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ARTICLE

Socio-Legal Studies in Germany and the UK: Theory and Methods

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(Received 07 September 2020; accepted 13 September 2020)

Abstract
This Special Issue considers the situated and contextualized development of socio-legal, or law and society, scholarship within two materially different legal and academic cultures, namely Germany and the United Kingdom, with a view to achieving a better understanding of why and how such differences in understanding and practice have arisen. The contributions are grouped into three themes. The first reflects upon the influence of institutional contexts and scholarly traditions in terms of the development of those approaches that come under the banner of socio-legal studies. The second features contributions that adopt a comparative perspective in terms of selected areas of law, pointing to notably different approaches taken in Germany and the UK, and considering the development of these respective situations. The third looks at the key contemporary trends, theoretical applications, and methodological approaches taken within both countries' socio-legal academic contexts.

Keywords: socio-legal studies; sociology of law; legal culture; academic culture; comparative legal studies

A. Introduction

It is not unusual for an introduction to a socio-legal studies collection to open with acknowledgement that the contours of the discipline—if a discipline it is—are contested. Innately interdisciplinary, there is no universally accepted definition of what constitutes a socio-legal or a law and society approach, or agreement as to what such an approach necessarily encompasses. Instead, law and society scholarship is best defined as "oppositional,"[1] due to the manner in which it sets, and has historically set, itself in distinction to doctrinal legal approaches. It is this negative definition that arguably underpins the rude health of socio-legal scholarship: such a broad-church approach lends itself to inclusivity, and those fluid disciplinary contours easily accommodate methodological and theoretical development in both the sociological and the legal fields.

The intent of this Special Issue is neither to reify these contours or to attempt to delimit what is or is not included under the big umbrella of socio-legal studies. Our aim is to consider the situated and contextualized development of socio-legal scholarship within two materially different legal

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[1]Phil Thomas, Christos Boukalas & Lydia Hayes, *The* Journal of Law and Society *at 40: History, Work, and Prospects*, SLSA NEWSLETTER (Socio-Legal Stud. Ass'n, U.K.), Summer 2015, https://onlinelibrary.wiley.com/pb-assets/assets/14676478/jols_at_40-1509472962000.pdf

and academic cultures, namely Germany and the United Kingdom, with a view to achieving a better understanding of why and how such differences in understanding and practice have arisen.

There is currently no published research that adopts a comparative perspective to look at how socio-legal research is undertaken across different academic and legal cultures, and the editors have identified this as a gap in the scholarship. To be clear on this point, while socio-legal studies tend to concern local and national legal issues and features, comparative law looks at legal differences and similarities across jurisdictions. Comparative legal studies considers underlying theoretical and critical issues of relevance and influence, and studies in legal pedagogy focus on teaching and learning—there is little engagement with academic legal cultures, epistemic communities, and institutional drivers and limitations that serve to shape specific and situated socio-legal approaches. This Special Issue is conceived as providing the first engagement with these important issues.

Our explicitly comparative perspective on socio-legal scholarship brings with it its own considerations, not least the interface between socio-legal and comparative legal studies and their respective engagement with critical approaches. With a view to reducing the variables at play, we make a primarily functional comparison of practices concerning socio-legal studies within these two academic legal cultures.[2] It should be noted at this stage that we employ the term "legal culture" throughout this introduction—and Special Issue—to denote law and legal practice within a particular, often national jurisdictional, social context, and to discuss how aspects of the law are embedded in larger frameworks of social structure'.[3] Our use of the term "academic culture," that is, a network of knowledge-based experts that comprises an epistemic community,[4] is informed by Friedman's conception of internal legal culture.[5] Importantly, this conception of a law and society epistemic community can transcend national jurisdictional boundaries and limitations; national law and society research and scholarship communities may be better connected and more coherent, but they are not siloed. In terms of the articles within this Special Issue, we have adopted a light-touch approach to the comparative methodology used, with the result that the Special Issue does not cleave to a single specific comparative approach. Another consideration, in terms of variety across contributor articles, is the jurisdictional differences within the selected countries: the UK has four home nations, across which both law and education differ, often significantly, while Germany is a federal republic where respective federal Länder have jurisdiction over a list of issues detailed in the constitution, including universities and law degrees.

Articles were selected from those presented at a workshop that took place in September 2019 at the Humboldt Universität zu Berlin, supported by the UK Socio-Legal Studies Association (SLSA) and the German *Vereinigung für Recht und Gesellschaft*.[6] The presented articles were in turn selected from abstracts submitted to an open call circulated via socio-legal networks in both countries.[7] This call invited articles that sought to "understand the influence of institutional contexts and scholarly traditions upon the development of those approaches that come under the banner of

[2]*See* Naomi Creutzfeldt, Agnieszka Kubal, & Fernanda Pirie, *Introduction: Exploring the Comparative in Socio-Legal Studies*, 12 Int'l J. L. Context 377 (2016).

[3]David Nelken, *Comparative Sociology of Law*, *in* An Introduction to Law and Social Theory 329 (Reza Banakar & Max Travers eds., 2002).

[4]Jennifer Hendry, *The Double Fragmentation of Law: Legal System-Internal Differentiation and the Process of Europeanisation*, *in* 'Integration Through Law, Revisited: The Making of the European Polity 157 (Daniel Augenstein ed., 2013).

[5]Lawrence M. Friedman, The Legal System: A Social Science Perspective (1975).

[6]Further support came from the *Recht im Kontext Project* and from the Integrative Research Institute Law & Society, both located at Humboldt's Law Department. We gratefully acknowledge supplemental financial support from the DFG Gottfried Wilhelm Leibniz Prize Funds of Christoph Möllers.

[7]Presentations were selected for their scholarly contribution to reflect a balance in contributions from across German and UK institutions, gender, and career stage.

socio-legal studies," and this core goal remains evident in the articles comprising this issue. Building on this, further stated aims of the workshop were as follows:

- To consider how different academic traditions and institutional contexts have influenced the development of socio-legal research in Germany and the UK;
- To scrutinize theoretical and methodological approaches with a view to exploring similarities and differences in both contexts;
- To start an initial dialogue among participants with a view to forging closer ties across the German and UK socio-legal communities, and to facilitating future connections and collaborations.

This Special Issue remains organized around these aims. Articles in the first section reflect upon the influence of institutional contexts and scholarly traditions in terms of the development of those approaches that come under the banner of socio-legal studies (Introduction, Background, and Development). The second section then features contributions that adopt a comparative perspective in terms of selected areas of law, pointing to notably different approaches taken in Germany and the UK, and considering the development of these respective situations (Historical Socio-Legal Perspectives). Finally, articles in section three look at the key contemporary trends, theoretical applications, and methodological approaches taken within both countries' socio-legal academic contexts (Contemporary Socio-Legal Approaches).

