

## Redefining the Traditional Pillars of German Legal Studies and Setting the Stage for Contemporary Interdisciplinary Research

By *Stephan Leibfried, Christoph Möllers, Christoph Schmid, and Peer Zumbansen\**

Rousseau, I think, once said:

“A child who knows only his parents, doesn’t truly know them.”

This idea can be applied to many areas of knowledge, indeed, to all those which are not of an absolutely pure character: He who understands nothing but chemistry, doesn’t really understand even it.<sup>1</sup>

GEORG CHRISTOPH LICHTENBERG, Professor of mathematics and natural sciences at the University of Göttingen, 1742-1799, APHORISMEN (1984), 42

Law ... is the perfection of reason.

EDWARD COKE, English jurist, 1552-1634,  
THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (1628),  
book 2, ch. 6, sect. I 38

No brilliance is needed in the law.

Nothing but common sense, and relatively clean fingernails.  
JOHN MORTIMER, English novelist, barrister, and dramatist, 1923- ...,  
A VOYAGE ROUND MY FATHER (1971), act 1

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<sup>1</sup> “Rousseau hat, glaube ich, gesagt: Ein Kind, das bloß seine Eltern kennt, kennt auch die nicht recht. Dieser Gedanke lässt sich [auf] viele andere Kenntnisse, ja auf alle anwenden, die nicht ganz reiner Natur sind: Wer nichts als Chemie versteht, versteht auch die nicht recht.”

## A. Introduction

This essay describes an emergent scheme for modernizing the study of law in German universities, creating a structure that is better equipped to address twenty-first century socio-legal issues and bring legal scholarship to bear on relevant research problems in the social sciences – and vice versa. It is a by-product of efforts by University of Bremen professors and administrators to foster their university's coming of age as a mature, internationally recognized research university and to compete for new funds that the German government is making available to select universities.<sup>2</sup> As such, it provides a rare example of the integration of legal studies into a large interdisciplinary research program, and of law professors rising to the challenges of contemporary funding demands, joining forces with political scientists, sociologists, economists, and philosophers.

The history and context of the university where this scheme was designed is critical. Though the University of Bremen opened its doors in 1971 as one of Germany's twentieth century "reform" universities, it can trace its roots back to the sixteenth century, when the *Bremer Lateinschule* was founded. In 1584 the *Lateinschule* became the *Gymnasium Academicum*, and in 1610 it was transformed into the *Gymnasium Illustre*, an institution of higher learning dedicated to the four disciplines: Theology, Law, Medicine and Philosophy. A frugal Calvinist-led enterprise, the *Gymnasium Illustre* later succumbed to competition from enlightenment-inspired universities like the University of Göttingen, founded in 1734,<sup>3</sup> and in 1810 Napoléon shut it down.<sup>4</sup> That same year, the Humboldt

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<sup>2</sup> See, EXCELLENCE INITIATIVE BY THE GERMAN FEDERAL AND STATE GOVERNMENTS, PROPOSAL FOR AN INSTITUTIONAL STRATEGY TO PROMOTE TOP-LEVEL RESEARCH, INTERDISCIPLINARY RESEARCH UNIVERSITY OF BREMEN, University of Bremen, April 2006, 31-45, especially 33-35. In the grant proposal an „incubator“ – called Bremen Exploratorium of the Social Sciences (BESS) – for the wider social sciences is proposed. BESS serves as a reform instrument for research policy. Six kinds of reform measures are outlined for BESS, in one instance impacting on the law faculty.

<sup>3</sup> HERBERT SCHWARZWÄLDER, DAS GROßE BREMEN-LEXIKON (2002), 282. On Göttingen's central pioneering role vis à vis the older central and east European universities see *infra* (note 4) vol. II.

<sup>4</sup> For a general discussion see, Walter Rüegg, general ed., A HISTORY OF THE UNIVERSITY IN EUROPE, vol. II: A HISTORY OF THE UNIVERSITY IN EARLY MODERN EUROPE (1600-1800) (Hilde de Ridder-Symoens, ed., 1996) and vol. III: UNIVERSITIES IN THE NINETEENTH AND EARLY TWENTIETH CENTURIES (1800-1945) (Walter Rüegg, ed., 2004). With respect to Bremen's *Gymnasium Illustre* in early modern Europe see, Willem Frijhoff, *Patterns*, in: vol. II *supra*, 43, 68-69: it was one of the many establishments "which by reason of their organization and the quality of their teaching could claim university status, but had not obtained all its privileges, especially that of awarding degrees". On its Calvinist pedigree see Notker Hammerstein, *Relations with Authority*, in: *ibid.*, 113, 117-118. "This religious derivation implied being denied the right to confer degrees by the emperor – which, ironically, pushed these schools onto a track heading toward interdisciplinarity and permanent education reform (Frijhoff, *ibid.*, 50). Bremen's rise after the Thirty Years War (1618-1648) is marked by its belonging to one of the "two favorite circuits –

University was founded and Bremen disappeared from the higher education scene, as Berlin's liberal new star took the lead. The Humboldt University provided fierce competition to the French revolution's model of highly disciplined, specialized professional schools with autocratic administrators, and by the end of the nineteenth century universities around the world were emulating the German basic research model.<sup>5</sup>

Ironically, during the last half of the twentieth century the trend away from narrow professional training towards multi-discipline research universities has partly reversed itself in the higher echelons of German universities, a tendency the federal government is currently combating with its "Excellence Initiative," a massive injection of funds into the universities with the most active and competitive basic research programs. And, now, at the beginning of the twenty-first century, Bremen is, surprisingly, back in the running.

Bremen's only attempts to revive its university tradition between 1810 and 1971 – or better the 1960s – consisted of a plan to create a German-French University during the Napoleon years, and ideas to found an "International University" after the end of World War II.<sup>6</sup> At the time, nothing came of either. Then, in the 1960s, debates about higher education reform in Germany and federal initiatives to increase university enrollment led to a reincarnation of the *Gymnasium Illustre* as the University of Bremen, which, if it were to ignore the long hiatus in its history, would be celebrating its 400<sup>th</sup> anniversary in 2010.<sup>7</sup> Unlike its Calvinist forebear, the new university was the most experimental and radical of the new "reform universities" that were established in Germany in the 60s and 70s. It was to be governed by an egalitarian tripartite body of students, staff, and professors. Social criticism was the rule of the day in teaching and research, and Bremen soon earned a reputation as a "pinko" university. The strict tripartite governing body was quickly challenged by faculty, with a Federal Constitutional Court decision<sup>8</sup> ruling

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Altdorf, Strasburg, Basle, and Heidelberg, Herborn, Bremen - ... discernible in the *Kavalierstour* followed by students from central and Eastern Europe, especially the Protestant nobility" (Hilde de Ridder-Symoens, *Mobility*, in: *ibid.*, 416, 435).

