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Some Realism About Legal Certainty in the Globalization of the Rule of Law

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SOME REALISM ABOUT LEGAL CERTAINTY IN THE GLOBALIZATION OF THE RULE OF LAW⁺

*James R. Maxeiner**

I. INTRODUCTION.....	28
II. LEGAL CERTAINTY IS <i>THE</i> INTERNATIONAL BASIS OF THE RULE OF LAW.....	30
III. “WE ARE ALL REALISTS NOW” IS THE AMERICAN CREDO ...	33
IV. LEGAL CERTAINTY AS <i>LEITMOTIF</i> FOR LEGAL METHODS... 38	
A. <i>Lawmaking</i>	39
B. <i>Law Finding and Judicial Lawmaking</i>	41
C. <i>Law Applying</i>	42
V. CONCLUSION: DEALING WITH EACH OTHER.....	45

⁺ Address to the Rule of Law Conference given at the European American Consortium for Legal Education Annual Meeting held on the 200th Anniversary of the Faculty of Law and Administration of the University of Warsaw, June 13, 2008. The address style is retained.

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I. INTRODUCTION

Legal certainty is a central tenet of the rule of law as understood around the world.¹ For example, the Foreign Ministers of the G8² declared in their meeting at Potsdam in 2007 their nations' commitment to "the rule of law [as a] core principle[] on which we build our partnership and our efforts to promote lasting peace, security, democracy and human rights as well as sustainable development worldwide."³ They stated that it is "imperative to adhere to the principle[] . . . of legal certainty."⁴

While the United States is among the strongest proponents of the rule of law,⁵ American jurists do not speak of legal certainty—at least, not anymore.⁶ While the term "legal certainty" is English, it is not American English.⁷ American academics who address certainty of law use another term, "legal indeterminacy";⁸ practicing lawyers by and large do not use either of these terms.⁹ Both groups of jurists seem resigned to ubiquitous uncertainty.¹⁰

1. See Danilo Zolo, *The Rule of Law: A Critical Appraisal*, in *THE RULE OF LAW: HISTORY, THEORY AND CRITICISM* 3, 24 (Pietro Costa & Danilo Zolo eds., 2007). Zolo seeks a uniform rule of law common to the four principal variations he sees in the rule of law—the British, North American, German, and French. See *id.* at 7.

2. Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States. University of Toronto G8 Information Centre, *What is the G8?*, http://www.g8.utoronto.ca/what_is_g8.html (last visited Oct. 26, 2008).

3. G8 Foreign Ministers, Declaration of G8 Foreign Ministers on the Rule of Law (2007), <http://www.g8.utoronto.ca/foreign/formin070530-law.pdf>, [hereinafter G8 Declaration].

4. *Id.*; accord *The Rule of Law at the National and International Levels*, G.A. Res. 62/70, U.N. Doc A/RES/72/70 (Dec. 6, 2007).

5. See James R. Maxeiner, *Legal Certainty: A European Alternative to American Legal Indeterminacy?*, 15 *TUL. J. INT'L & COMP. L.* 541, 545–46 (2007) [hereinafter Maxeiner, *European Alternative to American Legal Indeterminacy*].

6. See *id.* at 544.

7. See *id.* at 543–45.

8. See *id.* at 543–44.

9. See *id.*

10. See *id.* The term legal uncertainty has not, however, vanished from popular usage. See, e.g., Lisa Leff, *California Gay-Marriage Ban Creates Legal Uncertainty*, ASSOC. PRESS, Nov. 7, 2008, available at http://www.huffingtonpost.com/2008/11/07/california-gaymarriage-ba_n_142013.html.

The Secretary General of the United Nations wisely counseled, “a common understanding of key concepts is essential.”¹¹ Common efforts to build the rule of law have been “plagued” by “the failure of many policymakers to examine or fully understand the very concept of the ‘rule of law.’”¹² How are we to build a partnership based on a concept on which we differ?

This Article seeks to facilitate the international discussion of legal certainty and the rule of law. It aims: (I) to make Americans aware that skepticism of legal certainty espoused by American academics is atypical; (II) to make non-Americans aware of American skepticism of legal certainty; and (III) to help Americans and non-Americans alike understand each other better so that they may more efficiently cooperate.¹³

11. The Secretary-General, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, ¶ 5, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter Rule of Law and Transitional Justice] (stating that concepts such as the rule of law “serve both to define our goals and to determine our methods”).

12. JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 69 (2006) (emphasis omitted).

13. Since the purpose of this Article is to better inform the international discussion of the rule of law at international and domestic legal system levels, it focuses on the practical and the attainable. It has limited goals. It is not concerned with fine distinctions in academic writings. If professional philosophers happen to read it, they may find no use for it. See Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 354 (1973) (“The professional philosopher, who has no understanding of the peculiar technical interests and needs of law, can see nothing in formalism but . . . a clear derangement of the relationship between form and content.” (quoting Rudolf von Jhering, 2 II Der Geist des römischen Rechts 478–79 (1883) (a. von Mehren trans.))).