This introductory Article will proceed in four parts. In Part One, we will outline the provisional conceptual mapping of the field undertaken in advance of the September 2019 workshop, with a view to explaining not only how we identified the core strands of our investigation, but also how we discovered that points of contact were neither as obvious nor as consistent as we had originally assumed. Included in this part are our reflections on the challenges raised by the workshop itself, those national and local differences in both practical and interdisciplinary approaches that had us either talking at cross-purposes or encountering unforeseen obstacles. Part Two continues to outline this path of discovery in terms of our drafting of this Special Issue proposal and selecting the articles: our self-reflection on these experiences builds upon insights drawn from a comparative literature review of two collected volumes published in the same year and curated respectively by an editor of this Special Issue. Considered comparison of the contents of these volumes—their theoretical influences and methodological selections—yielded fascinating insight into the respective conditions of contemporary law and society scholarship in Germany and the UK, and assisted us greatly in the selection of the four core issues for consideration throughout this Special Issue: culture (academic and legal); scholars; pedagogy; and environment. Part Three introduces the contributor articles, highlighting the engagement each of these has with the identified core issues, and outlining this Special Issue's timely and important exploration of these questions. The Fourth Part will consider our endeavor into its own contemporary context, not least the continued tragedy of Brexit, but also the hopeful ambition of strengthening ties and connections across these two national law and society research communities.

B. Part One: Conceptual Mapping

This Special Issue—just as the workshop that it is a result of—is an exercise in academic reflexivity. On the one hand, the research questions and aims for the workshop are in themselves part of the research process creating its own data. For example, we noticed that our expectations about submissions and presentations at the workshop in comparison to what happened on the day were different. On the other hand, these expectations and the questions we ask are evidently connected to our own academic socialization and intellectual identity, and as such, can be seen as "data"; it is even more clear that this applies if the research questions are located at a "meta" level

(research about research). In this regard, then, this exercise in "conceptual mapping" should be read as our attempt to chart the more commonly used concepts, theories, and methods—the discipline's own internal shorthand, as it were—and subject these to the particular scrutiny facilitated by a selfreflective comparative perspective. It is our conviction that the concepts, theories, and methods employed by both lawyers and socio-legal scholars are intrinsically linked to the histories of both of their disciplines, and that this becomes especially apparent when comparing two countries with diverging trajectories. Socio-legal and legal thinking have always mirrored each other more or less explicitly, even in a jurisdiction like Germany where the doctrinal project is still effectively hegemonic.[8]

Hendry and Creutzfeldt were inspired to hold the Berlin workshop by an earlier SLSA-funded UK-French 2018 event in Paris.[9] They contacted Boulanger, who had been involved in recent efforts to strengthen the socio-legal scene in Germany, and whose atypical position, a social scientist working at a German law faculty, provided a fresh perspective. While all three scholars had separate and overlapping networks within law and society scholarship, it quickly became apparent that connections across those communities were limited. British and German scholars were often more likely to meet, whether intentionally or coincidentally, at a Law and Society Association annual meeting in the U.S. rather than in an academic event closer to home.[10] It further transpired that there were notable differences in the development of the research field; differences that were often awkward to track as a result of research and scholarship being undertaken under varied banners, namely "socio-legal studies," "law and society," "Rechtssoziologie/sociology of law," or "Interdisziplinäre Rechtsforschung (interdisciplinary research on law)."[11] Finally, and perhaps most importantly in terms of the aims of this Special Issue, the lack of comparative literature became increasingly evident.[12] Given that this initial mapping seemed to present several gaps, we were curious to see who would respond to the workshop call for articles that asked for contributions with a specifically cross-national perspective on methods and theories in socio-legal research.

This current Special Issue showcases selected responses to our workshop call, with these selections being indicative of the varied positions in both countries. Some immediately apparent divergences arose in terms of contributors. For example, there were more doctoral candidates from the UK, and a slight gender imbalance towards female participants. In terms of subject matter, submissions from British scholars focused more on methods and substantive research questions, while the submissions generated via the German networks took a more historical and grand-theoretical approach. More broadly, and notable in light of our meta-comparative approach, comparative issues were less well represented than anticipated; indeed, throughout the workshop it became increasingly apparent that comparative research on socio-legal studies lacks both a shared conceptual vocabulary and a literature base. It is these lacunae that this Special Issue will start to fill.

[8]As compared to the UK, where some observers consider it in "its final death throes." Anthony Bradney, *Law as a Parasitic Discipline*, 25 J. L. & Soc'y 71 (1998).

[9]The workshop explored the methods, traditions, and theories of socio-legal studies in France and the UK, reflecting on what "socio-legal studies in context" means for research traditions and forms of knowledge produced. Edward Dove, *What Can Socio-Legal Studies Contribute to Medical Law? Thoughts From a Workshop in Paris*, SLSA Blog (2018),.

[10]This is probably true for any two European countries picked at random, there is no European forum for socio-legal research that could remotely rival the membership base or the LSA and the corresponding size of its annual conferences.

[11]Susanne Baer, Rechtssoziologie: eine Einführung in die interdisziplinäre Rechtsforschung (3d ed. 2017); The Handbook of Law and Society (Austin Sarat & Patricia Ewick eds., 2015); Routledge Handbook of Socio-Legal Theory and Methods (Naomi Creutzfeldt, Marc Mason & Kirsten McConnachie eds., 2020).

[12]There have been efforts to map individual disciplinary histories,, for example a the ongoing Journal of Law & Society series that has so far covered Aotearoa/New Zealand, Canada, France, Germany and most recently Poland, or country reports in the International Journal of Law in Context, including reports on Germany, France, Japan or Denmark.

C. Part Two: Differences and Challenges

The first challenge of this comparative project is that the academic study of law differs significantly in both countries. Leaving aside substantive and doctrinal differences, our focus is on the different epistemological legal research traditions represented by each country's academic culture. While one adopts a normative perspective, the other's perspective is more empirical, and crossover is comparatively minimal. To make things even more complex, on closer inspection, it turns out that the boundaries between the "normative/doctrinal" and "empirical/socio-legal" are differently drawn in both countries, and the historical and present relationship between the two traditions also differs significantly. It is therefore necessary to develop a vocabulary that is capable of capturing not only the shifting boundaries of "legal" and "nonlegal" approaches to law,[13] but also what is distinct in the "doctrinal" study of law against which sociological approaches have often set themselves in opposition.[14]

The second challenge is that, as previously mentioned, very little comparative scholarship exists on law and society studies in both countries. This situation is further aggravated by the fact that only scant data is available on research environments and communities upon which comparative analyses can be based. The situation is somewhat better in the UK, as several reports on legal education have been published, which make recommendations on socio-legal teaching and research.[15] In Germany, one report on legal scholarship, published in 2012,[16] mentions the importance of non-doctrinal approaches as "foundational" subjects in legal education, but otherwise does not contain any data of relevance to the current investigation.

A third challenge is that German-UK networks of socio-legal research collaboration and shared information are currently still in their infancy. In the past, there have only been a few common research projects and little exchange about academic events, a situation likely caused by the language barrier. By contrast to this lack of direct UK-German collaboration and interaction, the Law and Society Association (LSA) annual conference in the U.S. has provided a convenient and often fertile ground for networking, being attended by scholars from both countries; the UK's Socio-Legal Studies Association (SLSA) annual conference seems to be less well known within German academia. And a final point to note in terms of obstacles to potential collaboration is that German remains the main language of publication of German scholarship, which has the effect of (de)limiting the audience, reinforcing the academic status quo, and arguably restricting innovation. Indeed, it was with a view to addressing these issues that the German Law Journal came into being as the premier vehicle for English-language scholarship focusing on German, European, and international law and jurisprudence.