<sup>5</sup> See, Walter Rüegg, *Themes* in: *ibid.*, Vol. III *supra* (note 4), 3, 4-6.

<sup>6</sup> This name was revived in 2001 by the International University Bremen, a private university founded with seed money from the state, see <http://www.iu-bremen.de/>.

<sup>7</sup> The University of Cologne referred to its 617th anniversary in 2005, despite a similar hiatus. It was closed by the French in 1794 and reopened in 1919 (see [http://www.uni-koeln.de/uni/aktuell\\_rede\\_unitag05-rektor.html](http://www.uni-koeln.de/uni/aktuell_rede_unitag05-rektor.html)).

<sup>8</sup> Published in Vol. 35 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT [*Entscheidungen des Bundesverfassungsgerichts*] 79 (1973).

against its use, and the University of Bremen gradually abandoned many of its other experiments. But some of the characteristics of its youth survived and informed very successful policies: chief among these are the general cooperation between faculty, administrators and local government, a holistic approach to interdisciplinary research that grew out of its innovative research funding strategies, and, in law, a fondness for socio-legal studies.

In the last decade, the University of Bremen's reputation as an intellectually marginalized red flower child leading a hand-to-mouth existence in the North Sea hinterlands changed drastically. Despite its impoverished city-state's government, it now figures prominently in the German academic landscape, with internationally known research groups in the marine sciences, social sciences, materials science, logistics, cognition and information science. In January of 2006 it was selected by the German Research Council (*Wissenschaftsrat*) and the German Research Foundation (*Deutsche Forschungsgemeinschaft*) to participate in the Federal Excellence Initiative, one of ten universities invited to compete for elite university funding.<sup>9</sup> The reform of legal studies<sup>10</sup> discussed here comprises a small but central part of the university's proposal for this initiative, and a final decision about funding is still pending. But the concept, design and philosophy of the reform and the problems it addresses are enlightening in their own right.

The reform of legal studies in Bremen was inspired by the need to reconnect legal and social research, something the university had made some effort to accomplish in its experimental reform university days. Edward Coke's view of the law as a rational science—as “the perfection of reason”—based on observation, analysis and deduction, rather than a static mode of interpretation of fixed codes, informed those early efforts, as it does today's. The premise was, and is, that, contrary to John Mortimer's literary caricature of the legal practitioner, the law is a living, ever-changing beast and its disciples need more than clean fingernails if they are to tend, nurture, and understand it—they need brilliance. And, they need dynamic, ongoing integration with the economic, social and political sciences. Bremen's law

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<sup>9</sup> The funding is in the range of € 130 million for the University of Bremen over the next five years, with some € 80 million for the “institutional strategy” (*supra*, note 2). See at [http://www.dfg.de/en/news/press\\_releases/2006/press\\_release\\_2006\\_03.html](http://www.dfg.de/en/news/press_releases/2006/press_release_2006_03.html)! (July 25, 2006) for the general German-wide funding strategy.

<sup>10</sup> Cf. BESS MEASURE 2: INTRADISCIPLINARY CHALLENGE GRANTS. THE EXAMPLE OF „REBUILDING THE PILLARS OF LAW?”, a paper in which the proposal reported here is outlined in more detail for the on-site inspection of a group of referees. The five-year grant for the “institutional strategy” also allows for seed money to be allotted to new chairs. The three overarching areas of research outlined in this essay thus are, at the same time, also first attempts at descriptions of three additional chairs to be funded at Bremen's Law School.

school attempted to accomplish this by adding a criminologist, a legal sociologist, and a specialist in constitutional law and politics to its faculty. But this innovation came too early, at a time when the university was still finding its feet, and, as we shall discuss here, it didn't go far enough. Rather than achieving interaction with the full range and depth of social and political research, it relegated sociology to service industry status, while "constitutional law and politics" grew apart from political science in the university and, with a few notable exceptions, was isolated from the vibrant scholarship developed within the discipline in the 1990s.

Over the past 35 years, social science research in Bremen has thrived, expanding its reach and developing successful interdisciplinary collaborations to deal with contemporary themes and issues, but the law school has become relatively isolated and out of reach. In January of 2004 a group of 65 researchers began work as part of a multi-project, multi- and inter-disciplinary examination of "Transformations of the State." TranState's mission is to chart the changes in the nature, role and status of the nation-state in the twentieth and twenty-first centuries. Presently, four of TranState's fifteen projects deal with changes in the legal dimension of the Golden Age nation state of the 1960s; two of these are directed by lawyers from the law school, one by a political scientist from the department of political science, and one by the law school's resident legal sociologist.<sup>11</sup> What has become apparent at the University of Bremen over the past couple of decades is that the analysis of inherently interdisciplinary themes is often limited by factors *within* an individual discipline, in other words, by *intradisciplinary* deficiencies.<sup>12</sup> As TranState researchers work their way into the many facets of their sweeping theme, they are beginning to realize that a comprehensive analysis is dependent, not only on the interdisciplinary cooperation between political scientists, sociologists, economists and lawyers, but on comprehensive, in-depth analyses of overarching contemporary legal principles—and that such analysis is, surprisingly, not readily forthcoming from German law schools. Why? Consideration of this question has led us to the conclusion that the traditional, set-in-stone three-pillar structure of legal study—with public, private, and criminal law in separate divisions—no longer serves the discipline, but, rather, impedes research on many crucial contemporary themes, which of necessity cut across the pillars. What to do?

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<sup>11</sup> Group leaders include lawyers Josef Falke, Christian Joerges, and Gerd Winter, and legal sociologist Volmar Gessner from the law school faculty, and political scientist Bernhard Zangl. TranState is a DFG Collaborative Research Center (Sfb 597); for information about its mission and ongoing projects see <http://www.state.uni-bremen.de>. For an analysis of results from the Center's first few years see Stephan Leibfried and Michael Zürn, eds., *TRANSFORMATIONS OF THE STATE?* (2005).

<sup>12</sup> The term "intra-disciplinary" was coined by Eberhard Schmidt-Aßmann, *Zur Situation der rechtswissenschaftlichen Forschung*, 50 *JURISTENZEITUNG* 1 (1995), at 2.