II. LEGAL CERTAINTY IS *THE* INTERNATIONAL BASIS OF THE RULE OF LAW

While at its outer bounds the rule of law may be “an essentially contested concept,”¹⁴ at its core, it promises legal certainty.¹⁵ According to a recent publication of the Organisation for Economic Cooperation and Development (OECD), “. . . the concept first and foremost seeks to emphasize the necessity of establishing a rule-based society in the interest of legal certainty and predictability.”¹⁶

A legal system that provides legal certainty guides those subject to the law.¹⁷ It permits those subject to the law to plan their lives with less uncertainty.¹⁸ It protects those subject to the law from arbitrary use of state power.¹⁹

The centrality of legal certainty to the thinking of continental jurists is not well appreciated by American academics captivated by legal indeterminacy.²⁰ For the great German legal philosopher, Gustav Radbruch, legal certainty—along with justice and policy—was one of only three

14. Neil MacCormick, *Der Rechtsstaat und die Rule of Law*, JURISTENZEITUNG, Jan. 1984, at 65, 65–66; Randall Peerenboom, *Varieties of Rule of Law, an Introduction and Provisional Conclusion*, in ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. 1 (Randall Peerenboom ed., 2004); see also RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 1 (2001) (“the rule of law’ still means very different things to different people”).

15. See, e.g., Gerhard Casper, *Rule of Law? Whose Law?* (Center on Democracy, Development, and the Rule of Law, Working Paper No. 10, 2004), reprinted in FESTSCHRIFT FÜR ANDREAS HELDRICH ZUM 70. GEBURTSTAG 1109 (Stephan Lorenz et al. eds., 2005); see also Danilo Zolo, *supra* note 1 (contending that a state must guarantee foreseeability in the law).

16. OECD DEVELOPMENT ASSISTANCE COMMITTEE, ISSUES BRIEF: EQUAL ACCESS TO JUSTICE AND THE RULE OF LAW 2 (2005) [hereinafter OECD], <http://www.oecd.org/dataoecd/26/51/35785471.pdf>. Enumerations of the requirements of the rule of law typically include legal certainty. See G8 Declaration, *supra* note 3; Rule of Law and Transitional Justice, *supra* note 11, ¶ 5.

17. See James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VAL. U. L. REV. 517, 522 (2006) [hereinafter Maxeiner, *Legal Indeterminacy Made in America*].

18. *Id.*

19. *Id.*

20. See *id.* at 520–23.

fundamental pillars of the very idea of law.²¹ Radbruch's contemporary, Ludwig Bendix, colorfully made the point in a way that scarcely permits forgetting: "[t]he concept of legal certainty is a central concept of [our] inherited legal methods, in which all have grown up[; i]t is the air in which all jurists have learned to breathe."²² Bendix was such a believer in legal certainty that, upon his release in May 1937 from the Nazi concentration camp at Dachau, he began to prepare a lawsuit against the camp's commandant.²³ He surely would have brought the suit had his children not first hustled him out of the country to the safety of realist America.²⁴

Bendix was the truest of true believers, but commitment to legal certainty such as his is characteristic of European legal systems.²⁵ Legal certainty is a "general principle of EC law."²⁶ It is one of a handful of legal concepts so recognized by the European Court of Justice and the European Court of Human Rights.²⁷ It is a fundamental principle of the national legal systems of Europe:²⁸ in Germany it is *Rechtssicherheit*,²⁹ in

21. Heather Leawoods, *Gustav Radbruch: An Extraordinary Legal Philosopher*, 2 WASH. U. J.L. & POL'Y 489, 493 (2000).

22. LUDWIG BENDIX, *DAS PROBLEM DER RECHTSSICHERHEIT. ZUR EINFÜHRUNG DES RELATIVISMUS IN DIE RECHTSANWENDUNGSLEHRE* 2 (1914) (Author's translation).

23. REINHARD BENDIX, *FROM BERLIN TO BERKELEY, GERMAN-JEWISH IDENTITIES* 172 (1986).

24. *Id.*

25. *See id.*; LUDWIG BENDIX, *supra* note 22, at 2; *see also* JUHA RAITIO, *THE PRINCIPLE OF LEGAL CERTAINTY IN EC LAW* 125–30 (2003).

26. RAITIO, *supra* note 25, at 125; *see* ANDREAS VON ARNAULD, *RECHTSSICHERHEIT: PERSPEKTIVISCHE ANNÄHERUNGEN AN EINE IDÉE DIRECTRICE DES RECHTS* 661–62 (2006).