An interesting sidebar with respect to research collaboration between Germany- and UK-based scholars is that, unknown to the other, two of the present editors were involved in producing textbooks on socio-legal approaches in the UK[17] and Germany respectively.[18] The different foci

[13] *See, e.g.*, Reza Banakar, *Law Through Sociology's Looking Glass: Conflict and Competition in Sociological Studies of Law*, *in* THE ISA HANDBOOK IN CONTEMPORARY SOCIOLOGY 58 (Ann Denis & Devorah Kalekin-Fishman eds., 2009) (enumerating different forms of socio-legal research).

[14] Christian Boulanger, *The Comparative Sociology of Legal Doctrine: Thoughts on a Research Program*, in this issue.

[15] HAZEL G. GENN, MARTIN PARTINGTON & SALLY WHEELER, LAW IN THE REAL WORLD: IMPROVING OUR UNDERSTANDING OF HOW LAW WORKS: FINAL REPORT AND RECOMMENDATIONS (2006); FIONA COWNIE, LEGAL ACADEMICS: CULTURE AND IDENTITIES (2004); Fiona Cownie & Anthony Bradney, *An Examined Life: Research into University Legal Education in the United Kingdom and the Journal of Law and Society*, 44 J. L. & SOC'Y S129 (2017).

[16] WISSENSCHAFTSRAT, PERSPEKTIVEN DER RECHTSWISSENSCHAFT IN DEUTSCHLAND: SITUATION, ANALYSEN, EMPFEHLUNGEN (2012), *translated in* GERMAN COUNCIL OF SCIENCE AND HUMANITIES, PROSPECTS OF LEGAL SCHOLARSHIP IN GERMANY: CURRENT SITUATION, ANALYSES, RECOMMENDATIONS (2012), https://www.wissenschaftsrat.de/download/archiv/2558-12_engl.pdf;jsessionid=B2B960E93BD907264DFB20E7E54467F3.delivery1-master?__blob=publicationFile&v=3.

[17] ROUTLEDGE HANDBOOK OF SOCIO-LEGAL THEORY AND METHODS, *supra* note 11.

[18] INTERDISZIPLINÄRE RECHTSFORSCHUNG: EINE EINFÜHRUNG IN DIE GEISTES- UND SOZIALWISSENSCHAFTLICHE BEFASSUNG MIT DEM RECHT UND SEINER PRAXIS (Christian Boulanger, Julika Rosenstock & Tobias Singelnstein eds., 2019).

and choices of these volumes are worthy of note here, as each textbook reflects the current state of knowledge as well as the ambition and authority of the discipline in very different ways. The German textbook is clearly embedded in a "sociology of law" tradition and maps a very disparate and fragmented research landscape. Its aim is to contribute to an emerging disciplinary identity after what has been a long period of stagnation. The chapters reflect the fact that socio-legal research still lacks, among other things, a firm institutional base, clear career paths, and established curricula. By comparison, the *Routledge Handbook* builds on and reflects an established discipline with academic protagonists, discrete schools of thought, different career stages, and systematic teaching on research methodology from socio-legal scholars around the world.

D. Part Three: Contributions to this Special Issue

In light of the breadth of issues raised by the initial mapping, an important consideration for us has been: how can we respond to these challenges and study these differences in a systematic way? We have thus identified four core strands that appear consistently throughout this mapping and, indeed, this Special Issue, and which are worthy of flagging in terms of the specific questions that they provoke. These are:

1. Legal Culture: What are the different trajectories of academic and legal cultures in Germany and the UK? Is there a typical pathway into and through law and society research?
2. Scholarship: Can patterns of law and society scholarship (education/ training/ mobility/ language competence/supervision) be identified? How influential are kinship connections? What theoretical traditions have been prevalent, and which ones are less visible?
3. Pedagogy: How do pedagogic practices, learning, and teaching differ in Germany and the UK? Is law and society taught as theory, practice, or both? To what extent does canonical socio-legal theory appear in contemporary law and society research and student education?
4. Institutions: In what ways do institutional structures that influence law and society research and education in the UK and Germany differ? Are these academic, professional, or both?

These four strands, which will be discussed in Part Four of this introduction, should be borne in mind throughout the Special Issue. The issue itself is structured into three sections: background and development, historical socio-legal perspectives, and contemporary socio-legal perspectives. It opens with Stefan Machura's comprehensive comparative account of the status quo in Germany and the UK. Machura sets himself the task of identifying and scrutinizing the key stages of development in both countries' socio-legal scholarly traditions. From the perspective of a Wales-based and German-trained scholar, Machura's comparison identifies the differing contours of what is alternatively known in English as socio-legal studies, law and society, and the sociology of law, the salient differences between these, and the extent to which they can be said to overlap. In terms of the subject's innate interdisciplinarity, Machura observes that particularly law schools within the UK have been more effective in accommodating this, while in Germany the disciplines of law and sociology are, whether intentionally or accidentally, very far apart.

Tanja Herklotz continues the comparative endeavor, although her focus rests explicitly on the specifics of comparing different socio-legal cultures of research and scholarship. Herklotz notes that the selection of what to compare in this sense is particularly salient, and cites the important comparators for this task as being: institutions, publications, scholars, and teaching. Herklotz offers a range of research questions that socio-legal scholars can draw upon when engaging in comparative projects. Further to this, Herklotz probes the "how" of such comparative work, outlining and critiquing several interdisciplinary methodological approaches and tools.

This background and development section continues in a self-reflective vein with Ulrike Schultz's fascinating account of gender in German socio-legal research and teaching. Drawing on her personal

experience, Schultz outlines and analyses not only the socio-legal issue of gender equality, but also the challenges in, and obstacles to, undertaking such research within Germany's legal-academic culture. By blending contextualized historical developments, such as gender equality legislation and increasingly permissive social norms, with her situated personal reflections on female professorial appointments and gender-related content in university teaching and curriculums, Schultz provides a unique and nuanced view of value to contemporary scholars of gender equality.

Concluding this section, in Christian Boulanger's article exploring the minefield of undertaking comparative research on legal doctrine, or *Rechtsdogmatik*, Boulanger notes that, while currently scholars in many different disciplinary areas are studying doctrinal aspects of law both normatively and empirically, an interdisciplinary and cross-national field of research has yet to take shape. In Germany, the sociology of law has, in Boulanger's view, been very reticent about analyses of legal doctrine, which it has regarded sometimes with suspicion, and as part of the "law on the books," in unfavorable contrast with the "law in action." Boulanger argues that the comparative study of legal doctrine as an institutionally legitimated social practice helps to understand how one is translated into the other, which is also relevant for evaluating the role of legal scholarship in democratic societies. For Boulanger, the almost diametrically opposed traditions of doctrinal analysis in Germany and the UK provide a fertile ground for comparative analysis. Using examples from German research, Boulanger's article contributes theoretical and methodological perspectives to the research agenda of the currently emerging socio-legal study of legal doctrine.