Below, we define and discuss three important realms of legal study. Their development, which includes the creation of several new law faculty chairs, would serve to either bridge or dissolve the three pillars: the first step of *intradisciplinary* reform. Then we discuss how research in these newly developed fields might naturally interact with various disciplines in the social sciences: a move toward fruitful *interdisciplinary* collaboration. And, finally, we discuss how to accomplish all this while maintaining continuity and productivity in a functioning law school and how this might affect legal education.

### **B. A Three-pronged Strategy for Reshaping the Three-Pillars-of-Law Structure**

Our first important and neglected subject of research is the merging of public and private legal spheres, especially in administrative and company law, as exemplified by new governance practices in the EU and the changing structures of corporate governance in the OECD-world. Here we define a new law faculty chair in “the common law of organization and regulation.” A second promising area of research is the changing use and jurisdiction of court systems as inter-, supra-, and transnational tribunals that operate without regard to the traditional separation between court systems and procedural regimes are proliferating, and many nations are consolidating their court systems, as exemplified by Germany’s recent reintegration efforts of the social, tax, and administrative, and of labor and civil courts. Here we define a new chair in “the law of procedure and conflict resolution.” And finally, research suggests that the once indisputable distinction between criminal sanctions, administrative penalties, and civil remedies has begun to blur, and market sanctions imposed by corporate powers are gaining importance at the transnational level. Here we define a third chair in “the law of sanctions.”<sup>13</sup>

#### *I. Organization: The Changing Faces and Interfaces of Public and Private Governance*

In an integrated exploration of the changing patterns of public and private ordering, the categories of public and private no longer identify the range of governance practices or the functions of regulatory instruments, but only the regularly identified *sources* of norm authorship.<sup>14</sup> Yet, to the degree that the

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<sup>13</sup> One should also explore, as was suggested by Gerd Winter, whether the increasing interface between law and the natural sciences shouldn’t be included as another important, pillar-dissolving research topic to be developed.

<sup>14</sup> See, e.g., PEER ZUMBANSEN, *ORDNUNGSMUSTER IM MODERNEN WOHLFAHRTSSTAAT. LERNERFAHRUNGEN ZWISCHEN STAAT, GESELLSCHAFT UND VERTRAG* (2000). One could go back at least to MARTIN BULLINGER, *ÖFFENTLICHES RECHT UND PRIVATRECHT* (1968) for a public law source pointing out that the public/private law divide is now counterproductive to a good curricular organization. For an early private (economic) law perspective on that theme see HEINZ-DIETER ASSMANN, GERT BRÜGGEMEIER,

boundary between coordinative (i.e. non-hierarchical, commutative) and regulatory (i.e. coercive, redistributive) functions of governance acts is increasingly eroding,<sup>15</sup> it has become clear that a study of contemporary forms and functions of governance has to begin from institutions and norms, regardless of whether they are 'public' or 'private'. It is now *organization* per se that matters, not whether it is public or private. This shift is one already signalled Europe-wide across the social sciences by EU Research Networks of Excellence like Connex (Connecting Excellence in European Governance<sup>16</sup>) and Integrated Projects like NewGov (New Modes of Governance<sup>17</sup>).

There is so far virtually no general law of, and no general legal literature on, *organization*.<sup>18</sup> This gap can be explained historically by the distinction between private law and public law that is common to all continental legal orders but has been emphasized particularly in the German academic debate.<sup>19</sup> In the field of organizational law, the sharp distinction drawn between public and private law was plausible as long as common features of public and private organizations were exceptional and not the rule. Public administration and its legal domain (*Verwaltungsorganisationsrecht*)<sup>20</sup> was governed by completely different principles than private administration which is regulated most extensively in established legal fields such as corporate (*Gesellschaftsrecht*)<sup>21</sup> and collective labor law (*kollektives*

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DIETER HART, and CHRISTIAN JOERGES, *WIRTSCHAFTSRECHT ALS KRITIK DES PRIVATRECHTS: BEITRÄGE ZUR PRIVAT- UND WIRTSCHAFTSRECHTSTHEORIE* (1980).

<sup>15</sup> Hereto Peer Zumbansen and Galf-Peter Calliess, *Rough Consensus, Running Code: A Theory of Transnational Private Law*, TranState Working Paper 2006 – forthcoming.

<sup>16</sup> Hub: MZES, Mannheim, Germany, at: <http://www.mzes.uni-mannheim.de/projekte/connex>.

<sup>17</sup> Hub: EUI, Florence, at: <http://www.eu-newgov.org/>.

<sup>18</sup> See, however, the very comprehensive study by GERALD SPINDLER, *UNTERNEHMENSORGANISATIONSPFLICHTEN – ZIVILRECHTLICHE UND ÖFFENTLICH-RECHTLICHE REGULIERUNGSKONZEPTE* (2001), analyzing both public and private organization duties; see also the contributions to the seminal volume: *CONTRACT AND ORGANISATION: LEGAL ANALYSIS IN THE LIGHT OF ECONOMIC AND SOCIAL THEORY* (Terence Daintith and Gunther Teubner, eds., 1986)

<sup>19</sup> See only, Michael Stolleis, *Öffentliches Recht und Privatrecht im Prozeß der Entstehung des modernen Staates*, in: *ÖFFENTLICHES RECHT UND PRIVATRECHT ALS WECHSELSEITIGE AUFFANGORDNUNGEN 41* (Wolfgang Hoffmann-Riem and Eberhard Schmidt-Aßmann, eds., 1996).

<sup>20</sup> For a conventional account, Walter Krebs, *Verwaltungsorganisationsrecht*, in: *HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND III* (Josef Isensee and Paul Kirchhof, eds., 1987), § 69, 567-621.

<sup>21</sup> KARSTEN SCHMIDT, *GESELLSCHAFTSRECHT* (4th ed. 2002); see the excellent introduction in FRIEDRICH KÜBLER and HEINZ-DIETER ASSMANN, *GESELLSCHAFTSRECHT* (6th ed., 2006), 1-21.