27. *See* Patricia Popelier, *Legal Certainty and Principles of Proper Law Making*, 2 EUR. J. L. REFORM 321, 327–28 (2000) (summarizing PATRICIA POPELIER, *RECHTSZEKERHEID ALS BEGINSSEL VAN BEHOORLIJKE REGELGEVING* (1997)); RAITIO, *supra* note 25, at 125–30; TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* 4 (2d ed. 2006).

28. *See* RAITIO, *supra* note 25, at 125–36.

29. Maxeiner, *European Alternative to American Legal Indeterminacy*, *supra* note 5 at 551 n.49; *see also* VON ARNAULD, *supra* note 26 at 661–62 (2006).

France *sécurité juridique*,³⁰ in Spain *la seguridad jurídica*,³¹ in Italy *certezza del diritto*,³² in the Benelux countries *rechtszekerheid*,³³ in Sweden *rättssäkerhet*,³⁴ in Poland *do obowiązującego prawa*,³⁵ and in Finland *oikeusvarmuuden periaate*.³⁶ Legal certainty has even made its way back into English through the common law systems of the United Kingdom.³⁷ A legal system without a modicum of legal certainty is scarcely worthy of the name.

As a general principle of European legal systems, legal certainty “requires that all law be sufficiently precise to allow the person—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”³⁸ It means that: (1) laws and decisions must be made public; (2) laws and decisions must be definite and clear; (3) decisions of courts must be binding; (4) limitations on retroactivity of laws and decisions must be imposed; and (5) legitimate expectations must be protected.³⁹ Elsewhere I have shown at length how legal certainty is indeed heightened in one EU country, Germany.⁴⁰

30. Maxeiner, *European Alternative to American Legal Indeterminacy*, *supra* note 5, at 551 n.48; *see also* RAITIO, *supra* note 25, at 128.

31. Maxeiner, *European Alternative to American Legal Indeterminacy*, *supra* note 5, at 551 n.52.

32. *Id.* at 551 n.50.

33. *Id.* at 550 n.47.

34. *Id.* at 551 n.55.

35. *Id.* at 551 n.53.

36. *Id.* at 551 n.56.

37. *See* RAITIO, *supra* note 25, at 127.

38. Korchuganova v. Russia, No. 75039/01, Judgment, ¶ 47 (Eur. Ct. H.R. June 8, 2006), available at <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=56853&sessionId=14913646&skin=hudoc-en&attachment=true>.

39. *See* TRIDIMAS, *supra* note 27, at 242–57; VON ARNAULD, *supra* note 26, ch. 7.II (citing numerous decisions of the European Court of Justice and asserting tenets of legal certainty in European law).

40. *See* Maxeiner, *European Alternative to American Legal Indeterminacy*, *supra* note 5, at 553–54.

III. "WE ARE ALL REALISTS NOW" IS THE AMERICAN CREDO

While jurists elsewhere in the world talk of legal certainty, in America they do not.⁴¹ While once American legal academics spoke of legal certainty, today they speak of *legal indeterminacy*.⁴² They reject legal certainty because they know better, or so they think.⁴³ Their credo is, "we are all realists now."⁴⁴

The "realists" were a loose group of mostly academic jurists in the United States in the 1920s and 1930s who critiqued what they saw as the prevailing "formalist" American legal system.⁴⁵ They thought judges judged without an accurate understanding of the way things actually were.⁴⁶ When American jurists today say "we are all realists now," they mean that contemporary American lawyers work with "a full awareness of the limitations and flaws in the law and the complexity and openness of judicial decision making."⁴⁷

Sophisticated American jurists today no longer believe in legal certainty as an attainable or even desirable goal.⁴⁸ According to Professors Jules Coleman and Brian Leiter, "only ordinary citizens, some jurisprudes, and first year law students

41. See *id.* at 601 (noting a belief that "wholesale indeterminacy is an inevitable feature of modern legal systems").

42. *Id.* at 543–44.

43. *Id.* at 544.

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

45. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1223–35 (1931).

46. See *id.* at 1236–37.

47. Smith, *supra* note 44, at 247; Brian Z. Tamanaha, *The Realism of the "Formalist" Age*, in ST. JOHN'S UNIVERSITY SCHOOL OF LAW LEGAL STUDIES RESEARCH PAPER SERIES 1, 8 (2007), available at <http://ssrn.com/abstract=985083>.