The articles in the next section on historical socio-legal perspectives take a somewhat broader approach. Remaining largely sectoral in focus, however, Rebecca Zahn, Klaas-Henrik Eller, and Ioannis Kampourakis provide comparative analyses of, respectively, historical socio-legal labor law scholarship, the empirical study of legal doctrine, the development of socio-legal research on the law of contract, and the different methodological and epistemological ideas to be found in different empirical approaches to law. Opening this section is Zahn's article, at the forefront of which is the recognized challenge posed by comparative labor law history, a largely neglected field that—in both Germany and the UK—has lacked those galvanizing academic debates as to the best way for it to be undertaken. In addition to Zahn's comprehensive and insightful account of this field in both countries, Zahn argues explicitly in favor of a methodology called "minor comparativism." Although at its heart still fundamentally comparative, this method makes the deliberate attempt to include the marginalized or minority foreign view by intentionally adopting "the perspective of those who remain foreign."[19]

By looking at contract law, Eller is able to survey a research topic that also connects a large variety of disciplinary inquiries from both normative and analytical perspectives, each with a long history of scholarly interest. As Eller notes, the study of contract is torn between the universality of the contract as a form and the specificity of its practice in different contexts. In particular, the way contract law has dealt with the "relational" character of contracts has been very different; for example, the fact that contracts cannot be detached from the social context in which they exist without creating normative or analytical problems. The article contrasts developments in contract law in the UK and US with those of Germany and finds that the variations are partly explained by the fact that the reception of legal realism varied widely. In the common law countries, the reception led to more interdisciplinary perspectives on contract law, whereas in Germany, realist thinking did not take root in post-war Germany's contract law doctrine. Eller concludes his article with thoughts on how these developments play out in the case of transnational contract law. He finds that despite the turn to "reflexive" law, transnational contract law scholarship is not characterized by truly interdisciplinary debates.

Kampourakis' article concludes this section by comparing two different sociological approaches to law—that is, empirical socio-legal studies and the "grand theory" of autopoietic

[19]Rebecca Zahn, *Finding New Ways of "Doing" Socio Legal Labor Law History in Germany and the UK: Introducing a "Minor Comparativism,"* in this issue.

social systems—in terms of transnational private regulation, an "increasingly important aspect of legal and social ordering under conditions of globalization."[20] Drawing attention to the effects that adopting epistemologically different theoretical approaches has upon the motivations, structuring, and results of such studies, Kampourakis then leads the more macro argument that insights into the field's developmental divergence in Germany and the UK can be gleaned from each country's law and society community, exhibiting a notable preference for one of these respective sociological approaches to the study of law.

The final section on contemporary socio-legal perspectives showcases new methodological approaches to socio-legal research. The articles in this section employ different perspectives, interdisciplinary approaches, and theories, considering legal design, urban law, and what it means to undertake socio-legal research "politically." Perry-Kessaris' article introduces the idea of legal design, that is, consideration of how the outlooks and tools characteristically associated with design can be oriented towards legal thinking and matters. Perry-Kessaris argues in favor of a sociologically-informed approach to both the theory and application of principles of legal design, stacking on top of these initial considerations a further requirement also to include sociological insights. With both law and design being social phenomena, Perry-Kessaris makes the case, referencing influential Anglo-German literature and practices, for the conceptualization of legal design as a form of social relations. Perry-Kessaris' article asks the question: "What would a sociologically-informed approach to researching legal design look like conceptually, empirically, and normatively?"[21]

Layard draws our attention to an area of scholarship underexplored in both countries' law and society scholarship: urban law. In proposing how such research can be undertaken, Layard advocates grasping legal opportunities to analyze urbanism comparatively as a socio-legal task. Adopting the *leitmotiv* of the cross-discipline, Layard shifts focus of inquiry from law to society. While underdeveloped across Europe, urban law scholarship in North America includes analyses of, for example, the relationships between national and state government, as well as individual legal aspects of housing, zoning, licensing, sustainability, consumer protection, poverty, race, and data law. Layard calls for scholars to follow Auby's ground-breaking *Droit de la ville*, where Auby synthesizes materials for lawyers and non-lawyers alike. Drawing on Andreas Philippopoulos-Mihalopoulos' suggestion of understanding a city as a *lawscape*, thereby integrating elements of the law with elements of the city, Layard describes a rich set of methods to explore urban law, drawing on doctrinal analysis, empirical observations, interviews, ethnographies, quantitative and mapping exercises, as well as contextual policy analysis.

Concluding this section, and indeed, this Special Issue, Mant's article puts into practice the kind of self-reflection discussed by both Herklotz and Schultz, recognizing how socio-legal researchers —specifically early-careers researchers in this particular case—must work politically in terms of reflecting on their own theoretical and methodological selections. This bigger-picture approach thus demands not only a commitment to self-reflection within a research project, but also within the discipline more broadly. Mant notes that, as is the case in her own study of litigants-in-person (LIPs) in family courts in England and Wales, the composite application—to a single issue—of different approaches that, while independently insightful, may appear irreconcilable, offers a genuinely fertile tension. While Mant's socio-legal study blends feminist legal theory with insights drawn from Bourdieu and Latour's Actor-Network Theory, the contribution of this article to the Special Issue lies in its recognition of how the myriad different tools available to socio-legal researchers can and even should interact, even in light of their apparent incoherence. That this article focuses on the willingness of early-career researchers to undertake this kind of blended

[20]Ioannis Kampourakis, *Empiricism, Constructivism, and Grand Theory in Sociological Approaches to Law: The Case of Transnational Private Regulation*, in this issue.

[21]A. Perry-Kassaris, *Making Socio-legal Research More Social by Design: Anglo-German Roots, Rewards, and Risks*, in this issue

research, moreover, highlights how different supervision and training practices have an enormous impact upon the development and ambit of socio-legal studies more generally.

E. Part Four: Stronger Ties

This Special Issue is a foundational part of an ongoing ambitious project to bring together socio-legal communities and to forge stronger ties between them. Our focus is on the UK and Germany, as these are the socio-legal spaces we operate within. This connected space has, we believe, huge potential to grow and to develop. The four strands mentioned above that we identify as running throughout this Special Issue correspond to four focal areas. It is through the targeted exploration of these that we can better understand the composition and operation of socio-legal spheres in the two countries. This collaborative socio-legal work will continue, and the uncertainties provoked by the COVID-19 pandemic and looming Brexit mean that it is ever more important to strengthen connections between jurisdictions and intellectual communities. The next generation of socio-legal scholars has enormous potential, and there is no better time at which to recognize and dismantle obstacles to cross-community action and interaction, to identify synergies, to strengthen ties, and to strengthen the socio-legal community beyond narrow national academic boundaries.

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ARTICLE

Milestones and Directions: Socio-Legal Studies in Germany and the United Kingdom

Stefan Machura*

(Received 07 September 2020; accepted 13 September 2020)

Abstract
Under the headings of "*Rechtssoziologie*" in Germany and "socio-legal studies" in the UK, scholarly traditions have developed that relate law to its social environment. This Article identifies key stages in the development the subject took in both countries and the directions of travel. Comparable milestones were passed, and directions were taken in Germany and the UK. This includes the institutionalization of the subject along the lines of programmatic texts; becoming part of university education; and the establishment of research institutes, academic associations, and specialized journals. The development tells us something beyond sociology of law or socio-legal studies, namely about the relation of law and sociology, the parent disciplines themselves, as well as about academic studies and professional and institutional practice. However, in contrast to the UK, there is still more of a distance between the sociology of law and jurisprudence in Germany.