*Arbeitsrecht*)<sup>22</sup>, but also permeates more recent legal branches such as telecommunication and data protection law.<sup>23</sup> The standards of public interest and democratic accountability, on the one hand, and those of efficiency and output orientation on the other were, at first, at odds but eventually began to egg each other on and evolve together, as evidenced by the invention of “New Public Management” in the late 1970s.<sup>24</sup>

One crucial problem of this discussion as it continues in the actual “Governance” discourse<sup>25</sup> is its strong and mostly unreflected reliance on sometimes overgeneral assumptions regarding ‘governance’, taken from the social sciences and its often lacking interest for genuinely legal problems and their particular methodological requirements.<sup>26</sup> By contrast, only the *intra*-disciplinary observation of *legal* phenomena of convergence between public and private organizations will make it possible for us to design a coherent research agenda that, in a second step, can be extended to an *interdisciplinary* perspective with the social sciences.<sup>27</sup> Therefore, a prime challenge of an intradisciplinary research agenda is to study the convergence of the law of public and private administration into a common law of organization

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<sup>22</sup> See only SIMON DEAKIN and FRANK WILKINSON, *THE LAW OF THE LABOUR MARKET. INDUSTRIALIZATION, EMPLOYMENT AND LEGAL EVOLUTION* (2005), ch. 4.

<sup>23</sup> Illuminating: Thomas Vesting, *The Autonomy of Law and the Formation of Network Standards*, 5 GERMAN L. J. 639 (2004).

<sup>24</sup> Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA L. REV. 1349 (1982); on new public management see Christopher Hood, *The New Public Management in the “1980s”: Variations on a Theme*, 20 ACCOUNTING, ORGANIZATIONS AND SOCIETY 93 (1995); Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDH. URB. L. J. 1611 (2001); for Germany, see GUNNAR FOLKE SCHUPPERT, *VERWALTUNGSWISSENSCHAFT* (2000).

<sup>25</sup> Gunnar Folke Schuppert, ed., *GOVERNANCE-FORSCHUNG. VERGEWISSERUNG ÜBER STAND UND ENTWICKLUNGSLINIEN* (2005); Christoph Möllers, *European Governance – Meaning and Value of a Concept*, 43 COMMON MARKET L. REV. 313 (2006).

<sup>26</sup> For the U.S. discussion, see now the comprehensive overview by Orly Lobel, *The Renew Deal. The Fall of Regulation and the Rise of Governance*, 89 MINN. L. REV. 342 (2004); very illuminating already the early study by Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); for the German discussion see: Christoph Möllers, *Theorie, Praxis und Interdisziplinarität in der Verwaltungsrechtswissenschaft*, 93 VERWALTUNGS-ARCHIV 22 (2002); see also Thomas Vesting, *Nachbarwissenschaftlich informierte und reflektierte Verwaltungsrechtswissenschaft – „Verkehrsregeln“ und „Verkehrsströme“*, in: *METHODEN DER VERWALTUNGSRECHTSWISSENSCHAFT* 253 (Wolfgang Hoffmann-Riem and Eberhard Schmidt-Aßmann, eds., 2004). Interdisciplinary research on these issues is gaining ground; see recently Herwig C.H. Hofmann and Alexander H. Türk, eds., *EU ADMINISTRATIVE GOVERNANCE* (2006).

<sup>27</sup> For an application of this approach to the study of law in an era of globalisation, see Paul Schiff Berman, *From International Law to Globalization and Law*, 43 COLUM. J. TRANSNAT’L L. 485 (2005).

and regulation which reconfigures if not overcomes the traditional private-public border.<sup>28</sup>

Phenomena that invite us to take a closer look at general principles of the law of organization are abundant: First of all, private corporations are more and more regulated in a way that is similar to the rules governing public administration. The most obvious examples come from the law of “information use”.<sup>29</sup> Thanks to the influence of European law, data processing standards, for example, have started to become uniform for public and private organizations. Two elements are driving this process: the need to provide a certain degree of transparency towards the public and the necessity to develop boundaries of information flow within the organization. Another example is the development of procurement law and the emerging procurement practices of private corporations. Here, the distinction between free private markets and public regulation dissolves into a market-empowering technique of public regulation that is voluntarily imitated by private actors.<sup>30</sup>

To be sure, over time, the question of “the chicken or the egg” loses its significance—or, is rediscovered as such!—, and we begin to understand that ‘public’ and ‘private’ actors are intertwined in a closely knit web of coordinative and regulative functions.<sup>31</sup> These and other examples illustrate the emerging convergence of organizational standards. Behind this convergence lie deeper adjustment processes of the legal orders: Fundamental rights, originally designed as the primary legal instrument of defence of private individuals against sovereign public power, turn more and more into “balancing instruments” between private actors, including corporations.<sup>32</sup> The mere power and the practical (public) functions of a given organization are becoming more relevant for the application of

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<sup>28</sup> The origins of this discussion reach back to GUNTER TEUBNER, *ORGANISATIONSDEMOKRATIE UND VERBANDSVERFASSUNG. RECHTSMODELLE FÜR POLITISCH RELEVANTE VERBÄNDE* (1978); see also the contributions by Trute, Damm and Ladeur in: *ÖFFENTLICHES RECHT UND PRIVATRECHT ALS WECHSELSEITIGE AUFFANGORDNUNGEN* (Wolfgang Hoffmann-Riem and Eberhard Schmidt-Aßmann, eds., 1996).

<sup>29</sup> Thomas Vesting, *Die Staatsrechtslehre und die Veränderung ihres Gegenstandes: Konsequenzen von Europäisierung und Internationalisierung*, in: 63 *VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER (VVDSTRL)* 41 (2004).

<sup>30</sup> Sue Arrowsmith, ed., *see*, *REGULATING PUBLIC PROCUREMENT LAW* (2000).

<sup>31</sup> Zumbansen and Calliess, *supra*, note 15.

<sup>32</sup> E.g. GAVIN W. ANDERSON, *CONSTITUTIONAL RIGHTS AFTER GLOBALIZATION* (2005).

human rights than its formal legal attribution to the public or the private sphere.<sup>33</sup> Especially supra- and trans-national adjudicatory bodies that have to cope with a rather diverse field of public/private borders in different domestic legal orders, like the European Court of Justice, promote this approach.<sup>34</sup> Furthermore, the interchangeability and mobility of ownership and the transparency requirements of the stock market, today, demand an internal specification of corporate organizations that is comparable to the organizational necessities imposed on a democratic public administration.<sup>35</sup>

This paves the way for the idea of a general law of public *and* private organizations that would be a genuinely intra-disciplinary challenge for legal studies, connecting administrative law and private law.<sup>36</sup> Organizational features of internal hierarchy or co-operation, transparency for controlling entities (shareholders, courts, parliamentarians), transparency for the general public versus an interest in nondisclosure needing to be specified, internal information walls, etc. are all parts of such a field of research that will have to be guided by a model of underlying principles that combines democratic standards of collective self-determination with the respect for individual market-driven forms of self-organization.