48. Maxeiner, *European Alternative to American Legal Indeterminacy*, *supra* note 5, at 543–44.

have a working conception of law as determinate.”⁴⁹ Many American jurists regard legal certainty as a chimera, an infantile longing, a childhood belief that one gets over, just as one gets over belief in Santa Claus or the Wizard of Oz.⁵⁰ In their assessment, they hearken back to the opinion of Judge Jerome Frank, the noted realist, who in his 1930 book *Law and the Modern Mind* challenged the idea that legal decisions are always certain.⁵¹ Frank deprecated as a childish myth the idea that law could ever be certain.⁵² His criticism was effective; by the 1960s the term “legal certainty” had fallen out of use.⁵³

Ironically, most legal realists did not share Frank’s extreme views of legal certainty.⁵⁴ They did not argue that judicial decisions are *always* uncertain.⁵⁵ Most did not even argue that judicial decisions are *usually* uncertain.⁵⁶ Karl Llewellyn, perhaps the best known of the legal realists, agreed that law is *not always* certain, but did not agree that law is *necessarily* uncertain.⁵⁷ Indeed, as the principal drafter of the Uniform

49. Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 579 n.54 (1993). Much of the populace at large, however, clings to the idea of legal certainty. Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 82 (2001). American law professors report that their first year law students must “un-learn” the idea that rules decide cases. *Id.*

50. *E.g.*, Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 63.

51. Julius Paul, *Jerome Frank’s Attack on the “Myth” of Legal Certainty*, 36 NEB. L. REV. 547, 547–49 (1957); see JEROME FRANK, *LAW AND THE MODERN MIND* 244 (1930) (asserting that legal certainty does not exist).

52. *Id.* at 547; see also Wilfrid R. Rumble, *American Legal Realism and the Reduction of Uncertainty*, 13 J. PUB. L. 45, 45–46 (1964); Wilfrid R. Rumble, *Rule-Skepticism and the Role of the Judge: A Study of American Legal Realism*, 15 J. PUB. L. 251, 258–60 (1966) [hereinafter Rumble II].

53. See Rumble II, *supra* note 52, at 260.

54. BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 17 (2007).

55. *Id.* at 19.

56. *Id.* at 19–20.

57. Karl Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581, 599 (1940) (“It does not show ‘uncertainty’ in the law What it shows is lack of 100 percent certainty, and that is all it shows.”).

Commercial Code, America's most European piece of legislation, Llewellyn invested heavily in bringing certainty to American law.⁵⁸

Yet today, three quarters of a century later, legal certainty has disappeared as a concept of the American legal system and as a goal to strive for; legal indeterminacy has become the common "conceptual terrain."⁵⁹ The term "legal indeterminacy" in its present sense made its first appearances only in the 1960s and did not achieve currency until the 1980s, when a new group of legal academics, known as "crits" (from Critical Legal Studies), adopted it.⁶⁰ Some of them endorsed the more radical position espoused by Frank that legal decisions are always uncertain.⁶¹

Legal indeterminacy means that law does not always determine the answer to a legal question.⁶² According to the strongest version of the "indeterminacy thesis," known as "radical indeterminacy," law is always indefinite and never certain, any decision is legally justifiable in any case, and law is nothing more than politics by another name.⁶³ Scholars quickly dispatched this point.⁶⁴

While few American jurists accept a strong version of indeterminacy, most academics, and perhaps most lawyers, believe in a weaker version sometimes termed

58. See Richard E. Coulson, *Private Law Codes and the Uniform Commercial Code—Comments on History*, 27 OKLA. CITY U. L. REV. 615, 627 (identifying Professor Llewellyn as the chief reporter of the Uniform Commercial Code).

59. LEITER, *supra* note 54, at 9.

60. John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 85 (1995).

61. LEITER, *supra* note 54, at 15, 17 (speaking of "Frankification" of realism).

62. Maxeiner, *European Alternative to American Legal Indeterminacy*, *supra* note 5, at 543.

63. *Id.*

64. See Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 283 (1989); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 462 (1987) [hereinafter *Indeterminacy Crisis*]; Lawrence B. Solum, *Indeterminacy*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 488 (Dennis Patterson ed., 1996) (summarizing and challenging the "radical indeterminacy" argument).

“underdeterminacy.”⁶⁵ Underdeterminacy means that while the law constrains judicial decision, it does not uniquely determine it.⁶⁶

This does not seem to be a particular advance on what Llewellyn and other Americans—including this Author relying on Llewellyn—said decades ago.⁶⁷ To jurists schooled in civil law methods, it is quite unremarkable. Karl Engisch, in his classic work on legal method, wrote long ago that binding to a statute “will always be a question of more or less.”⁶⁸

Legal certainty and legal indeterminacy are not complements.⁶⁹ Legal indeterminacy as a legal proposition has narrower application than does legal certainty.⁷⁰ As far as individuals are concerned, legal certainty serves two distinct functions: it guides them in complying with the law, and it protects them against arbitrary government action by controlling the use of the power to make and apply law.⁷¹

65. See, e.g., *Indeterminacy Crisis*, *supra* note 64; Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419 (2006); Lawrence B. Solum, *Legal Theory Lexicon 036: Indeterminacy*, http://lsolum.typepad.com/legal_theory_lexicon/2004/05/legal_theory_le_2.html (last visited Oct. 26, 2008).