Keywords: Sociology of law; socio-legal studies; Socio-Legal Studies Association; empirical legal research; legal education

A. Introduction: What is "Socio-Legal Studies" or "Sociology of Law"?

Considering how "sociology of law," or "socio-legal studies," developed in Germany and the UK, this Article analyzes the institutionalization of the subject. How did it grow roots in the two countries? As other contributions to the workshop and this Special Issue explicitly focus on the trajectory of theoretical thought in socio-legal studies, this Article will only note those aspects in passing.[1] Interest in sociology of law, or socio-legal studies, started to develop mainly in the twentieth century and took similar trajectories in Germany and the UK. Though the UK lagged

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[1]The author has elsewhere narrated the history of sociology of law in Germany in more detail in Stefan Machura, *The German Sociology of Law: A Case of Path Dependency*, 8 INT'L J.L. CONTEXT 506 (2012), covering the development of the two parent disciplines as well as political and social movements inspiring some of the actors. For alternative accounts on sociology of law in Germany see, for example, Michael Wrase, *Rechtssoziologie und Law and Society – Die deutsche Rechtssoziologie zwischen Krise und Neuaufbruch*, 27 ZFRSOZ 289 (2006); Alfons Bora, *Sociology of Law in Germany: Reflection and Practice*, 43 J.L. SOC'Y 619 (2016).

behind for a long time, it caught up quickly over the last decades. Today, the subject may have an even larger base in the British Isles than in Germany. This was helped by a wider definition of the study area in the UK than in Germany, a greater openness towards inter- and transdisciplinary work in the UK, more flexibility of teaching demonstrated by faculties, and supported by more wide-spread employment opportunities.

What defines sociology of law? A key German player, Erhard Blankenburg, has described it as a social science "dealing with legal institutions and law-oriented behavior, striving to explain these from the canon of sociological theories and which simultaneously disciplines itself to methodological standards consented among social scientists."[2] The main contrast here is between social science and dogmatic law, where the latter is the study of law as found in authoritative legal texts with an aim to prepare, or at least to contemplate, legal decisions. Comparatively, sociology of law takes legal doctrine or legal decisions as "data," and jurisprudence employs aspects of sociological theory or sociological methods not only to theorize law but also to inform decision-making. The latter largely describes the socio-legal studies beyond sociology of law. Socio-legal studies must be the broader term, while sociology of law is somewhat more specific. The former could be perceived as identical with the "law and society" label, reflecting a broad range of topics, paradigms, and methods on display at the annual meetings of the United States' Law and Society Association (LSA).[3]

What in Germany is called "*Rechtstatsachenforschung*" takes little reference to sociological concepts. But, as an "empirical study of law," it draws purely on social science research methods to inquire into problems of the application of law. The conflict between this type of socio-legal studies and sociology of law, concerned with understanding the function of law in society, was prominent in the twentieth century among academics in the UK. The divide was not as important in other parts of Europe.[4] Indeed, there can be a fruitful division of labor between the two.[5] The study of law as part of society can only benefit from an inter- and transdisciplinary approach,[6] in which content from different academic disciplines is combined.

A plethora of neighboring social science and humanities subjects are drawn into socio-legal studies and sociology of law. The most successful being criminology, which experienced a phenomenal rise in public awareness, student numbers, degree courses, and targeted academic research in the UK. "Gradually the subject took off during the 1980s as crime and crime control became defined as a more central socio-political problem in the UK and police procedurals became a central part of television (now media streaming) culture."[7] In the UK, criminology is based in law schools at some universities and social sciences at other places. There are several permanent lectureships at one university. German criminology is almost exclusively at home at law schools where there is typically only one criminology professor with secure employment. Criminology in Germany has long been part of the study of law, with sociological and psychological content increasingly defining the subject, following the American example.

Historically strong relations exist between sociologists of law in the three German-speaking countries of Austria, Germany, and Switzerland. In equal measure, British academia is well connected to Australia, New Zealand, and other Commonwealth countries, or erstwhile British

[2]Erhard Blankenburg, *Die Praxisrelevanz einer Nicht-Disziplin: der Fall der Rechtssoziologie*, *in* SOZIOLOGIE UND PRAXIS. SOZIALE WELT, (SPECIAL ISSUE) 205, 206 (Ulrich Beck ed., 1982) (author's own translation).

[3]Its website lists no less than fifty-six Collaborative Research Networks, formed around joint scholarly interests, organizing the bulk of the activities. LAW AND SOCIETY ASSOCIATION, https://www.lawandsociety.org/ (last visited 26 April 2020).

[4]David Nelken, *The 'Gap Problem' in the Sociology of Law: A Theoretical Review*, 1 WINDSOR Y.B. ACCESS JUST. 35 (1981), *reprinted in* BEYOND LAW IN CONTEXT 1, 2 (2009).

[5]*Id.* at 7–8.

[6]Alfons Bora, Armin Höland, Dorothea Jansen, Doris Lucke, Stefan Machura, Wolfgang Ludwig-Mayerhofer & Gunther Teubner, *Rechtssoziologie „auf der Grenze": Mitteilung der Herausgeber*, 21 ZFRSOZ 319 (2000).

[7]Mike Levi, *Emerged from the American Shadows? Reflections on the Growth of Criminology in the UK*, 16 CRIM. EUR. 4, 5 (2017).

colonies. Ideas and staff sometimes travel lightly between the English-speaking nations and between the German-speaking countries. German sociologists of law closely follow English language literature, but few colleagues in the UK are able to read publications in German. Communication flows, therefore, tend to be slightly one-sided. When it comes to the structural development of sociology of law and socio-legal studies, the conditions within the two countries were key, as will be shown in the remainder of this Article.

B. The Early Mobilization Phase of Sociology of Law

I. Beginnings in Germany

The field developed much earlier in Germany than in the UK. Established academics pioneered sociology of law by the turn of the nineteenth to the twentieth century. This was the generation of Eugen Ehrlich, as well as Max and Marianne Weber. Ehrlich published his famous book *Grundlegung der Soziologie des Rechts* in 1913. His basic idea was that there is "dead law" that exists in the legal codes but is not being applied in practice, and there is "living law," some of which bears no relation to the state's written law.[8] Associations within society may organize themselves along self-developed rules. For example, if judges are called to decide in a dispute, they need to be trained to find out about those non-state but essential rules. Sociology of law would equip lawyers to research the non-codified "living law" through observation, interviews, or the study of legal documents. In this way, sociology of law becomes part and parcel of a more encompassing legal science. Ehrlich's ideas met considerable support, but also strong resistance. It started with the Kelsen-Ehrlich debate.[9] Ehrlich was not particularly extreme in his views, but he was often carried away by his rhetoric. Politically of liberal-conservative persuasion, his "revolution" meant providing lawyers with an additional empirical method to understand law. He did not aim to do away with state law or with legal training based on legal texts. Hans Kelsen, his adversary, pointed out logical errors in Ehrlich's argumentation, but he did not deny sociology of law a place within jurisprudence.

Max Weber's sociology of law, published after his death, emphasized the technical advantages of the modern dogmatic law based on the systematizing work undertaken by lawyers.[10] This type of law serves a capitalist economy and a liberal society. In his analysis, Weber was not at all blind to the problem of economic power turning into advantages for specific classes of people when dealing with the law and when developing the law. As a liberal thinker, he saw the alternatives as essentially worse, even for those disadvantaged by the modern legal regime.