## *II. Procedure: Towards a Common Framework*

The distinction between organization and procedure in law is difficult but necessary. Though there is a continuum between administrative and corporate procedural rules, on the one hand, and those rules governing court and court-like procedures on the other, the latter need to be defined in their own right.<sup>37</sup> Once again the classical distinction between criminal, public and private *procedural* law

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<sup>33</sup> A. CLAIRE CUTLER, PRIVATE POWER AND PUBLIC AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL ECONOMY (2003); Peer Zumbansen, *Sustaining Paradox Boundaries. Perspectives on the Internal Affairs in Domestic and International Law*, 15 EUR. J. INT'L L. 197 (2004); Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT'L L. J. 471 (2005).

<sup>34</sup> E.g., Aurelia Colombi Ciacchi, *The Constitutionalisation of European Contract Law: Judicial Convergence and Social Justice*, 13 EUROPEAN REV. OF PRIVATE LAW (2006)—*forthcoming*; Christoph Schmid, *The ECJ as a Constitutional and a Private Law Court. A Methodological Comparison*, ZERP Discussion Paper 4/2006.

<sup>35</sup> See only, HANNO MERKT, UNTERNEHMENSPUBLIZITÄT: OFFENLEGUNG VON UNRERNEHMENS DATEN ALS KORRELAT DER MARKTTEILNAHME (2001).

<sup>36</sup> MONIKA JOHN-KOCH, ORGANISATIONSRECHTLICHE ASPEKTE DER AUFGABENWAHRNEHMUNG IM MODERNEN STAAT (2005).

<sup>37</sup> This is due to the institutional stability of court procedures in comparison to other forms; see Mauro Cappelletti with the collaboration of Paul J. Kollmer and Joanne M. Olson, eds., *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* (1989).

has led to an over-emphasis of differences in the structure of *judicial procedure*. The idea of a common procedural framework, encompassing civil, administrative and penal procedure has been neglected for quite a while despite its having a common historical origin.<sup>38</sup>

The separation of different courts and procedural regimes is again a particularity of the continental civil law tradition, while starting to blur at different levels: For supra- and international tribunals without an elaborate procedural statute, the development of procedural requirements on a case-by-case basis is an attractive institutional option. Transnational private regimes—*lex mercatoria*, but also consumer contracts or corporate governance codes<sup>39</sup>—spontaneously emerge with their own procedural practices.<sup>40</sup> Both regimes rather refer to procedural standards of the Common Law—which itself emerged, and continues to develop, out of a case law practice and therefore, provides more flexible mechanisms.<sup>41</sup> Beyond that, it is, especially in the U.S. legal discussion, much disputed, whether a division of labour between different specialized courts really enhances their problem-solving capability, i.e. whether a single procedural order would not be preferable.<sup>42</sup>

These developments illustrate alternatives to the dominant national procedural mechanisms and also influence them. From an internal legal perspective, this raises questions that must be answered by means of comparative studies which include procedures that obtain beyond national legal orders.<sup>43</sup> The adjudication of economic issues reaching from trade barriers before a WTO-panel to price regulation in telecommunications law challenged in a national administrative court is regularly confronted with comparable problems of using a satisfying definition of rights, assessing politically and scientifically contested facts including technical

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<sup>38</sup> KNUT WOLFGANG NÖRR, *IUDICIUM EST ACTUS TRIUM PERSONARUM. BEITRÄGE ZUR GESCHICHTE DES ZIVILPROZESSRECHTS IN EUROPA* (1993)

<sup>39</sup> Zumbansen and Calliess, *supra*, note 15.

<sup>40</sup> URSULA STEIN, *LEX MERCATORIA: REALITÄT UND THEORIE* (1995); Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in: *GLOBAL LAW WITHOUT A STATE 3* (id., ed., 1997) [orig. published in German as: *Globale Bukowina. Zur Emergenz eines transnationalen Rechtspluralismus*, *RECHTSHISTORISCHES JOURNAL* 255 (1996)]; Graf-Peter Calliess, *Lex Mercatoria: A Reflexive Law Guide to an autonomous legal system*, 2 *GERMAN L. J.* No. 17 (2001), at: <http://www.germanlawjournal.com/article.php?id=109>.

<sup>41</sup> Phillip M. Nichols, *GATT Doctrine*, 36 *VA. J. INT'L L.* 379 (1996).

<sup>42</sup> See, e.g., Richard Revesz, *Specialized Courts and the Administrative Law System*, 138 *U. PA. L. REV.* 1111 (1990).

<sup>43</sup> E.g., PETER GILLES, *TRANSNATIONALES PROZESSRECHT: DEUTSCHE LANDESBERICHTE ZUR WELTKONFERENZ FÜR PROZESSRECHT IN TAORMINA, SIZILIEN* (1995).

and scientific ones, providing procedures acceptable not only for the parties at hand but also for an interested public and doing so in a frame of reasoning that can plausibly be presented as being purely legal.<sup>44</sup> From a German perspective, the discussions in civil—as opposed to administrative or criminal—procedural law seem to provide the most promising point of departure because comparative studies, as the inclusion of arguments of economic analysis of law,<sup>45</sup> and the inclusion of trans- and international forms of litigation are most advanced in this field.<sup>46</sup>

### III. Sanctions: Enforcement, Compliance, and Penalties

A final topic arises from new perspectives taken on *legal sanctions*: Sanctions are the formal implications a legal order attaches to a breach of its own rules. Legal rules are not necessarily reinforced by sanctions (*lex imperfecta*). But typically, legal rules choose between a set of substantial sanctions—ranging from obligations that imply the loss of advantages to criminal penalties—and between different forms of enforcement, ranging from private actions to obligatory public prosecution. Once again, the distinctions between criminal sanctions, administrative penalties and civil remedies used to be watertight in the German legal order, but they have been washed away at many levels.

European law, for example, connects specific administrative measures like subsidies with sanctions that cross the line between criminal and administrative law.<sup>47</sup> It is therefore criminal law of economic behavior (*Wirtschaftsstrafrecht*) that is characterized by these hybrid modes of regulation. Modern regulation starts to

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<sup>44</sup> See, for WTO dispute settlement procedures, e.g., Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, in: THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE? 35 (Joseph H.H. Weiler, ed., 2000) (*Collected Courses of the Academy of European Law*, vol. 9, no. 1); generally Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312 (1997).

