Edith Fine, *Cupla in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 Harv. L. Rev. 401, 448 (1964) (pointing to "the increased duty to disclose, the concept of estoppel, the notion of an implied subsidiary promise, the colorful doctrine of 'instrinct with an obligation,' all impos[ing] such responsibility."). These legal doctrines, one could say, lead to a rulification of good faith.

In addition, the previously mentioned German "typification" is – in large part – nothing more than a set of default positions.[185] This set might contain more details than general U.S. contract law. But it largely alleviates the parties from writing excessive contracts.[186] In terms of specificity and detail, German contract default rules are situated in the middle, between the few general U.S. contract default rules and the detailed terms of an individual contract. They necessarily contain many standards because even though they apply to the same contract types, they still have to be open enough for the significant varieties of individual contracts of the same type. Therefore, if one compares the German default contract types with the detailed rules-based contracts written by U.S. parties, the picture changes: whereas German courts tend to apply contractual default standards, U.S. courts adhere to rule-like contractual stipulations, interpreted according to strict rules. Just like in criminal procedure, the standards-model dominates in Germany and the rules-model in the United States. Far from being an exception, the difference in norm design between the United States and Germany can be generalized to other areas of the law as well.

A. Common Law versus Civil Law

In the previous section, we looked at another legal subject: contract law. Let us now take one step back and examine the broader common-civil law divide. At first glance, we might think that our interpretation of criminal procedure contradicts the presumed flexibility of the common law as contrasted with German civil law, relying on rigid codes and statutes. However, at closer inspection, we realize that the rules-model harmonizes quite well with U.S. common law.

First, it is important to see that the difference between civil law and common law primarily refers to the institution that creates legal norms (parliament versus judges). However, questions of norm design, such as whether a legal norm is a rule or a standard,[187] complex or simple,[188] and based on structured decision-making or free balancing,[189] do not depend on the institution that creates them. It is perfectly possible

185. Pargendler, *supra* note 4, at 155. On standardization, *see* Hill & King, *supra* note 183, at 912–15.

186. On that point John H. Langbein, *Comparative Civil Procedure and the Style of Complex Contracts*, 35 Am. J. Comp. L. 381, 383 (1987); Hill & King, *supra* note 183. On the greater emphasis of the common law on private ordering, *see* Pargendler, *supra* note 4, at 147.

187. *Supra* notes 19–21.

188. *Supra* notes 22–28.

189. *Supra* notes 29–32.

that a common law court creates a rule in a precedent where a civil law code uses a standard, as we have seen throughout this article. If we link issues of norm design to the institutional tradition of common law and civil law, we would rather be inclined to think that a common law judge is more likely to recur to the rules-model. Indeed, a precedent can create a detailed rule with a small scope of application precisely for the case that has to be decided. The high degree of proximity between rulemaking and facts to be regulated allows a high degree of rule-like precision that a civil law code can hardly achieve. Indeed, code provisions are created far before a case arises and for a potentially unlimited number of cases. Therefore, the common law guarantees its flexibility by means of distinguishing cases and their rule-like precedents, civil law by using standards.

Second, large areas of law are not regulated by codes or statutes in civil law systems. German industrial action law (*Arbeitskampfrecht*) is often used as an example on that point.[190] But industrial action law is no exception. In general, be it because of the use of standards, be it because of gaps in the law, judge-made law is omnipresent in civil law systems. If we were to compare the areas of judge-made law and how the legitimate expectations of parties are protected absent statutes, we find yet again a rule-like approach in the common law and a standards-approach in Germany. Indeed, the common law doctrine of *stare decisis* tends to confer precedents binding force according to well-established rules.[191] In contrast, German precedents do not have binding force. In a standard-like manner, the German Federal Constitutional Court (*Bundesverfassungsgericht*) points to the need to somehow consider that parties might have legitimate expectations, but in the end, the deciding judge has to balance whether the legitimate expectations are actually more important than overruling the precedent.[192]

Third, large areas of law are regulated by codes or statutes in common law systems. We might refer to the written Constitution, the broad acceptance of the Uniform Commercial Code, the Civil Rights Act, or

190. *See, e.g.*, Bernd Rüthers, Christian Fischer & Axel Birk, Rechtstheorie und Juristische Methodenlehre 514 (12th ed. 2022).

191. On the stare decisis doctrine, *see, e.g.*, Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 Yale L.J. 2031 (1996); Ernst Rabel, *Private Laws of Western Civilization: Part IV. Civil and Common Law*, 10 La. L. Rev. 431, 434 (1950); John Hasnas, *Hayek, the Common Law, and Fluid Drive*, 1 N.Y.U. J.L. & Liberty 79, 89 (2005); Sebastian A. E. Martens, *Die Werte des Stare Decisis*, 66 JZ 348 (2011).

192. *See, e.g.*, BverfG, 2013 NJW 523, 524 ("Insofar as settled case law established legitimate expectations, [. . .] it is possible to take this aspect into account through considerations of equity"). *See also* 122 BVerfGE 248, 277–8.

in general the heavy New Deal legislation and regulation of economic affairs.[193] It is interesting to see that in the presence of statutes, common law courts are often more formalistic than their civil law counterparts, where reasoning by analogy (*Analogie*) or unwritten, judicial exceptions to a rule (*teleologische Reduktion*) are quite common.[194] In England, for instance, it was a long time common practice to disregard anything beyond the "plain meaning" of the text in interpreting statutes.[195] In the United States, constitutional law scholarship and jurisprudence are concerned with judicial activism, which originalists try to limit by pointing either to the "original intent"[196] or the "original meaning"[197] as opposed to a dynamic interpretation of the constitution as a living instrument.[198] Constitutional court activism is much less discussed and perceived as a problem in Germany. We might explain this in different ways, but one

193. In general on the significant increase in statutory lawmaking over time, *see* Grant Gilmore, The Ages of American Law 86 (2d ed. 2014) ("orgy of statute making"). *See also* Guido Calabresi, A Common Law for the Age of Statutes 1 (1982). On the transformations of the New Deal Era, *see also* Bruce Ackerman, We The People, Volume 1: Foundations 105 (1991).