66. According to Lawrence B. Solum:

[1] The law is determinate with respect to a given case if and only if the set of legally acceptable outcomes contains one and only one member. [2] The law is underdeterminate with respect to a given case if and only if the set of legally acceptable outcomes is a nonidentical subset of the set of all possible results. [3] The law is indeterminate with respect to a given case if the set of legally acceptable outcomes is identical with the set of all possible results.

Solum, *supra* note 65.

67. Llewellyn, *supra* note 57; JAMES MAXEINER, *POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW: A COMPARATIVE STUDY* 28 (1986) [hereinafter MAXEINER, *POLICY AND METHODS*] (speaking of “negative” and “positive” binding).

68. KARL ENGISCH, *EINFÜHRUNG IN DAS JURISTISCHE DENKEN* 136 (1st ed. 1956) (“Es wird sich immer nur um die Frage des mehr oder Minder der Bindung an das Gesetz handeln.”).

69. See Maxeiner, *European Alternative to American Legal Indeterminacy*, *supra* note 5, at 601.

70. See Maxeiner, *Legal Indeterminacy Made in America*, *supra* note 17, at 552.

71. See MAXEINER, *POLICY AND METHODS*, *supra* note 67, at 10–11.

American legal indeterminacy is concerned principally only with the latter;⁷² it is interested in the former only incidentally in that it is concerned with predicting appellate decisions.⁷³

Legal indeterminacy is principally a theory of appellate judicial decision making.⁷⁴ It assumes the perspective of appellate judges.⁷⁵ By focusing on whether rules require appellate judges to reach particular correct answers, the American discussion of legal indeterminacy overstates the level of uncertainty and underestimates opportunities for decreasing it.⁷⁶

Controlling appellate decisions is only one concern of legal certainty.⁷⁷ Legal certainty is concerned more generally with controlling legal decisions of all types,⁷⁸ and more broadly still, with guiding persons subject to law.⁷⁹ Perfect precision is not essential for substantial fulfillment of the guidance function.⁸⁰ Legal certainty thus includes the perspective of law abiding subjects as well as that of law appliers.⁸¹

These different concerns mean that there is no inverse correlation between legal certainty and legal indeterminacy.⁸² A high level of legal certainty can be consistent with a high level of legal indeterminacy.⁸³ For example, judicial decisions may be

72. *See id.*

73. *See id.*

74. *See* LEITER, *supra* note 54, at 19–20. Leiter makes the point that the realists focused on appellate decision making. *Id.* Since then, many American jurists have used indeterminacy with respect to judicial decisions generally. *See* Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 2 (2007). The American study of law emphasizes judicial decision making and, in particular, appellate decision making. *See id.* at 3–4.

75. *See, e.g.*, E.W. THOMAS, *THE JUDICIAL PROCESS: REALISM, PRAGMATISM, PRACTICAL REASONING AND PRINCIPLES* 108–09 (2005).

76. *See* Maxeiner, *Legal Indeterminacy Made in America*, *supra* note 17, at 523.

77. *See* MAXEINER, *POLICY AND METHODS*, *supra* note 67, at 10–12.

78. Maxeiner, *European Alternative to American Legal Indeterminacy*, *supra* note 5, at 546.

79. *Id.* at 11 (noting how German law distinguishes *Orientierungs* from *Realisierungssicherheit*).

80. *Id.* at 11–12.

81. *See* Maxeiner, *Legal Indeterminacy Made in America*, *supra* note 17, at 524.

82. LEITER, *supra* note 54, at 60.

83. *See id.*

certain, even though they are subject to little control, if who the decision maker is, is certain and that decision maker for reasons external to legal rules decides predictably.⁸⁴ Or judicial decisions may be sufficiently certain for guidance purposes, if the grounds for their invocation or if their consequences are clearly constrained.⁸⁵

IV. LEGAL CERTAINTY AS *LEITMOTIF* FOR LEGAL METHODS

The importance of legal certainty transcends that of its constituent rules and principles.⁸⁶ It is, as Andreas von Arnould has said, an "*idée-directrice*" or "*Leitgedanke*," that is, a guiding idea or leitmotif for the entire legal system.⁸⁷ The extent and the manner in which it is incorporated into positive law varies from system to system, but its realization in some form is essential to individual autonomy.⁸⁸ Its importance derives less from providing an independent basis for reviewing legal decision (its sub-principles provide that basis) and more from being an omnipresent guiding idea protecting personal autonomy.⁸⁹ Long before individual decisions are reached, legal certainty is a consideration in *how* those decisions will be made.⁹⁰ Legal certainty is central to the creation of the legal methods by which law is made, interpreted, and applied.⁹¹ Legal indeterminacy cannot and does not have the same guiding function that legal certainty has.⁹² When indeterminacy is expected and even embraced, rules recede in importance.⁹³ Some American academics put in their place process.⁹⁴ Their idea is, if we are

84. Leiter speaks of decisions that may not be "rationally []determinate" but are "causally determinate." *Id.* at 9.

85. See MAXEINER, *POLICY AND METHODS*, *supra* note 67, at 26–27 (speaking of "negative binding").

86. VON ARNAULD, *supra* note 26, at 661–64.

87. *Id.*

88. *Id.* at 662–64, 691–92.