<sup>45</sup> MICHAEL ADAMS, *ÖKONOMISCHE ANALYSE DES ZIVILPROZESSES* (1981); compare the Common Law Perspective presented in Robert Cooter and Thomas Ulen, *The Economic Efficiency of the Common Law Process*, in: LAW AND ECONOMICS 477 (*id.*, eds., 4<sup>th</sup>. ed., 2003).

<sup>46</sup> Craig Scott and Robert Wai, *Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential of Transnational "Private" Litigation*, in: TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 287 (Christian Joerges, Inger-Johanne Sand, and Gunther Teubner, eds., 2004).

<sup>47</sup> Cf. MARTIN BÖSE, STRAFEN UND SANKTIONEN IM EUROPÄISCHEN GEMEINSCHAFTSRECHT (1996) (*Studien zum internationalen Wirtschaftsrecht und Atomenergierecht*, vol. 94); and now *id.*, WIRTSCHAFTSAUFSICHT UND STRAFVERFOLGUNG: DIE VERFAHRENSÜBERGREIFENDE VERWENDUNG VON INFORMATIONEN UND DIE GRUND- UND VERFAHRENSRECHTE DES EINZELNEN (2005) (*Jus publicum*, vol. 127); see also the contributions in: John A.E. Vervaele, ed., COMPLIANCE AND ENFORCEMENT OF EUROPEAN COMMUNITY LAW (1999).

develop over-arching concepts (like sustainability or precaution) that apply and include all possible forms of legal sanctions and that bridge classical fields of legal studies.<sup>48</sup> From environmental law to consumer protection and anti-terror legislation, legal orders have to cope with problems which are defined more and more in similar categories (e.g., risk) and which, to boot, can only be approached with a very limited set of legal tools, i.e. of positive and negative sanctions for a certain behavior.<sup>49</sup>

But whilst the diagnosis of blurring boundaries within the traditional system of sanctions is generally accepted, there is even from a comparative perspective almost no systematic research on different laws of sanctions. Neither different comparative studies of certain legal instruments nor the comparison of different instruments within one legal system have provided us with a picture that goes beyond bits and pieces. The complexity of the regulatory task makes it more and more necessary to compare different regulatory tasks and to use this as a tool for finding a systematic set of regulations under the restraints of limited resources. Criminal, civil and administrative sanctions traditionally applied in certain areas become regulatory options. While they were previously found “on one menu” to choose between, there are now to be integrated into a coherent regulatory concept.

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<sup>48</sup> E.g., ROLAND FLEURY, *DAS VORSORGEPRINZIP IM UMWELTRECHT* (1995); KARL-HEINZ LADEUR, *DAS UMWELTRECHT DER WISSENSGESELLSCHAFT* (1995); *ID.*, *POSTMODERNE RECHTSTHEORIE: SELBSTREFERENZ - SELBSTORGANISATION - PROZEDURALISIERUNG* (2nd ed., 1995), last chapter.

<sup>49</sup> See *fundamentally*, NIKLAS LUHMANN, *RISK. A SOCIOLOGICAL THEORY* (1993).

### C. Interlocking Legal Studies with the Wider Social Sciences

In a second step, these three topics—organization, procedure, sanctions—need to be interlocked with different subfields in the social sciences.<sup>50</sup> All three topics invite interdisciplinary co-operation at a specific level. They invite such cooperation on an equal footing of the disciplines concerned while the old three-pillar structure only knows of hierarchical relationships with other disciplines: It relegates sociology to service industry status (Criminology, Sociology of Law) and claims political science as its own (*Staatsrecht und Politik*).

The quest for a common law of public and private organizations can be transferred to problems either of organizational sociology or political theory. The sociology of organization may be especially helpful in identifying concepts and describing organizational features that are abstract enough to develop a common language for such over-differentiated legal discourses. Especially for the use of information in organizations<sup>51</sup> and for their need to produce and amend rules,<sup>52</sup> there is a rich literature that may help us to come to terms with the identification of common problems, looking at different legal formal organizations as if they were already one.<sup>53</sup> In addition, political theory may be an important normative corrective for any institutional comparison. Detached from direct references to positive law, comparative studies of the different laws of organization will in any case have to look out for other more general normative guidelines in order to answer the

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<sup>50</sup> Our proposal differs from the US-reforms in the last decades, which focussed on Critical Legal Studies, Feminist Theory, Race Theory etc., thus augmenting “normal” law schools with some critical, secondary elements. We focus instead on changes in or around *the core* of legal research and education itself. On the US development see the new expanded version of the pamphlet by DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983); DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM. A CRITICAL EDITION, WITH COMMENTARIES BY PAUL CARRINGTON, PETER GABEL, ANGELA HARRIS, DONNA MAEDA, AND JANET HALLEY* (2004); down the same line but directed more at scholarship than legal education: ARTHUR AUSTIN, *THE EMPIRE STRIKES BACK: OUTSIDERS AND THE STRUGGLE OVER LEGAL EDUCATION* (1998); for a more traditional plea for a “rounder” legal education, be it in clinical education or policy needs, see Barry Boyer and Roger C. Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221 (1974) plus the ‘daddy’ of legal education reform: David Haber and Julius Cohen, eds., *THE LAW SCHOOL OF TOMORROW: THE PROJECTION OF AN IDEA* (1968).

<sup>51</sup> ARTHUR L. STINCHCOMBE, *INFORMATION AND ORGANIZATIONS* (1990).

<sup>52</sup> JAMES G. MARCH, MARTIN SCHULZ, and XUEGUANG ZHOU, *THE DYNAMICS OF RULES: CHANGE IN WRITTEN ORGANIZATIONAL CODES* (2000)

<sup>53</sup> Paul DiMaggio and Walter Powell, eds., *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* (reprint 2002); see now: Paul DiMaggio, ed., *THE TWENTY-FIRST CENTURY FIRM: CHANGING ECONOMIC ORGANIZATION IN INTERNATIONAL PERSPECTIVE* (2001).

question: How can the two dominant legitimizing mechanisms of 'democratic politics' and 'free markets' justify particular forms of legal organizations?<sup>54</sup>

Research on procedural law also opens up different interdisciplinary perspectives: First of all, theoretical research about procedural justice will help provide an over-differentiated legal system with some basic and comparable structures.<sup>55</sup> Another intersection concerns the actual theoretical and sociological discussion on the status of empirical facts. As procedural law functions to an important degree as a fact-finding or even fact-producing mechanism, questions of the production of knowledge, well-known to the theory and sociology of sciences, can be connected with issues of procedural law.<sup>56</sup> Sociology of knowledge has already begun to take interest in court procedures,<sup>57</sup> other comparative research on the relationship between legal and scientific contacts with knowledge may also be helpful.<sup>58</sup> But still most research in this field either neglects genuinely legal questions or remains too focused on one legal system, namely the U.S.<sup>59</sup> Against this background, it may not be the smallest possible achievement of this interdisciplinary agenda to broaden the picture of how legal systems work when contrasted with a social science discourse that is regularly directed towards one legal system only.