194. *Cf.* Karl Larenz, Methodenlehre der Rechtswissenschaft 202–10 (6th ed. 1991) (on reasoning by analogy [*Analogie*]), 210–16 (on unwritten exceptions [*teleologische Reduktion*]). This reluctance in simply accepting statutory commands is deeply rooted in the history of the German judiciary and connected to its high self-confidence already at the time of the enactment of the *BGB* (German Civil Code) in 1900. On that, *see* Hans-Peter Haferkamp, *The Science of Private Law and the State in Nineteenth Century Germany*, 56 Am. J. Comp. L. 667, 688 (2008) ("[The judges'] willingness to submit to the newly promulgated code was quite limited.").

195. *See* Pepper v. Hart, [1993] 1 All ER, at 60 (restating the rule before reversing it). *See also* Michael P. Healy, *Legislative Intent and Statutory Interpretation in England and the United States: An Assessment of the Impact of Pepper v. Hart*, 35 Stan. J. Int'l L. 231, 236–37 (1999).

196. *Cf.* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. Rev. 226, 244 n.77 (1988). *See also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 In. L.J. 1, 10–2, 17–8 (1971) (at 17 mentioning legislative intent, but in general focusing more on the need for judicial restraint than on the means of how to achieve it).

197. This textualist approach is the now dominant version of originalism, *see, e.g.*, the later Robert H. Bork, The Tempting of America: The Political Seduction of the Law 143–60 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 853 (1989). Specifically against judicial activism, *see also* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 23 (1997); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 552 (1994); Amy Coney Barrett, *Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921, 1924–25 (2017).

198. *E.g.,* Bruce Ackerman, *The Living Constitution*, 120 Harv. L. Rev. 1737, 1742 (2007). *See also* the chain-novel conception of Ronald Dworkin, *Natural Law Revisited*, U. Fla. L. Rev. 165, 166–68 (1982) (on the metaphor), 168–69 (applying it to the law). For an overview over originalism, *see* Daniel Wolff, *Conceptual and Jurisprudential Foundations of the Debate on Interpretive Methodology in Constitutional Law: An Argument for More Analytical Rigor, in* The Law between Objectivity and Power 163–92 (Philip M. Bender ed., 2022).

aspect could be that in Germany, the vague constitutional terms do not seem so special in the light of the standards-model and its corresponding concept of the idealized, non-political judge.

B. Legal Theory: Formalism and Realism

How do the rules-model and the standards-model align with the theoretical context in the United States and Germany? At first glance, our comparative analysis of norm design seems yet again counter-intuitive. Aren't the continental systems still in the grip of formalism and its rules-based approach,[199] whereas U.S. law breathes legal realism in all its aspects, with its flexibility for judges? At closer look, things are not as easy. We make three clarifying remarks, which suggest that the dominant strains of legal thought in both countries harmonize well with the described differences in norm design.

First, formalism, or its German counterpart, the jurisprudence of notions (*Begriffsjurisprudenz*), is a label branded by post-formalists to discredit the previous approaches they attacked.[200] Often, they caricatured and largely exaggerated the formalist adherence to rules and notional reasoning to underline the newness of their own approach. At least towards the end of the nineteenth century, it was quite common for German judges to take into consideration "diverse aspects of community interests, social and practical needs, legal culture, the idea of law and various other elements."[201] Therefore, classical formalism is much less "formalistic" than one might think – and probably less formalistic than some U.S. neo-formalist accounts.[202]

Second, legal thought commonly referred to as classical formalism (and, as we have seen, we may even question the extent of its formalism) ceased to be dominant in both systems at the beginning of

199. *Cf.* Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 Stan. L. Rev. 2113, 2114 (2003) ("[Formalism] was dominant at the beginning of the century, and probably remains so in Europe today [. . .].").

200. The first use of it was made by Rudolf von Jhering, Scherz und Ernst in der Jurisprudenz: Eine Weihnachtsgabe für das juristische Publikum 337 (1884). On that point, *see* Hans-Peter Haferkamp, *Die sogenannte Begriffsjurisprudenz im 19. Jahrhundert – "Reines" Recht?, in* Reinheit des Rechts: Kategorisches Prinzip oder regulative Idee? 79, 80 (Otto Depenheuer ed., 2010). More in detail on the "rehabilitation" of the jurisprudence of notions, *see* Hans-Peter Haferkamp, Georg Friedrich Puchta und die "Begriffsjurisprudenz" 26–8 (2004). On the pejorative use of "formalism" in the United States, *see also* Richard A. Posner, The Problems of Jurisprudence 40 (1990); Auer, *supra* note 19, at 70.

201. Haferkamp, *supra* note 194, at 686–7.

202. For a neo-formalist American account, *see* Ernest J. Weinrib, The Idea of Private Law (2d ed. 2012); Ernest J. Weinrib, *Legal Formalism*, 97 Yale L.J. 949 (1988).

the twentieth century. Legal realism in the United States[203] and currents such as the free law-movement (*Freirechtsbewegung*)[204] or the jurisprudence of interests (*Interessenjurisprudenz*)[205] in Germany relativized the previously dominant theoretical strains. There even was some German influence on U.S. realism.[206] In that sense, it is at least misleading to describe the German system as formalist and the American system as realist. Both systems incorporated some insights of legal realism and at the same time, courts still rely on the achievements and the doctrinal heritage of formalism.[207]

Third, the concrete changes of legal culture in the United States and Germany brought about by U.S. realism and its German counterparts support the previous analysis of norm design. In Germany, one could say, the end of classical formalism led to a functionalist, purposive, or teleological interpretative style, which considers conflicting principles, values, and policy goals. It is embedded in the jurisprudence of values (*Wertungsjurisprudenz*),[208] which could be described as the German counterpart of reasoned elaboration.[209] In the end, not many guidelines exist in how to discern these principles, values, and policy goals, and in how to balance conflicting interests. Indeed, most cases could not be decided by reference to these theoretical accounts alone. In contrast, in the United States – in addition to this method of reasoned

203. For the U.S. context, *see* Dunkan Kennedy, The Rise and Fall of Classical Legal Thought 28 (2006). *See also* George L. Priest, The Rise of Law and Economics: An Intellectual History 11 (2020).