Sociologists of law were quite prominent on the academic scene when German sociology took the first steps towards institutionalization at the beginning of the twentieth century. Max Weber was heavily involved in founding the *Deutsche Gesellschaft für Soziologie* in 1909.[11] Nevertheless, the political, economic, and intellectual climate proved unfavorable, and the catastrophic twelve years of national socialist rule largely stopped German sociology in its tracks. In the divided post-war Germany, sociology of law started slowly in the Federal Republic and saw an accelerated development in the 1970s and 1980s. Comparatively, in the German Democratic Republic (GDR), the leadership of the ruling Socialist Unity Party did not allow any initiative in the direction of sociology of law to become a reality. The subject was seen as incompatible with the

[8]Eugen Ehrlich, *Das lebende Recht der Völker der Bukowina*, *in* EUGEN EHRLICH, RECHT UND LEBEN 43 (Manfred Rehbinder ed., 1967) (1912); EUGEN EHRLICH, GRUNDLEGUNG DER SOZIOLOGIE DES RECHTS (4th ed., 1989); Eugen Ehrlich, *Über das "lebende Recht," in* POLITISCHE SCHRIFTEN 191 (Manfred Rehbinder ed., 2007).

[9]Hans Kelsen, *Eine Grundlegung der Rechtssoziologie*, *in* RECHTSSOZIOLOGIE UND RECHTSWISSENSCHAFT 3 (reprt. Klaus Lüderssen ed., 2003) (1915); Stefan Machura, *Eugen Ehrlich's Legacy in Contemporary German Sociology of Law*, *in* EUGEN EHRLICH'S SOCIOLOGY OF LAW 39 (Knut Papendorf, Stefan Machura & Anne Hellum eds., 2014).

[10]MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT (Johannes Winckelmann ed., 5th ed. 1980).

[11]MARIANNE WEBER, MAX WEBER: EIN LEBENSBILD 425–430 (4th ed. 1989); Uwe Dörk, Sonja Schnitzler & Alexander Wierzock, *Die Gründung der deutschen Gesellschaft für Soziologie vor 110 Jahren*, 48 SOZIOLOGIE 309, 311–13 (2019).

prevailing Marxist-Leninist ideology. Once the working class established its own rule, there would be no need for sociology of law.[12] In the process of German reunification after 1990, the legal structures, institutions, and personnel of the West were introduced.

In the early years of West Germany, aspects of sociology of law were part of lectures in philosophy of law.[13] A key step forward proved the editing of Weber's sociology of law by Johannes Winckelmann in 1956 as part of the *Economy and Society* compilation of Weber's texts. The subject now had an authoritative text that was less controversial than Ehrlich's 1913 book, *Grundlegung einer Soziologie des Rechts*. The 1960s saw a further build-up of sociology of law. In 1964, the first institute for sociology of law was founded by Ernst E. Hirsch at the Free University Berlin.[14] Still, students of sociology of law lacked a textbook in the German language. Finally, in 1967, Hirsch and Manfred Rehbinder edited a widely used textbook, which also introduced American work to German readers.[15] The wider public may have learned about sociological inquiries on law through opinion research. Elisabeth Noelle-Neumann acquainted Germans with opinion research,[16] a field that developed in the United States. Some of her surveys touched on legal topics.[17] Sociology of law gained prominence through a series of empirical studies concerning law students, lawyers, and judges. Ralf Dahrendorf emphasized the dominance of representatives from the higher social stratum in law. The upper half of society would sit in judgment over the lower half.[18] Marxists went a step further and referred to Ernst Fraenkel's attack on "class justice" from the Weimar years, which by then the author himself had already come to see as too extreme a view.[19] An alternative theory was put forward by Judge Theo Rasehorn.[20] This was essentially a socialization theory: The bureaucratic apparatus of the justice system forms the actions of legal personnel. Rasehorn's theory was later supported by further empirical studies.[21] Both approaches, the class and the bureaucratic perspective, were quite unflattering for the legal profession and, as they were also written in forceful language, created quite a stir.

Interest in sociology of law continued to grow, and at the end of the decade, students demanded that the subject be taught, which meant an institutionalization of the subject had to be granted. In the feverish atmosphere of the "student revolution," starting in 1967, some activists saw sociology of law as an opener for the introduction of Marxist doctrine into universities. Others favored "sociological jurisprudence," the phrase, of course, being much earlier used by Roscoe Pound for drawing on "the relations of law to society."[22] The students' demand was chiming in with the zeitgeist of the period, which widely believed in social engineering. The books *Sociology Before the Gates of Jurisprudence* and *Jurisprudence as Social*

[12]Rosemarie Will, *Betrifft: Forschungsprofilierung Rechtssoziologie*, 11 ZfRSoz 2 (1990).

[13]Theo Rasehorn, *Wolfgang Kaupen und die deutsche Rechtssoziologie. Aufstieg und Niedergang*, *in* Empirische Rechtssoziologie. Gedenkschrift für Wolfgang Kaupen 15, 15–16 (Dieter Strempel & Theo Rasehorn eds., 2002).

[14]Thomas Raiser, *Keynote Address: Sociology of Law in Germany*, 11 German L.J. 391, 392 (2010).

[15]Ernst. E. Hirsch & Manfred Rehbinder, *Studien und Materialien zur Rechtssoziologie*, *in* KZfSS, Sonderheft, No. 11 (Ernst. E. Hirsch & Manfred Rehbinder eds., 2d ed. 1971).

[16]David Childs, *Elisabeth Noelle Neumann: Pioneer of Public-Opinion Polling and Market Research*, Independent (Apr. 10, 2010) www.independent.co.uk/news/obituaries/elisabeth-noelle-neumann-pioneer-of-public-opinion-polling-and-market-research-1940766.html.

[17]*See, e.g.,* Elisabeth Noelle-Neumann, *Rechtsbewußtsein im wiedervereinigten Deutschland*, 16 ZfRSoz 121 (1995).

[18]Ralf Dahrendorf, Gesellschaft und Freiheit 195 (1963).

[19]Ernst Fraenkel, Zur Soziologie der Klassenjustiz und Aufsätze zur Verfassungskrise 1931–32 (1968).

[20]Written under pseudonym Xaver Berra, Im Paragraphenturm: Eine Streitschrift zur Entideologisierung der Justiz (1966).

[21]Rüdiger Lautmann, *Rechtsfindung als Karriereberuf*, *in* Festschrift für Rudolf Wassermann zum sechzigsten Geburtstag 109 (1985); Wolfgang Langer, Staatsanwälte und Richter: Justizielles Entscheidungsverhalten zwischen Sachzwang und lokaler Justizkultur 66 (1994).

[22]A. Javier Treviño, *Pound, Roscoe (1870-1964)*, *in* Encyclopedia of Law and Society: American and Global Perspectives 1160, 1161 (David S. Clark ed., 2007). *See* Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 Harv. L. Rev. 489, § III. Sociological Jurisprudence (1911).

Science alerted legal academia.[23] As much as these debates helped the initial institutionalization of sociology of law, they also triggered fierce resistance from traditionally-minded law professors. The reaction of many was, "don't rock the boat." There was little appetite on the part of many legal scholars to transform jurisprudence for various reasons, including the limited practicability of sociological jurisprudence, which can be too cumbersome when decisions have to be made quickly.[24] Still today, German legal education somewhat neglects the training needs of law graduates aiming for a career in politics and administration where social science knowledge is obviously beneficial. The influential sociologist Helmut Schelsky first supported the institutionalization of sociology of law, but he started to fiercely and loudly criticize left-leaning reformers.[25] The short period of change was quickly followed by the onset of a roll-back. The efforts of lawyers wanting to defend the traditional outlook of jurisprudence, a disappointment in society and politics about the practicality of social engineering on a large scale—as well as the onset of repeated economic crises with the ensuing austerity measures, all came together to endanger the institutionalization of sociology of law.