Our approach to sanctions invites cooperation with the still growing and diverse field of interdisciplinary law and economics research, in particular with institutional economics<sup>60</sup>, classical economic analysis of law<sup>61</sup> and behavioral law

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<sup>54</sup> One example for this kind of research is Neil K. Komesar, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1977); Miguel Poiars Maduro, *WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION. A CRITICAL READING OF ARTICLE 30 OF THE EC TREATY* (1999) (relying on Komesar).

<sup>55</sup> See, Klaus F. Röhl and Stefan Machura, eds., *PROCEDURAL JUSTICE* (1997).

<sup>56</sup> Helga Nowotny, Hans-Heinrich Trute, Eberhard Schmidt-Armann, Dominique Pestre, and Helmut Schulze-Fielitz, *THE PUBLIC NATURE OF SCIENCE UNDER ASSAULT: POLITICS, MARKETS, SCIENCE AND THE LAW* (2005).

<sup>57</sup> Sheila Jasanoff, *SCIENCE AT THE BAR: LAW, SCIENCE AND TECHNOLOGY IN AMERICA* (1996).

<sup>58</sup> E.g., Bruno Latour, *LA FABRIQUE DU DROIT: UNE ANTHROPOLOGIE DU CONSEIL D'ÉTAT* (1994).

<sup>59</sup> *But see*, for an antidote Christian Joerges, Karl-Heinz Ladeur, and Ellen Vos, eds., *INTEGRATING SCIENTIFIC EXPERTISE INTO REGULATORY DECISION-MAKING: NATIONAL TRADITIONS AND EUROPEAN INNOVATIONS* (1997).

<sup>60</sup> Rudolf Richter and Erik Furobotn, *NEUE INSTITUTIONENÖKONOMIK: EINE EINFÜHRUNG UND KRITISCHE WÜRDIGUNG* (2<sup>nd</sup> ed., 1999); *id.*, *INSTITUTIONS AND ECONOMIC THEORY, THE CONTRIBUTION OF THE NEW INSTITUTIONAL ECONOMICS* (1999); Anne van Aaken, "RATIONAL CHOICE" IN DER RECHTSWISSENSCHAFT. ZUM STELLENWERT DER ÖKONOMISCHEN THEORIE IM RECHT (2003).

<sup>61</sup> Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* (1972), 6<sup>th</sup> ed., 2003

and economics.<sup>62</sup> Such research on the need for, and the effect of, sanctions requires a common descriptive framework. These types of economic analyses of law are focused on the effect of negative and positive incentives and are readily linked to a comprehensive legal perspective on sanctions.<sup>63</sup> In this interdisciplinary context legal institutions may also serve a quasi-empirical function for the social sciences, as they represent a systematic method of ordering and structuring the society that informs, or even tests the theories developed in the social sciences. Conversely, the social sciences may be of use to the legal discipline by stimulating reshuffling, innovation and reinterpretation within the traditional legal categories and systems.

Finally, all of these intra-, and interdisciplinary links must be mapped from a multi-level perspective. Many of the phenomena mentioned above are the result of vertical and horizontal effects in the threefold structure of national, supra-national (European) and international legal orders.<sup>64</sup> Nation states chafe at regulations imposed by supra- and international legal orders that they themselves comprise. And these higher legal orders are often irritated by the independent legal systems within their constituent nation states. Horizontal irritation occurs within supra-national and international law when national legal orders are compelled to cooperate, continuously comparing and accommodating each other's "local" structures.

The legal world's experiences with these concrete arrangements can and should be used to refine and flesh out political scientists' concepts of "governance"<sup>65</sup>, "multi-level governance"<sup>66</sup>, and "superstate"<sup>67</sup>.

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<sup>62</sup> For recent contributions, see CASS R. SUNSTEIN, *BEHAVIORAL LAW AND ECONOMICS* (2000); Christine Jolls, Cass Sunstein, and Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STANFORD LAW REVIEW* 1471 (1998)

<sup>63</sup> RICHTER and FUROBOTN, *supra* (note 60), at 93.

<sup>64</sup> E.g., FRITZ W. SCHARPE, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* (1999); CHRISTOPH SCHMID, *MULTI-LEVEL CONSTITUTIONALISM AND CONSTITUTIONAL CONFLICTS*, unpubl. Ph.D. thesis (Florence: European University Institute 2001).

<sup>65</sup> E.g., *GOVERNANCE: REGIEREN IN KOMPLEXEN REGELSYSTEMEN. EINE EINFÜHRUNG* (Arthur Benz, ed., 2004).

<sup>66</sup> E.g., LIESBET HOOGHE AND GARY MARX, *MULTILEVEL GOVERNANCE AND EUROPEAN INTEGRATION* (2000), in particular chapter 1 on theory; Markus Jachtenfuchs and Beate Kohler-Koch, *Regieren und Institutionenbildung*, in: *EUROPÄISCHE INTEGRATION* 11 (Id., eds., 2nd ed., 2003).

<sup>67</sup> GLYN MORGAN, *THE IDEA OF A EUROPEAN SUPERSTATE. PUBLIC JUSTIFICATION AND EUROPEAN INTEGRATION* (2005). In contrast to the two empirical positions referred to above Morgan's argument is an expressly normative one.

In the meantime, the impermeable, self-sufficient national legal system that once dominated interactions in this three-level structure is becoming ever more porous and undefined. National legal systems and their traditional legal categories now bear the burden of proof and must justify themselves in supra-national and international legal and scientific discourses. Rather than providing stern guidance and a stable foundation for rule-making in supra-national and international legal structures, national legal systems are disassembled into a smorgasboard of legal components that are applied on a problem by problem basis, a process that is readily apparent in the piecemeal evolution of standards at the European level. The thorough integration of legal and social science research is critical to understanding, evaluating and developing criteria for this long, winding process of legal de-nationalization.<sup>68</sup>

#### **D. Renewal, Reinvention, Innovation – and Education**

Any effort to renovate the traditional structure of German jurisprudence will have to be undertaken under the auspices and within the framework of that same structure. In other words, the ship needs repair on high seas while in full service. In order to guarantee continuity and maintain a positive institutional dynamic during the initial stages of the reform, one needs to retain the traditional three pillars, which to some extent define the internal identity of any law faculty. It makes sense to continue to educate, train and support students and faculty within the three pillars, and the new chairs could be loosely coupled to this old structure in the sense that they would work with and in all three pillars without being tied to any one. Whereas the pillars themselves are asymmetric, with the civil law division being the largest, and criminal law the smallest, our reforms contain no inherent bias for one or the other division. The new chairs could equally well go to criminal, public or civil lawyers and would, most likely, fall to hybrid types who have worked in more than one specialty. Such an incremental approach allows for the gradual weaning of the system from dependence on its three-pillar structure.