204. *See* Gnaeus Flavius, Der Kampf um die Rechtswissenschaft (1906) (The main contribution of Hermann Kantorovicz under his pen name).

205. *See* Philipp Heck, Gesetzesauslegung und Interessenjurisprudenz, 112 Archiv für die civilistische Praxis [AcP] 1, 17 (1914); Philipp Heck, Das Problem der Rechtsgewinnung (2d ed. 1932); Philipp Heck, *Die Interessenjurisprudenz und ihre neuen Gegner*, 142 AcP 129 (1936). *See also* Rudolf von Jhering, Der Kampf um's Recht (1872). *See generally* Marietta Auer, *Methodenkritik und Interessenjurisprudenz*, 2008 Zeitschrift für europäisches Privatrecht [ZeuP] 517.

206. *See, e.g.*, Julie E. Grise *et al*., *Rudolf von Jhering's Influence on Karl Llewellyn*, 48 Tulsa L. Rev. 93, 95 n.7 (2013); *see also* Bender, *supra* note 159, at 376–77.

207. *Cf.* Auer, *supra* note 19, at 70.

208. *See* Karl Larenz & Claus-Wilhelm Canaris, Methodenlehre der Rechtswissenschaft 265 (1995); *see also* Franz Bydlinski, Juristische Methodenlehre und Rechtsbegriff 123–39 (2d ed. 1991).

209. *Cf.* Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 145 (Foundation Press 1994); William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 Harv. L. Rev. 2031, 2042–43 (1994). For a critical presentation, see Klicken oder tippen Sie hier, um Text einzugeben. Roberto Mangabeira Unger, The Critical Legal Studies Movement: Another Time, A Greater Task (at 13 pointing to the parallels to Germany). On the parallels, see also Philip M. Bender, *Ways of Thinking about Objectivity, in* The Law between Objectivity and Power, *supra* note 198, at 30.

elaboration – theoretical approaches flourished that tried to formalize the free-floating balancing by turning to extra-legal, neighboring disciplines.[210] The most famous of these endeavors is the economic analysis of law.[211] Its cost-benefit-analysis, notably in combination with Richard Posner's wealth maximization criterion,[212] can be interpreted as a way of formalizing free-floating balancing. Besides that, it often embraces existing (rather formalist and rule-like) common law norms as economically sound.[213] Whereas this economic analysis of law is quite dominant in American legal thought and sometimes even explicitly integrated in court decisions of efficiency-minded judges,[214] the German system is reluctant to embrace this kind of economic formalism as adjudicative theory.[215]

V. Contextualizing the Difference in the Concept of the Judge

Just as we contextualized the rules-model and the standards-model by looking beyond criminal justice in the previous Part IV, we can now contextualize the respective concepts of the judge. Associating the concept of fallible judges with the United States and idealized judges with Germany harmonizes with (1) the different structures of authority in

210. *See also* Calabresi, *supra* note 199, at 2118–22 (pointing to the many "law and . . . ").

211. *See, e.g.,* Priest, *supra* note 203, at 4 (on the connection between the functional approach towards law and economic analysis of law); Calabresi, *supra* note 199, at 2118–22.

212. On wealth maximization as an ethical concept, see Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. Legal Stud. 103, 124 (1979); Posner, *supra* note 32, at 24. For foundational contributions to the development of law and economics, see Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960), Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499 (1961), and Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis (1970).

213. On positive economic analysis of law, *see* Posner, *supra* note 32, at 23–6.

214. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173–174 (2d Cir. 1947) (elaborating the famous Learned Hand Test as an early manifestation of economic reasoning in tort law). On further studies of economic reasoning in U.S. courts, see Keith Kendall, *The Use of Economic Analysis in Court Judgments: A Comparison Between the United States, Australia and New Zealand*, 28 UCLA Pac. Basin L.J. 107, 113–16 (2011). Focusing on Judge Posner, see George M. Cohen, *Posnerian Jurisprudence and Economic Analysis of Law: The View from the Bench*, 133 U. Pa. L. Rev. 1117, 1131–32 (1985). For further references, see the overview of Janet Sinder, *Economists as Judges: A Selective, Annotated Bibliography*, 50 L. & Contemp. Probs. 279, 279 (1987).

215. For instance, the most famous German contribution to economic analysis of law, Horst Eidenmüller, Effizienz als Rechtsprinzip: Möglichkeiten und Grenzen der ökonomischen Analyse des Rechts 414–449 (4th ed. 2015), argues that the economic analysis of law is convincing in the German legal system, if understood as an (optional) theory of legislation, but not as a theory of adjudication.

both countries, (2) the different concept of the individual, and (3) the general philosophical heritage.

A. Structures of Authority: Hierarchy versus Proximity

Previous scholarship has succinctly pointed to the institutional differences of criminal justice systems in the United States and continental Europe. As previously mentioned, Damaška distinguishes a hierarchical model of structuring authority, dominant in continental Europe, and a coordinate model, prevalent in the United States.[216] Kagan draws attention to similar aspects and refers to the continental model as bureaucratic and the U.S. model as adversarial.[217] Even though we rejected the general association of rigidity with the continental (hierarchical and bureaucratic) model and of flexibility with the U.S. (coordinate and adversarial) model, their overall framework on the different organizations of authority (hierarchy versus coordination) captures significant differences between the United States and Germany. In what follows, I want to develop four organizational aspects linked to this overall framework, which can explain, at least in part, why both countries have a different concept of the judge in terms of fallibility and idealization.