II. Beginnings in the UK

In the United Kingdom, sociology developed much later than in Germany. It essentially began in the 1960s.[26] Richard Münch paints a particular trajectory for British sociology as it was "developed in correspondence with the labor movement. As such, social theory portrayed society as a class hierarchy and societal development that was shaped by class conflict and power."[27] Other authors, outlining the history of socio-legal studies and sociology of law in the UK, emphasize a very long tradition of empirical and reform-oriented research, but with a noted absence, if not adversity, towards general social theory in Britain.[28]

The earliest events relevant to the present discussion included "law in context" studies in the new universities of Kent and Warwick, according to Bradney, on government initiative.[29] Warwick kept all the law in context teaching in-house within the Law School and integrated it into the teaching of law subjects, whereas Kent drew on teaching provisions from other academic subjects.[30] Sociology of law was just an optional third-year module in Warwick at that time.[31] In retrospect, Foster and Osborn argue that "contextualism" did not take full advantage of what interdisciplinarity can offer and kept centered on understanding the operation of law.[32]

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[23]Rüdiger Lautmann, Soziologie vor den Toren der Jurisprudenz (1971); Helmut Rottleuthner, Rechtswissenschaft als Sozialwissenschaft (1973); Doris Lucke, *Feminae ante portas: Gleichstellung und Geschlechtergerechtigkeit in der Jurisprudenz*, 39 ZfRSoz 298, 309 (2019) (commenting on the effect most recently).

[24]Practical problems of sociological jurisprudence are outlined by Klaus F. Röhl, Rechtssoziologie 100–01 (1987) [hereinafter Röhl, Rechtssoziologie]; Klaus F. Röhl, *Zur Bedeutung der Rechtssoziologie für das Zivilrecht*, *in* Rechtssoziologie am Ende des 20. Jahrhunderts: Gedächtnissymposium für Edgar Michael Wenz 39, 51 (Horst Dreier ed., 2000).

[25] Helmut Schelsky, Die Arbeit tun die anderen: Klassenkampf und Priesterherrschaft der Intellektuellen (2d ed. 1975).

[26]Max Travers, *Sociology of Law in Britain*, 32 Am. Sociologist 26, 28 (2001); Michael Albrow, *The Changing British Role in European Sociology*, *in* Sociology in Europe: In Search of an Identity 81, 85 (Brigitta Nedelmann & Piotr Sztompka eds., 1993).

[27]Richard Münch, *The Contribution of German Social Theory to European Sociology*, *in* Sociology in Europe: In Search of an Identity 45, 47 (Brigitta Nedelmann & Piotr Sztompka eds., 1993).

[28]Carl Campbell & Paul Wiles, *The Study of Law in Society in Britain*, 10 L. & Soc'y Rev. 551, 555–56 (1976).

[29]Anthony Bradney, *United Kingdom*, *in* Encyclopedia of Law and Society: American and Global Perspectives 1529, 1529 (David S. Clark ed., 2007).

[30]Ralph Folsom & Neil Roberts, *The Warwick Story: Being Led Down the Contextual Path of the Law*, 30 J. Legal Educ. 166, 182–83 (1979).

[31]*Id.* at 176.

[32]Ken Foster & Guy Osborn, *Dancing on the Edge of Disciplines: Law and the Interdisciplinary Turn*, 8 Ent. & Sports L.J. 4, 4-5 (2010).

A 1971 Parliamentary report on legal education, the "Ormrod Report," called for universities to "impart an understanding of the relationship of law to the social and economic environment in which it operates and the intellectual training necessary to enable students to handle facts and apply abstract concepts to them."[33] Pat Carlen mentions the Social Science Research Council, the principal state funding agency—today, the Economic and Social Research Council (ESRC)—setting up a socio-legal committee in 1972.[34] It was formed at about the same time as a socio-legal group within the Society for Public Teachers of Law.[35] According to Folsom and Roberts, there was a demand for social sciences and humanities coming from the substantial part of law students who did not wish to gain a professional legal qualification.[36] Both U.S. lecturers and those teaching abroad influenced the direction taken by Warwick and elsewhere.[37] As in Germany, the subject gained momentum when a younger generation of scholars, inspired by Marxism, started to study theories on law and society.[38] Meanwhile, there was also an established pattern of pragmatist research directed at reforming the public sector and the welfare state, which encompassed the state of affairs in the legal system.[39] As Michael King put it, "many of us believed that the social sciences held the key that would unlock the door to universal knowledge on how best to control people's behavior and regulate social life for the benefit of all society's members."[40] Early discussions focused on the contrast between the two camps: Theorists, most notably of the Marxist persuasion, and empirical researchers.[41]

C. Institutionalization of Sociology of Law

I. German Situation

1. Universities

Sociology of law became part of the curriculum for lawyers via the legal requirements for the training of lawyers, as set out in law. At this level, the curriculum is ultimately determined by political forces, and the inclusion of sociology of law thus did not need the consent of law schools. Germany's law on judges now required some knowledge of the social foundations of law.[42] The provinces thus included aspects of sociology of law into the spectrum of topics potentially tested in the state bar exam, for example, today § 3(2) JAG Berlin, and § 7(1) JAG Hessen.[43] The law schools had to organize lectures in sociology of law, and staff had to be employed to teach the subject. Yet most preferred a minimal solution. Given the politically controversial nature of sociology of law at the time and doubts over the concept of "sociological jurisprudence," law schools required candidates to be able to teach doctrinal law. Sociology of law became typically one of the several denominations of a chair, in combination with public, civil, or criminal law as a main working area. Professors had to have passed both *Staatsexamen* with an overall mark that

[33]Folsom & Roberts, *supra* note 30, at 169.

[34]Pat Carlen, *Introduction*, *in* THE SOCIOLOGY OF LAW 1, 1 (Pat Carlen ed., 1976).

[35]*See Id.* The Society for Public Teachers of Law was "the then principal professional association of British university law teachers," according to David Sugarman, *A Special Relationship? American Influences on English Legal Education, c. 1870-1965*, 18 INT'L J. LEGAL PROF. 7, 19 (2011).

[36]Folsom & Roberts, *supra* note 30, at 180.

[37]*Id.* at 174–75, 177; Sugarman, *supra* note 35.

[38]Travers, *supra* note 26.

[39]*Id.*

[40]Michael King, *Roger Cotterrell and Law's Sociology of Law*, 42 J.L. SOC'Y 649, 649 (2015).

[41]Travers, *supra* note 26.

[42]§ 5a(2) Deutsches Richtergetz [The German Judiciary Act], Apr. 19, 1972, BGBL. I at 713 (Ger.), available at http://www.gesetze-im-internet.de/drig/BJNR016650961.html#BJNR016650961BJNG000100666.