89. See Maxeiner, *Legal Indeterminacy Made in America*, *supra* note 17, at 523–25.

90. See MAXEINER, *POLICY AND METHODS*, *supra* note 67, at 11.

91. *Id.* at 10–11.

92. See Maxeiner, *Legal Indeterminacy Made in America*, *supra* note 17, at 552 (explaining the differences in effect between certainty and indeterminacy).

93. *Id.*

94. *Id.*

unable to guarantee a decision according to law, i.e., according to legal rules, at least we can guarantee a decision according to a lawful process.⁹⁵

The legal indeterminacy thesis is not, however, the cause of this development. The thesis has achieved acceptance because American law is *uncertain*.⁹⁶ American legal methods function less well than do their foreign counterparts.⁹⁷

Space does not allow more than ticking off some of the more prominent legal certainty-enhancing methods that are routine in other legal systems, but are deficient or lacking in the American. Many of these methods were once subjects of protracted and mostly unsuccessful American law reform efforts.⁹⁸

A. Lawmaking

1. *Legal Rules are Syllogistic Norms; They Determine Their Consequences and Who May Invoke and Apply Them.*⁹⁹

Legal rules guide people's actions and judges' decisions.¹⁰⁰ Legal norms prescribe particular outcomes when generally described states of fact are present.¹⁰¹ While legal rules cannot always be precise and definite, and while they cannot always exclude judgment and discretion in their application and enforcement, they can always state who may invoke them, who may apply them, and what the consequences of application may be.¹⁰²

95. *Id.* at 525–26, 552.

96. *See id.* at 518.

97. *See* Maxeiner, *European Alternative to American Legal Indeterminacy*, *supra* note 5, at 605–06.

98. *Id.* at 587.

99. Maxeiner, *Legal Indeterminacy Made in America*, *supra* note 17, at 555, 573.

100. Maxeiner, *European Alternative to American Legal Indeterminacy*, *supra* note 5, at 524.

101. Maxeiner, *Legal Indeterminacy Made in America*, *supra* note 17, at 556.

102. *Id.* at 559.

2. *Legal Rules are Consistent and Coordinated with Other Legal Rules.*¹⁰³

Legal rules are internally consistent.¹⁰⁴ They are routinely coordinated with other legal rules of the same jurisdiction and with rules of other jurisdictions.¹⁰⁵

3. *Authority to Make and Apply Legal Rules is Bestowed Guardedly.*¹⁰⁶

Government presents a single face to citizens on most legal questions.¹⁰⁷ Law abiding people need not choose which of the government's rules to comply with or which of the government's courts to petition.¹⁰⁸ Federal and state governments coordinate their legislation, administration, and adjudication well.¹⁰⁹ State governments control the limited lawmaking authority they allow local governments.¹¹⁰

4. *Legal Rules are Impartially Prepared in a Professional Process.*¹¹¹

Formal systems for lawmaking improve legislation quality and reduce opportunities for special interest and amateur influence in legislative drafting.¹¹² Legislation usually originates in a government ministry

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 602.

107. *Id.*; Maxeiner, *European Alternative to American Legal Indeterminacy*, *supra* note 5, at 522.

108. Maxeiner, *European Alternative to American Legal Indeterminacy*, *supra* note 5, at 559–64.

109. *Id.* at 574.

110. Maxeiner, *Legal Indeterminacy Made in America*, *supra* note 17, at 599.

111. Maxeiner, *European Alternative to American Legal Indeterminacy*, *supra* note 5, at 532; OECD, *supra* note 16, at 2.

112. Maxeiner, *European Alternative to American Legal Indeterminacy*, *supra* note 5, at 532.

having professional competence in the field.¹¹³ It is routinely subject to intergovernmental vetting before adoption by the legislature.¹¹⁴

B. Law Finding and Judicial Lawmaking

5. *Judges Know the Legal Rules.*¹¹⁵

Judges know the law; the maxim *jura novit curia* applies.¹¹⁶ Courts ordinarily spend little time determining which rules apply.¹¹⁷

6. *Judges Do Not See Their Job as Routinely Making New Legal Rules.*¹¹⁸

Even in modern legal systems, not all law is statutory;¹¹⁹ judge-made law is necessary.¹²⁰ But in most modern legal systems, judge-made law is exceptional; judges do not see making law as a routine part, let alone as the essence, of their jobs.¹²¹

113. *Id.*

114. *Id.*

115. *Id.* at 536 (describing the way in which judges find the appropriate rules).