The first one concerns the personal accountability of judges. Both systems try to provide for some democratic accountability in choosing and reviewing the judicial personnel. The German system creates this accountability through a more or less centralized hierarchy,[218] which aims at an "uninterrupted chain of democratic legitimacy" (*ununterbrochene Legitimationskette*).[219] Judges (and prosecutors) for the lowest level are regularly appointed by the minister of justice of the state in which they perform their duties.[220] The minister of justice in turn is appointed by the respective state prime minister, who derives its democratic legitimacy from the state parliament, which the people as sovereign can elect.[221] After their appointment on the lowest level,

216. *See* Damaška, *supra* note 6, at 483–509 (hierarchical model), 509–523 (coordinate model). The terminology of "coordinate model" is maybe not the best, because it disguises the adversarial nature. We prefer denominations such as decentralized (as opposed to centralized) or proximity-based (as opposed to hierarchical).

217. *See* Kagan, *supra* note 7, at 10–11.

218. *See* Damaška, *supra* note 6, at 483–509; Kagan, *supra* note 7, at 11.

219. *See* 77 BVerfGE 1, 40; 83 BVerfGE 60, 73.

220. On details of the appointment procedure (which can also be delegated to the presidents of the higher regional courts and involve appointed election committees), see Johannes Riedel, *Training and Recruitment of Judges in Germany*, 5 Int'L.J. for Ct. Admin. 42, 46–47 (2013).

221. *See* 77 BVerfGE 1, 40; 83 BVerfGE 60, 72–3.

judges climb up the career ladder depending on their entrance exam and the continued evaluation.[222] This has two important consequences, which tend to uniformity in the German judiciary. First, the continued evaluation will push back on creativity and individuality.[223] Solving a high number of cases in a short time without having them reversed on appeal is rewarded, not finding new legal solutions. In addition, the sociological environment of German judges is largely similar throughout the bench. They share the same experience and, therefore, tend to see things similarly.[224] In contrast, the U.S. judiciary is characterized by decentralization and proximity. State judges and prosecutors often dispose of direct democratic legitimacy by being elected – not by the whole people, but by the community in which they judge.[225] Being a judge is not a career path, but an appointment of someone considered worthy of the office. The perspective of achieving higher judicial offices according to continued supervision does not play a significant role. The personality of the judge is highly relevant and present in the judgments and dissenting opinions,[226] which are, in Germany, only common at the Federal Constitutional Court.[227] Neither continued evaluation nor sociological background push towards uniformity.[228] As a consequence of this difference, we might say that the idea of a prototypical judge is more plausible in the German system. It is a smaller step from the idea of a prototypical judge to the ideal judge (German system) than from a whole set of different personalities that happen to hold a judicial office (U.S. system).

---

222. *See* Damaška, *supra* note 6, at 486, 500.

223. Kagan, *supra* note 7, at 26 (pointing to the advantages of U.S. adversarial legalism, notably "its openness to individual legal complaints, its tradition of entrepreneurial legal advocacy, and the creativity and boldness of its politically appointed, diverse judiciary").

224. One might also point to the comparatively high degree of overall societal homogeneity in Germany. On that, see, for example, Hörnle, *supra* note 2, at 188.

225. For prosecutors, *see* Damaška, *supra* note 6, at 512; Jescheck, *supra* note 1, at 245. For state judges, see Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. Chi. L. Rev. 1215, 1216–17 (2012); Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 Chicago Law Review 1215, 1216–7 (2012) (at 1258 *et seq.* discussing cases in which the fact of judges being elected should allow some interpretive divergence).

226. *See* Kagan, *supra* note 7, at 22. Contrast this with the "corporate personality" of continental courts, *see* Damaška, *supra* note 6, at 501.

227. *See* Lord Mance, *In a Manner of Speaking: How Do Common, Civil and European Law Compare?*, 78 Rabels Zeitschrift für ausländisches und internationales Privatrecht [RabelsZ] 231, 235 (2014); *see also* E. J. Cohn, *Dissenting Opinions in German Law*, 6 Int'l & Comp. L.Q. 540 (1957).

228. On the connection between sociological background (diversity) and uniformity in decision-making *cf.* Posner, *supra* note 200, at 196, 466.

The second aspect is still related to the hierarchical organization of the judiciary in Germany, but it focuses less on personal accountability than on the substantive review of decisions.[229] The German system requires judges to state the reason for their decisions.[230] Notably, the judge has to explain why she believes one witness and not the other. Higher courts cannot say that the lower court should have believed another witness. Establishing the facts of the case is the original task (*ureigene Aufgabe*) of the fact finding judge of the first judicial level.[231] However, even though the reviewability of factfinding is limited, in stating reason, the judge can make a whole set of mistakes that will lead to a reversal of her decision on appeal.[232] In contrast to that, it largely is a black box how the jury reached the guilty verdict.[233] The pressure of motivating judgments under the risk of having the judgment reversed will lead to standardized patterns of factual interpretation. Thus, the extended reviewability leads to uniformity in judicial decisions. It tampers the risk that standards pose to equality, control, and communication.

A third aspect concerns the professionalization of the judicial office.[234] German judges normally study law between four and five

229. In general on the centripetal force originating in the comprehensive system of appellate review, *see* Damaška, *supra* note 6, at 488–91, 495 ("Because the striving for uniformity and consistent decision-making is such an overriding tendency in all continental systems, a number of mechanisms have been designed to make lower courts accept legal propositions developed by superior courts.").

230. On that, *see* Strafprozessordnung [StPO] [Code of Criminal Procedure], § 267, *https://www.gesetze-im-internet.de/stpo/__267.html* (Ger.) [https://perma.cc/JKE5–5NJB]. *See also* Kagan, *supra* note 7, at 73, 87.

231. *See*, *e.g.*, 3 BGHSt 52, 53; 8 BGHSt 130, 131. This not only limits revisibility, but also delegation to (psychology) expert witnesses, *See also* Thomas Fischer, *Glaubwürdigkeitsbeurteilung und Beweiswürdigung*, 1994 NSTZ 1 *(*describing this original judicial task and criticizing [especially on p. 5] the increasing

importance of [psychology] expert witnesses against this background).