Fears that reforms might make legal studies less attractive for students are unfounded for a number of reasons. Many students are aware of the academic deficiencies in current legal education in Germany and would welcome change. They know that the law schools are overcrowded, their law professors are overwhelmed by teaching loads that both limit their ability to interact directly with students and frustrate their – and by association, their students' – engagement in

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<sup>68</sup> See, Saskia Sassen, *Globalization or denationalization?*, 10 REV. INT'L POL. ECON. 1 (2003); VIVIEN A. SCHMIDT, *THE FUTURES OF EUROPEAN CAPITALISM* (2002).

stimulating academic inquiry. It is quite possible that the reforms discussed here, which include the introduction of a research-oriented cadre of law professors, would attract a new influx of third-party research funding which law schools, with their current emphasis on professional training and the traditional nuts-and-bolts approach, do not currently have access to. The research cadre also teaches, of course, and this research funding would be reflected in more professors, smaller classes and more stimulating academic engagement—all powerful attractants for potential students.

What about the content and exam structure of legal education? Since the establishment of the state law exam in nineteenth century Germany, legal research and legal education have been inextricably interlocked. Today, the first and second law exams are organized around the same three pillars of law that dominate legal studies. One disturbing result of the *strong coupling* between legal studies and narrowly perceived judicial needs during the post-WW II years was that research ceased to define the contents of the exam, and the exam started to define the contents of research. This produces a plethora of treatises and textbooks of the “pillar in a nutshell” genre, but has resulted in a paucity of academic curiosity in the modern German legal academe compared to, say, the time of the Weimar Republic.<sup>69</sup>

Clearly, a more aggressive focus on the content of legal education is called for. A number of possibilities have been discussed. One is to abolish the state exam in favor of a Bachelor/Master system, a solution that the profession itself abhors. It seems unlikely that the results of such a reform would be beneficial. One advantage of the German state exam system is, after all, a relatively broad approach to law, with specialization allowed only after a comprehensive legal education. Another possibility is a renovated law exam, wherein responsibility for designing and administering the exam would be transferred from the state to the law schools. This would allow the law faculties to determine the nature of the exams, choosing their own themes and incorporating concepts from various branches of the law as well as

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<sup>69</sup> For the area of Public Law see Christoph Möllers and Andreas Voßkuhle, *Die deutsche Staatsrechtswissenschaft im Zusammenhang der internationalisierten Wissenschaften - Beobachtungen, Vermutungen, Thesen*, 36 DIE VERWALTUNG 321 (2003). At the top twenty law schools in the U.S, based in a diverse group of public, private and Ivy League universities, the strictures of the exam structure also reign, but the breadth of inquiry is not restricted by a three-pillar structure or by the adherence to legal dogma that constrains German scholars. Law journals—characterized by more “outreach” to other disciplines and often edited by the best students from each cohort—play a bigger role in legal education in the U.S., and there is generally less emphasis on the production of oversimplified and formulaic textbooks. Case books produced by the top academics tend to be less free-ranging than their articles, but the better ones do include a good measure of research material from economics and, to a lesser extent, from political science and sociology.

from the social sciences, depending on the interests and strengths of their programs. This would be in harmony with the reforms outlined above as, unlike the current system, it allows for a *strong coupling* between research in the law school and the exam system—now with research as the driving force. This renovated law exam was partially made possible in July 2003,<sup>70</sup> when responsibility for thirty percent of the first exam grade was assigned to the law school in areas of its own choosing.<sup>71</sup> A further development might take the shape of a *weak coupling* brought about by mutual ignorance and where the relationship between state exam and innovative forms of research is a sporadic and unsystematic one.<sup>72</sup> A final strategy might rely on a *stronger and quite conscious de-coupling*, a trajectory of actual “counter coupling” of university research and the bar (or state) exam system, as it can be observed in the research-driven part of the U.S. system of legal education.<sup>73</sup>

Finally, returning to the three epitaphs that inaugurate this discussion, our reflections on twenty-first century legal studies in Germany have led us to the same conclusion that Lichtenberg’s generalization of Rousseau’s pronouncement that “A child who understands only his parents, does not understand even them” led him to about chemistry in the seventeenth century. Of course, some of our colleagues in the legal profession may protest that law, unlike chemistry and parenthood, is indeed of “*ganz reiner Natur*” and so exempt from Lichtenberg’s generalization, which he applies to all but the purest fields of knowledge—perhaps his own mathematics. But we, at least, have come to the conclusion that: He or she who understands only the law, does not really understand even it.

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<sup>70</sup> GESETZ ZUR REFORM DER JURISTENAUSBILDUNG (Reform Act on Legal Education) of July 11, 2002 (BGBl. I 2002, 2592).

<sup>71</sup> The final grade of the first law exam depends to thirty percent on the grades attained in the faculty’s focal areas (*Schwerpunktbereichsprüfung*).

<sup>72</sup> Today this pattern could obtain for the seventy percent of the first law exam which is, as a “*staatliche Pflichtfachprüfung*”, out of a German law faculty’s direct reach.

<sup>73</sup> At the top twenty U.S. law schools the university exams and the bar exam refer to different *universes*, with the university exams stressing principled approaches and scholarly values while the bar exam always emphasizes the “nuts and bolts” issues of state law. And, while the quality of the legal education—and of the grade—may matter to career choices, to enter the profession at any level requires that you simply pass your bar exam. For a still valid German look at US legal education see WALTER OTTO WEYRAUCH, *HIERARCHIE DER AUSBILDUNGSSTÄTTEN: RECHTSSTUDIUM UND RECHT IN DEN VEREINIGTEN STAATEN. EIN VERGLEICHENDER BEITRAG ZUR DEUTSCHEN AUSBILDUNGSREFORM* (1976).