116. Except in England. See F.A. Mann, *Fusion of the Legal Professions?*, 93 LAW Q. REV. 367, 369 (1977).

117. See *id.* at 369–70 (arguing that in the English and Irish systems the law has little to do with legal decision making).

118. Maxeiner, *European Alternative to American Legal Indeterminacy*, *supra* note 5, at 534–35; Maxeiner, *Legal Indeterminacy Made in America*, *supra* note 17, at 562.

119. Maxeiner, *Legal Indeterminacy Made in America*, *supra* note 17, at 534.

120. *Id.* at 535.

121. Maxeiner, *European Alternative to American Legal Indeterminacy*, *supra* note 5, at 534–35.

C. Law Applying

7. *Professional Judges Apply Legal Rules to Facts.*¹²²

Judges are professionals.¹²³ They are trained to be judges.¹²⁴

8. *Applying Legal Rules to Facts Is the Principal Goal of Legal Procedure,¹²⁵ It Requires Written Justification.*¹²⁶

There are routine methods for applying rules to facts that make it possible for others, namely participants and reviewing courts, to reproduce the process of decision.¹²⁷ Participants are entitled to justified decisions that rationally relate legal decisions to substantive law.¹²⁸

9. *Courts Take Evidence Only on Material, Disputed Facts.*¹²⁹

Rules by their nature single out certain facts as determinative (material elements) and exclude other facts from consideration.¹³⁰ Courts ordinarily take evidence only on factual questions that are both material and disputed.¹³¹

122. James R. Maxeiner, *Guiding Litigation: Applying Law to Facts in Germany* (Common Good Forum, The Boundaries of Litigation: A Forum Addressing the Alignment of Civil Justice with Social Goals, Washington, D.C., Apr. 15, 2008), available at <http://ssrn.com/abstract=1230453>; MAXEINER, POLICY AND METHODS, *supra* note 67, at 83.

123. Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 61 (2002).

124. *Id.*

125. Maxeiner, *European Alternative to American Legal Indeterminacy*, *supra* note 5, at 558.

126. MAXEINER, POLICY AND METHODS, *supra* note 67, at 86.

127. *Id.*; Maxeiner, *Legal Indeterminacy Made in America*, *supra* note 17, at 604.

128. Maxeiner, *Legal Indeterminacy Made in America*, *supra* note 17, at 604; OECD, *supra* note 16, at 2.

129. Maxeiner, *Legal Indeterminacy Made in America*, *supra* note 17, at 604.

130. *Id.*

131. *Id.*

* * *

What most American academics overlook is that American jurists, from the adoption of the Constitution through at least the era of the realists in the 1920s, sought—largely unsuccessfully—to abandon old and uncertain common law methods and substitute more modern certainty enhancing methods along the lines just mentioned.¹³²

The legal indeterminacy thesis—accepting the “we are all realists” credo—validates a collective abandonment of legal certainty as a legitimate goal of the legal system.

Ask an American legal academic what happened to legal certainty, and he or she is likely to answer, “the law has always been uncertain and it always will be uncertain.”¹³³ Protest that this is not so on the Continent and the American academic likely will suggest—politely—that Europeans are deluding themselves.¹³⁴ Persist, and claim that there is greater legal certainty in Europe, and the American academic will express skepticism that this is so and will demand empirical proof.¹³⁵ Provide the proof and the American academic will insist that there are higher values than legal certainty and that the American legal system prefers those values.¹³⁶ Finally, question

132. See generally Maxeiner, *Legal Indeterminacy Made in America*, *supra* note 17 (tracing the development of legal indeterminacy in American law). For a refreshing exception, see Brian Z. Tamanaha, *The Bogus Tale About the Legal Formalists* (St. John's Legal Studies Research Paper No. 08-0130, 2008), available at <http://ssrn.com/abstract=1123498>.

133. See THOMAS, *supra* note 75, at 115–16. These words are actually those of a New Zealand judge, but many American legal academics might have uttered them. *Id.*

134. See *id.* at 116.

135. *E.g.*, Robert Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705, 708, 761–62 (1988) (challenging the superiority of the German litigation system and calling for an empirical analysis of the respective approaches to civil procedure, experts, and qualification of judges). *But see* Maxeiner, *Guiding Litigation*, *supra* note 122 (demonstrating advantages of the German system in applying law).