232. As BGH, 2002 NStZ-RR 243, puts it, the reasoning of the judgment notably has to indicate that the evaluation of evidence rests upon a sound basis and that the conclusion drawn by the court is not only an assumption or a mere supposition.

233. *See* Kagan, *supra* note 7, at 73, 87.

234. *Cf.* Kagan, *supra* note 7, at 71 ("apolitical professionalism").

years.[235] A uniform statewide exam ends the period of legal study.[236] Universities do not differ significantly in terms of prestige. Therefore, it does not matter so much to which university you went. What tends to be more important is the performance in the uniform state exam. Graduates of law school do not even receive their graduation certificate from the university but from the state in which they took the exam.[237] Even within law school, the existence of the final state exam leads to each student studying more or less the same subjects, with little space for individual course choices.[238] After law school, there are two years of uniform training, no matter which profession one will take.[239] Each

235. *See* Deutsches Richtergesetz [DRiG] [German Judiciary Act], [*https://perma.cc/2KQ6–4RAS*]. In general on German legal education, see Stefan Korioth, *Legal Education in Germany Today*, 24 Wis. Int'l L.J. 85 (2006); Heinrich Amadeus Wolff, *Bar Examination and Cram Schools in Germany*, 24 Wis. Int'l L.J. 109, 109–11 (2006); Peter M. Huber, *Zwischen Konsolidierung und Dauerreform – Das Drama der deutschen Juristenausbildung*, 40 Zeitschrift für Rechtspolitik [ZRP] 188 (2007); Riedel, *supra* note 220, at 43–6. *See also* David S. Clark, *The Selection and Accountabiity of Judges in West Germany: Implication of a Rechtsstaat*, 61 S. Cal. L. Rev. 1795, 1802–06 (1988); Jacek Srokosz, *Philosophical and cultural basis of the main methods of legal education in the USA*, 15 Opolskie Studia Administracyjno-Prawne 53, 57 (2017). As a historical, but still instructive document, see Max Rheinstein, *Law Faculties and Law Schools – A Comparison of Legal Education in the United States and Germany*, 1938 Wis. L. Rev. 5. For the Free State of Bavaria, the details of legal education are contained in the Ausbildungs- und Prüfungsordnung für Juristen [JAPO] [Training and Examination Regulation for Jurists], *translation at http://www.justiz.bayern.de/media/pdf/ljpa//japo_ab_zjs_2022–1.pdf*, issued by the State Examination Agency for Jurists (*Landesjustizprüfungsamt*).. 19, 1971, BGBl 1 at 2154 § 5a, *translated inhttp://www.gesetze-im-internet.de/englisch_drig/englisch_drig.html* [*https://perma.cc/2KQ6–4RAS*]. In general on German legal education, *see* Stefan Korioth, *Legal Education in Germany Today*, 24 Wis. Int'l L.J. 85 (2006); Heinrich Amadeus Wolff, *Bar Examination and Cram Schools in Germany*, 24 Wis. Int'l L.J. 109, 109–11 (2006); Peter M. Huber, *Zwischen Konsolidierung und Dauerreform – Das Drama der deutschen Juristenausbildung*, 40 Zeitschrift für Rechtspolitik [ZRP] 188 (2007); Riedel, *supra* note 220, at 43–6. *See also* David S. Clark, *The Selection and Accountabiity of Judges in West Germany: Implication of a Rechtsstaat*, 61 S. Cal. L. Rev. 1795, 1802–06 (1988); Jacek Srokosz, *Philosophical and cultural basis of the main methods of legal education in the USA*, 15 Opolskie Studia Administracyjno-Prawne 53, 57 (2017). As a historical, but still instructive document, *see* Max Rheinstein, *Law Faculties and Law Schools – A Comparison of Legal Education in the United States and Germany*, 1938 Wis. L. Rev. 5 (1938). For the Free State of Bavaria, the details of legal education are contained in the Ausbildungs- und Prüfungsordnung für Juristen [JAPO] [Training and Examination Regulation for Jurists], *translation at http://www.justiz.bayern.de/media/pdf/ljpa//japo_ab_zjs_2022–1.pdf*, issued by the State Examination Agency for Jurists (*Landesjustizprüfungsamt*). Other German states have enacted similar rules.

236. On this so-called first legal examination (*Erste juristische Prüfung*) for Bavaria, *see* JAPO, §§ 16–43.

237. Indeed, in the case of Bavaria, the certificate is issued by the State Examination Agency for Jurists, *see id.* at § 17 para. 1, sentence 4.

238. This is notably due to the importance of the final state examination and the detailed, state-wide regulation on its content, *see id.* at § 18.

239. The German system aims at the ideal of the "standardized jurist" (*Einheitsjurist*).

legal trainee works for a certain time as a clerk of a judge, in the prosecution office, at the administration, and with a lawyer.[240] At the end, there is a second state-wide exam.[241] All of this uniform education is focused on the profession of a judge.[242] But the option of becoming a judge is only open for those of the candidates whose score places them among the best 15 percent.[243] Contrast this with the United States. Each law school student comes from a very different background, having studied subjects as diverse as math, literature, history, or economics. Even after the diverse undergraduate studies, law school does not uniformize the future judiciary. Each law school has a different profile, and even within law school, the array of courses out of which students can choose is impressive. The only shared experience, the preparation and taking of the uniform bar exam, lasts about a month. In addition, there is no specific training for judges.[244] The guilt of the criminal defendant is even often determined by laypeople altogether (the jurors), which are as diverse in their views as the community they come from.[245] Here, I did not even take into consideration the higher degree of ethnic diversity in the United States.[246] The judicial training alone produces uniform legal mechanics in Germany and creative individuals in the United States. Therefore, it is not surprising that the concept of the judge tends to converge in Germany.

Finally, in Germany, law is taught and perceived as a science – the "science of law" (*Rechtswissenschaft*).[247] There is a strong belief

See David S. Clark, *The Selection and Accountabiity of Judges in West Germany: Implication of a Rechtsstaat*, 61 S. Cal. L. Rev. 1795, 1803, 183;*see also* Korioth, *supra* note 235 (Stefan Korioth, *Legal Education in Germany Today*, 24 Wis. Int'l L.J. 85, 86 (2006)); Wolff, *supra* note 235, at 110 ("unitary lawyers"); Huber, *supra* note 235, at 190.