136. *Cf.* Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 742–47 (1988) (standing for the proposition that the American legal system may sacrifice efficiency in order to attain other goals such as superior accuracy, promoting citizens' confidence, and respect for individual autonomy); see also Howard Bernstein, *Whose Advantage After All?*, 21 U.C. DAVIS L. REV. 587, 599 (1988). The opponents of codification made similar arguments. See JAMES COOLIDGE CARTER, *THE PROPOSED CODIFICATION OF OUR COMMON LAW* (1884), *reprinted in* THE

whether the American system really accomplishes those aims, and the American academic will say that it does not really matter, since the United States probably could not ever adopt legal methods that produce legal certainty.¹³⁷

Widespread acceptance of the legal indeterminacy thesis—even in a less than radical form—has called into question in the United States the utility of rules as parts of solutions to social problems.¹³⁸ It has led to resignation.¹³⁹ According to Professor Pierre Schlag and his colleagues, “a great many leading American legal thinkers have now mostly abandoned ‘doing law.’”¹⁴⁰ Unable to overcome a problem, they want to move on to things that they can solve.¹⁴¹ Professor Michael Dorf says that there are more important things to worry about than justifying judicial lawmaking as law application.¹⁴² Contemporary theory has reached, he says, a “dead end.”¹⁴³

LIFE OF THE LAW, READINGS ON THE GROWTH OF LEGAL INSTITUTIONS 115, 118 (John Honnold ed., 1964) (explaining that unwritten law, best described as law that embraces the rights, obligations, and duties of both person and property, cannot be sufficiently codified in a scientific system of jurisprudence).

137. Cf. John Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987, 988 (1990) (discussing the impracticability of modeling the American legal system after the German system).

138. See Maxeiner, *Legal Indeterminacy Made in America*, *supra* note 17, at 519–20.

139. *Id.*

140. PAUL E. CAMPOS ET AL., *AGAINST THE LAW* 1 (1996).

141. *Id.*

142. Michael Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 878–79 (2003).

143. *Id.* at 876.

V. CONCLUSION: DEALING WITH EACH OTHER

The insularity of the United States would not matter much if the United States were a minor power off on its own on a small island.¹⁴⁴ But it is not.¹⁴⁵ It projects its power—and its concepts—around the globe.¹⁴⁶ The United States is world leader in promoting rule of law programs.¹⁴⁷ So if its jurists have a peculiar view of the rule of law, they may—if only inadvertently—impose their view on others.¹⁴⁸ In their dealings with others, and in the dealings of others with them, it behooves all to have an understanding of each others' underlying assumptions. How are we to accomplish that?

My advice to non-American jurists: do not argue with American jurists about legal certainty; do not discuss legal indeterminacy. Do not even talk about the formal rule of law. Redirect the conversation. Instead of discussing legal certainty, talk about specifics. No American jurist will debate whether laws and decisions should be made public. Most will welcome discussing how judicial decisions can be made more definite and binding. Raise questions about how courts should limit retroactivity of laws and how they should protect legitimate expectations. From there you can go on to talk about how to draft better laws that can be more easily applied.

My advice to American jurists: **do** talk about legal certainty. For a moment stop conversing about controlling judicial decisions. Take the perspective of ordinary people seeking to abide by law. Put aside, for one moment, whether you can predict judges' decisions. Remember that the vast majority of

144. Adam Liptak, *U.S. Court, a Longtime Beacon, Is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008, at A1.

145. *Id.*

146. *Id.*

147. American programs include: American Bar Association Rule of Law Initiative (<http://www.abanet.org/rol/>), Carnegie Endowment for International Peace, Democracy & Rule of Law (<http://www.carnegieendowment.org/programs/global/index.cfm?fa=proj&id=101&proj=zdr1>), and United States Institute of Peace, Rule of Law Program (<http://www.usip.org/ruleoflaw/index.html>).

148. *Cf.* Casper, *supra* note 15.

legal questions never come close to a judge's bench. Ask, as an eminent American jurist once did, does the law make "plain to the apprehension of the people what conduct on their part is forbidden"?¹⁴⁹ Look to what other legal systems have to offer. The American system can learn from them.¹⁵⁰

149. Thomas M. Cooley, *The Uncertainty of the Law*, 22 AM. L. REV. 347, 355 (1888).

150. See James R. Maxeiner, *Learning from Others: Sustaining the Internationalization and Globalization of U.S. Law School Curriculums*, 32 FORDHAM J. INT'L L. 501 (2008); Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States: Opportunity for Learning from Civilized European Procedure Instead of Continued Isolation?*, 42 AM. J. COMP. L. 167 (1994); James R. Maxeiner, *1992: High Time For American Lawyers to Learn from Europe, or Roscoe Pound's 1906 Address Revisited*, 1991 FORDHAM I.L.J. 1.