240. It is in this two-years-period in which the clerks also receive training in how to approach sentencing, a point omitted in the critique of Hörnle, *supra* note 2, at 189 (rightly pointing out that sentencing is not part of the law school curriculum, which, however, does not constitute the whole legal training). In general on this so-called preparation service (*Vorbereitungsdienst*) for Bavaria, *see* JAPO, §§ 44–56.

241. On this so-called second legal state examination (*Zweite juristische Staatsprüfung*) for Bavaria, *see id.* at §§ 57–71. It can be seen as the equivalent of the bar exam. But it is broader because it is the entry exam for all legal professions, including any kind of civil servants. *See, e.g.,* Korioth, *supra* note 239, at 86.

242. Clark, *supra* note 239, at 1802.

243. On the percentage of judges in the German system, see Johanna Strohm, *Die juristische Arbeitswelt in Zahlen*, Legal Trib. Online (May 5, 2014), lto-karriere.de/jurastudium/stories/detail/statistik-jura-arbeitswelt-zahlen-fakten-juristenschwemme-gehalt-frauenanteil [https://perma.cc/R7EB-PKT5] and Clark, *supra* note 239, at 1807.

244. *Cf.* Kagan, *supra* note 7, at 73.

245. *Id.* at 87. On keeping lay participation low as a "centripetal weapon," *see also* Damaška, *supra* note 6, at 491.

246. On that point, see the discussion at *supra* note 224.

247. On that aspect, *see* Damaška, *supra* note 6, at 505 ("legal science").

in law being able to provide right answers even if balancing in the application of standards is involved.[248] At least as a regulative idea, the belief in Dworkin's one right answer thesis is not uncommon.[249] Judicial decision-making is referred to not as the making of law, but as the discovery of law (*Rechtsfindung*).[250] In contrast, in the United States, law and politics tend to merge.[251] In general, as the different "law and . . . "-movements show, law is taught and perceived in connection with other disciplines.[252] The mindset of the participants of the legal process must not be underestimated. To some extent, the belief in the autonomy of law, in correct outcomes, can become a self-fulfilling prophecy. We do not need to claim here that ontologically, it *is* easier to discern right and wrong in German criminal procedure. It is enough to point to how legal participants and drafters of the law *perceive* this issue, for this already explains the different concepts of the judge and the corresponding difference in norm design.

B. Concepts of Individuals: Homo Oeconomicus versus Zoon Politicon

Let us now further pursue the aspect of idealization. We already mentioned the dominance of economic thought in the U.S. system. The economic model of the individual is the *homo economicus* – the fully informed, rational, egoistic maximizer of her interests.[253] In reality, as behavioral economics underlines, individuals do not always live up to this model.[254] This, however, does not mean that U.S. economic

248. *See also id.* at 505 (rightly pointing to the importance of "intellectual habit" of judges, but less convincingly linking this habit oriented towards accurate answers with abstraction and lack of detail, i.e. – in our terminology – a lack of internal complexity).

249. On the one right answer thesis, *see* Ronald Dworkin, Taking Rights Seriously 348 (2013). *See* Ulfrid Neumann, Wahrheit im Recht: Zur Problematik und Legitimität einer fragwürdigen Denkform 37–41 (2004); Claus-Wilhelm Canaris, *Richtigkeit und Eigenwertung in der richterlichen Rechtsfindung*, 50 Grazer Universitätsreden 23, 41 (1993). One might add that the belief in the rule of law (*Rechtsstaat*) plays a similar regulative role. On that, *see* Clark, *supra* note 235, at 1832–6.

250. It is also not uncommon to perceive the whole making of private law as discovery, *see, e.g.*, Hans Christoph Grigoleit, *Anforderungen des Privatrechts and die Privatrechtstheorie, in* Rechtswissenschaftstheorie 53 (Matthias Jaestedt & Oliver Lepsius eds., 2008). In general on the different perceptions on law as to objectivity, see Bender, *supra* note 209.

251. *See* Kagan, *supra* note 7, at 10–11 (on the political character of U.S. adversarial legalism in general), 67–68, 80–81 (specifically for the criminal justice system).

252. On that observation, *see also* Calabresi, *supra* note 199, at 2118–22.

253. For a critical presentation of the traits of the *homo economicus*, see Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471, 1476–9 (1998).

254. For a discussion on behavioral insights, see *id.*, at 1476–81, 1548–50.

thought tends to idealize individuals in the sense the German system idealizes judges.

Indeed, it is important to see that each theory simplifies reality according to its specific needs, and, therefore, idealizes humans according to certain aspects it is designed to highlight. Economic reasoning has chosen the *homo economicus* as a model. Other theoretical accounts also have their model of a human. Republicanism, for instance, is built on the concept of a virtuous citizen that cares about the commonwealth.[255] Even though mainly conceptualized in its current version in the English-speaking world,[256] it seems to describe the legal role-model in continental Europe. It idealizes the human not as *homo oeconomicus*, but as *zoon politicon*,[257] as a citizen with multiple ties to the broader social context.

Comparing the U.S. *homo oeconomicus* and the German *zoon politicon*, we realize that the respective concept of the judge aligns very well with these different views on individuals. This point becomes particularly clear if we underline the self-interestedness of the *homo oeconomicus*.[258] If we imagine the judge as *homo oeconomicus*, she pursues her interests and is open for bribes if the bribe exceeds the product of costs and risk of punishment. This judge will conceive of law as a price.[259] She will likely try to minimize her workload by apply-

255. On Republicanism from a philosophical-historical perspective, see notably John G. A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition [insert pincite] (2d ed. 2016); Louis Hartz, The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution (2d ed. 1991); Quentin Skinner, The Foundations of Modern Political Thought (1978). From a legal perspective, *see* Ackerman, *supra* note 193, 29–32; Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539, 1555 (1988); Cass R. Sunstein, *Republicanism and the Preference Problem*, 66 Chi.-Kent L. Rev. 181 (1990). From the European context, *see* Samantha Besson & José Luis Martí, *Law and Republicanism: Mapping the Issue, in* Legal Republicanism: National and International Perspectives 3, 26 (Samantha Besson & José Luis Martí eds., 2009).

256. *See* the contributions of the previous footnote.

257. *See* Aristoteles, Politics 1.1253a [1] (Rackham Harris ed., 1944) ("man is by nature a political animal").

258. At least historically, this seems to be the central aspect of describing the *homo oeconomicus*. Indeed, all early contributions focus on this aspect. *See, e.g.*, Adam Smith, The Wealth of Nations 30 (2001) (Book 1, Chapter II) ("It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.").

259. This economic perspective can be traced back to Holmes' famous way of looking at the law like a "bad man" does. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."). For modern accounts of

ing standards in a simple way, thus minimizing the information she considers,[260] so that standards lose their comparative advantage in being able to reach high internal complexity while maintaining external complexity low. However, this judge will hesitate to violate clear-cut rules because they increase the risk of discovery. In short, classical economic theory captures the dangers that follow from the self-interest maximizing individual – even if this assumption exaggerates in the negative direction.

In contrast, if we imagine the judge as a *zoon politicon*, she is inspired by higher ideals of republican citizenry. Even if granted discretionary power by standards and balancing, she will not use this discretionary power to favor the party that offers the bigger advantage to her. Rules rather hinder her in the virtuous endeavor of finding the best outcome.[261] Moreover, she will, even if this brings her only costs and no benefits, still consider the case in all its internal complexity, so that standards can play out their comparative advantage. In short, by imagining the judge as a virtuous citizen, the republican approach also captures a part of reality – even if this idealistic assumption exaggerates in the positive direction. In the end, the fallible and the idealized concept of the judge align well with the ways of viewing individuals in both systems.

C. Philosophical Heritage: Pragmatism versus Idealism

The fact that the German system underlines the idealistic traits of a judge, whereas the U.S. system rather relies on the concept of fallible judges might further be explained by the different philosophical heritage of both countries. Considering the philosophical tradition of the United Kingdom, with England as the mother country of the common law, many currents come to mind. Maybe the most emblematic ones

---

the law as price theory (as opposed to law as limit), see Daniel R. Fischel, *The Corporate Governance Movement*, 35 Vand. L. Rev. 1259, 1290 (1982), Frank H Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offer*, 80 Mich. L. Rev. 1155, 1168 n.36, 1177, footnote 57 (1982) ("[. . .] the idea of optimal sanctions is based on the supposition that managers not only may but also should violate the rules when it is profitable to do so."). Critically Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N. C. L. Rev. 1265, 1267–8 (1998). Similarly in the field of legal ethics Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 Yale L.J. 1545, 1559, 1576–7 (1995) (law as cost v. law as prohibition).

260. For a particularly non-idealistic view on standards, see Kaplow, *supra* note 14, at 566 (full citation of his example *supra* note 14, at 25).

261. On the advantages of the standards-model in a world of perfect judges, *see supra* at text to notes 156–61.

are empiricism[262] and utilitarianism.[263] Considering the United States specifically, we might come up with pragmatism.[264] How do these theories connect to the rules-model and the underlying assumption of judges being imperfect? Empiricism invites us to look at reality, to observe how judges actually operate. We realize that they make mistakes and sometimes even accept bribes. Judges are imperfect. A legal system must take this into account, and the rules-model is one possible answer. Being used to utilitarian thinking, it is easy to accept that all pleasure (benefit) comes with pain (cost). Therefore, the classical inconveniences of the rules-model, notably the problem of over-inclusive- or under-inclusiveness, do not bother us too much. They are a cost – and a cost that is probably smaller than the cost of freeing judges of any guidance.[265] The pragmatic attention on the effects of a theory[266] further familiarizes us in considering the costs and benefits of norm design. Moreover, pragmatism emphasizes the possibility of a theory being

262. Among the "British Empiricists" we might count Francis Bacon, Novum Organum 187 (1878) (First Aphorism) ("Homo, naturae minister et interpres, tantum facit et intelligit quantum de naturae ordine re vel mente observaverit: nec amplius scit, aut potest."); Thomas Hobbes, The Elements of Law Natural & Politic: Part I (Ferdinand Tönnies ed., 2d ed. 2013); John Locke, An Essay Concerning Human Understanding (1690) (especially Book I, Chapter I–III; Book II, Chapter I, Section 24); George Berkeley, A Treatise Concerning the Principles of Human Knowledge (Kenneth Winkler ed., 1982); David Hume, A Treatise on Human Nature (Levis A. Selby-Bigge ed., 1896) (Section XIV).

263. *See* Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 2 (Claredon Press 1907) ("By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness."); John Stuart Mill, Utilitarianism 14 (Floating Press 2009) ("The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness.").

264. For American representatives of philosophical pragmatism, see Charles Sanders Peirce, *The Fixation of Belief*, 12 Pop. Sci. Monthly 1 (1877) [hereinafter Peirce, *Belief*]; Sanders Peirce, *How to Make Our Ideas Clear*, 12 Pop. Sci. Monthly 286 (1878) [hereinafter Peirce, *Ideas*]; John Dewey, The Public and Its Problems (1927); John Dewey, Logic: The Theory of Inquiry (1938); William James, Pragmatism: A New Name for Some Old Ways of Thinking (2010). For the quite different adjudicative pragmatism, *see* Richard A. Posner, Law, Pragmatism, and Democracy (2003); Posner, *supra* note 200, at 454–69; Richard A. Posner, *Legal Pragmatism Defended*, 71 U. Chi. L. Rev. 683 (2004); Richard A. Posner, *Pragmatic Adjudication*, 18 Cardozo L. Rev. 1 (1996). On the differences between philosophical and adjudicative pragmatism, *see id.* at 3. For an overview of both types of pragmatism, *see* Bender, *supra* note 209, at 73–7.

265. *See* Schauer, *supra* note 19, at 685, and *supra* at 162–4.

266. *See* James, *supra* note 264, at 44 ("Theories thus become instruments, not answers to enigmas, in which we can rest."). *See generally* Jack Knight & James Johnson, The Priority of Democracy: Political Consequences of Pragmatism 27 (2011).

falsified at some point.[267] In line with that, judges are as well fallible in their legal pronouncements. Finally, we might realize that a rules-based model provides certainty and, therefore, helps us to settle opinions on how to solve legal disputes. We might, here and there, be unhappy with the result. But we do not doubt that the result was required according to the rules. In a pragmatic spirit, this belief (and not metaphysical truth) is all we can aim for.[268]

In contrast, if we were to come up with a philosophical current for civil law countries, we would probably have in mind continental rationalism[269] and German idealism.[270] In that spirit, we construct our system according to the laws of reason. We shape reality according to our ideas and ideals. In this world of ideas, we want judges to be perfect, and we hope reality to conform to these ideals. We design the best possible system and adopt the standards-model for perfect judges. This, of course, is an overly simplistic account. But it might contain a glimpse of truth, which further makes plausible the perspective on judges prevailing in the United States and Germany.

Conclusion

We can conclude our inquiry by summarizing the main findings. In the first part, we presented the framework of comparative norm design. For that purpose, we introduced some concepts, building on and further developing Louis Kaplow's previous analysis concerning rules and standards, complexity and simplicity, and structured decision-making and free balancing. We defined rules as norms that give content to the law in the moment of their enactment (*ex ante*), whereas

267. *See* Peirce, *Belief*, *supra* note 264, at 11. *See generally* Knight & Johnson, *supra* note 266, at 26–7.

268. Peirce, *Belief*, *supra* note 264, at 6 ("Hence, the sole object of inquiry is the settlement of opinion."); Peirce, *Ideas*, *supra* note 264, at 300 ("The opinion which is fated to be ultimately agreed to by all who investigate, is what we mean by the truth, and the object represented in this opinion is the real.").

269. Among the "Continental Rationalists", we can count René Descartes, Discours de la Méthode Pour bien conduire sa raison, et chercher la vérité dans les sciences (1637); Benedictus de Spinoza, and Gottfried Wilhelm Leibnitz, . *See generally* Dea Shannon et al., *Continental Rationalism* (Winter 2018 Ed.), *in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed.), *http://plato.stanford.edu.*

270. *See* notably Immanuel Kant, Critik der reinen Vernunft (1781); Johann Gottlieb Fichte, Grundlage der gesammten Wissenschaftslehre: Als Handschrift für seine Zuhörer (1794); Friedrich Wilhelm von Schelling, System des transzendentalen Idealismus (1800); Georg Wilhelm Friedrich Hegel, System der Wissenschaft: Erster Teil, die Phänomenologie des Geistes (1807). *See generally* Paul Guyer & Rolf-Peter Horstmann, *Idealism* (Spring 2022 Ed.), *in* The Stanford Encyclopedia of Philosophy, *supra* note 269 (under 5.).

standards defer the decision-making to a later moment (*ex post*). We introduced the distinction between internal complexity, measuring the amount of information processed by a legal norm, and external complexity, related to the accessibility of an area of law. We also introduced two types of structured decision-making: value-structuring that requires the facts to pass legal thresholds, and probability-structuring that attaches the threshold to the legal issues actually being the case. Based on these concepts, we could present the rules-model and the standards-model as tools of comparative norm design: the rules-model is characterized by internally simple, but externally complex rules that structure decision-making; the standards-model is based on internally complex, but externally simple standards that allow free balancing. Both models capture discretion in different ways: in the rules-model, it is openly deferred to the decision-makers by clear-cut rules; in the standards-model, it is a consequence of the use of vague notions that require concretization by the decision-maker *ex post*. We also pointed to the fact that these models can be implemented *de jure* given the content of the law, or *de facto* because the institutional and procedural setting and behavioral biases such as anchoring lead in fact to a certain way of applying the law.

In the second part, we applied the rules-model and the standards-model to the criminal justice system of the United States and Germany. Analyzing exclusionary rules, the determination of credibility of witnesses, sentencing, and plea bargaining in both countries, we could show that the United States follows the rules-model and Germany the standards-model. This analysis relativizes common characterizations of the German system as characterized by simple, rigid rules and of the U.S. criminal justice system as highly complex, flexible, and discretionary. Rather, both countries implement discretion in different ways. The United States only do so more openly, through internally simple, but externally complex rules that structure decision-making. Germany does so using internally complex, but externally simple standards that allow free balancing. Thus, the actual difference rather concerns the design of legal norms.

In the third part, we explained the dominance of the rules-model in the United States and the standards-model in Germany by a differing concept of the judge. Whereas standards have significant advantages in a world of perfect judges, the advantages of rules increase the more judges are fallible. Therefore, it seems plausible to explain the difference in norm design between the United States and Germany in terms

of a different concept of the judge: both countries pursue the same ends in criminal procedure, but they choose a different design of legal norms because of the different prevailing concept of the judge.

In a fourth part, we contextualized the insights gained throughout the analysis of the difference in norm design in the realm of criminal justice which we gained in the second part. The goal of this part was to show that the rules-model and the standards-model can describe broader differences between the United States and Germany beyond criminal justice. Indeed, the analysis of comparative norm design based on the rules-model and the standards-model aligns well with other areas of the law such as contract law, with the common-civil law divide, and with dominant strains of legal thought in general.

In a fifth and final part, we contextualized the prevailing concept of the judge which we developed in the third part. We aimed at showing that the difference in how judges are conceived in the United States and Germany harmonizes with the different modes in which authority is organized, the different ways of thinking about individuals, and the different philosophical heritage. Though not all differences between the United States and Germany can be explained through the rules-model and standards-model and their corresponding concepts of the judge, focusing on the design of legal norms in comparative analysis offers valuable insights.