[43]Gesetz über die Ausbildung von Juristinnen und Juristen im Land Berlin (Berliner Juristenausbildungsgesetz - JAG), June 23, 2003, GVBL., 232 (Ger.), available at http://www.lexsoft.de/cgi-bin/lexsoft/justizportal_nrw.cgi?xid=216050,1; Gesetz über die juristische Ausbildung (Juristenausbildungsgesetz - JAG), Apr. 1, 2004, GVBL. I at 158 (Ger.), available at http://www.lexsoft.de/cgi-bin/lexsoft/justizportal_nrw.cgi?xid=169594,1.

allowed them to become a judge. Furthermore, it was advisable to have published a significant amount of traditional legal books and articles. This constellation allowed universities to exclude sociologists on the one hand and to keep out left-leaning candidates on the other hand.[44] In other words, sociology of law was only a side-aspect of a professor's duties.[45] Any engagement with the subject beyond giving lectures and occasional seminars was an issue of personal preference. Therefore, the quality and extent of socio-legal research in Germany has suffered tremendously.[46]

Sociology, as the other parent discipline, might have offered more to sociologists of law, but in fact, it offered much less. The professionalization model of sociology in this period emphasized embedding sociology in other disciplines.[47] And law faculties were reluctant to create chairs in sociology of law. Sociology had largely forgotten about law as a topic of research and teaching.[48] In spite of the prominence of law within the oeuvres of, for example, Niklas Luhmann and Jürgen Habermas,[49] German sociologists did not typically engage with it to any real extent.

There was a big chance for sociology of law to become an integrated part of legal education but it passed quickly. German legal education is traditionally divided into three years at university followed by a legal apprenticeship. Some German *Länder* in the 1970s introduced a one-phase model, the "*einstufige Juristenausbildung*," integrating practical training elements with academic studies. Furthermore, they also combined traditional legal learnings and the sociology of law. In this model, law students learned about the black-letter law in its application to legal problems, the legal practice in the application of law, and sociological analyses of the problem's social background. But after a few years, these experiments were abruptly stopped by political decision, because the framework for legal training is determined on the federal level where the opponents, who were chiefly from the politically more conservative southern *Länder*, were in the majority. Which model prepared lawyers better for their professional practice will never be known.

From this point onwards, the numbers of sociologists of law in permanent employment at universities started to dwindle. When a job was vacated, the law faculties allocated the positions to other legal subjects. Many members of the younger generation took up different careers or moved to the USA, the UK, Australia, or Norway, which offered more to sociologists of law.

Law students changed, too. Reforms, which aimed at streamlining and accelerating the speed of studies, resulted in students at universities concentrating all their efforts on passing the key assessments in doctrinal law. For their first state exam, most paid to attend extra lectures by private *Repetitoren*. A leaflet illustrates the clever marketing of a leading private *Repetitor*.[50] It shows three gladly laughing young males and lists their names. One of them pats the right shoulder of the man in the middle, the other one resting his arm on the left shoulder. The heading reads "*Wir haben etwas 'gut' gemacht*" ("We did something well"), playing with the word "gut" ("good" or "well", in English) which in this context means the three young men depicted made the right choice to go to this instructor, but more importantly, that they got an upper-level second class degree in the famously selective state exams. With this average, a career as a judge, public prosecutor, or at a reputable law firm was in sight, and the three are introduced to the reader as doctoral candidates. The *Repetitors'* formula was to calm nervous students down by offering them the bare bones of

[44]Pierre Guibentif, *Niklas Luhmann und die Rechtssoziologie: Gespräch mit Niklas Luhmann, Bielefeld, den 7. Januar 1991*, 21 ZfRSoz 217, 230 (2000).

[45]Stefan Machura, *Rechtssoziologie in der Juristenausbildung*, 37 Juristische Schulung 953 (1997); Barbara Heitzmann, *Lehre der Rechtssoziologie an deutschen Hochschulen*, 25 ZfRSoz, 249 (2003); Wrase, *supra*, note 1; Hanna Uebach & Sebastian Leuschner, *Zum Stand der rechtssoziologischen Lehre und Forschung im deutschsprachigen Raum*, 31 ZfRSoz 303 (2010).

[46]Susanne Karstedt, *Standortprobleme: Kriminalsoziologie in Deutschland*, 23 Soziologische Revue 141 (2000).

[47]Bora et al., *supra* note 6, at 320.

[48]Bernhard Schäfers, *Rechtssoziologie*, *in* Einführung in Spezielle Soziologien 191, 195 (Helmut Korte & Bernhard Schäfers eds., 1993).

[49]Niklas Luhmann, A Sociological Theory of Law (Martin Albrow ed., Routledge and Kegan Paul, 2d ed., 1985); Niklas Luhmann, Das Recht der Gesellschaft (1993); Jürgen Habermas, Faktizität und Geltung (1993).

[50]Alpmann Schmidt, Wir haben was "gut" gemacht (1999) (on file with the author).

doctrinal law. Sociology-related content did not figure at all as it was no secret that sociology of law was rarely asked for in the state exams.

After unification in 1990, the East German law faculties adopted the model of the west. As a consequence, law professors who were experts to the western system were in high demand. This allowed socio-legal scholars who had faced bleak job prospects after the end of the one-phase model of legal training to receive professorships at universities like Halle, Frankfurt-on-Oder, and *Humboldt Universität Berlin*. The result was a boost to socio-legal research, teaching, publication, and to the activities of sociology of law associations.

Another possible casing for sociology of law was research centers. One such attempt failed in Hamburg when the directors decided to disband the sociology of law research group.[51] The years of Erhard Blankenburg's leadership of a sociology of law working group at the *Wissenschaftszentrum Berlin* have been described by Ralf Rogowski as the most productive for German sociology of law.[52] Much later, the Law and Society Institute at the Humboldt University was founded. It successfully tapped into the well of talent available in the Berlin region and into the funding opportunities of the capital city. The "*Recht als Kultur*" Institute in Bonn is also a more recent development and has gained an international profile by hosting guest scholars.

2. Associations

The institutionalization of an academic subject also requires scholarly associations. The sociology of law section in the German Sociological Association (DGS) has been in existence since 1972. Wolfgang Kaupen, who made a name through empirical research on knowledge and opinion on law, was a key force in the early years.[53] A second association, the *Vereinigung für Rechtssoziologie*, was founded in 1976 for several reasons. There were differences in appearance and motivations between professors of law and often younger sociologists energized by the student movement.[54] Other reasons included that teachers of sociology of law in law departments needed a place to develop their common interests. Erhard Blankenburg, a key scholar, had a two-track strategy for the advancement of sociology of law in mind: The DGS section to continue its work, and the *Vereinigung* as a market-place where sociologists of law interested in empirical research set out their stalls. The strategy was successful in the following years. The Federal Justice Ministry tasked sociologists with a series of research projects. In this, Dieter Strempel, head of the ministry's unit for empirical legal research, was pivotal.[55] As for the cultural clash, this aspect was soon ameliorated. By the 1990s, both German sociology of law associations worked together in a spirit of cooperation. Some scholars, including the author, sat on the committees of both. In 2010, the *Vereinigung* changed its name to "*Vereinigung für Recht und Gesellschaft*" ("Law and Society Association") following the example of the broad approach taken by the United States' Law and Society Association. Also notable is the *Berliner Arbeitskreis Rechtswirklichkeit* ("Berlin Working Group on Socio-Legal Studies"), which has a local focus but has, since its inception in 2001, developed a network that includes scholars throughout and beyond the borders of Germany.

[51]Dieter Martiny, *Entstehung, Tätigkeit und Perspektiven der Sozialwissenschaftlichen Forschungsgruppe*, *in* EMPIRISCHE RECHTSFORSCHUNG ZWISCHEN WISSENSCHAFT UND POLITIK 19, 25 (Konstanze Plett & Klaus A. Ziegert eds., 1982). The research group existed between 1975 and 1982.

[52]Ralf Rogowski, *Nachruf auf Erhard Blankenburg (1938–2018)*, 38 ZFRSOZ 168, 170 (2018).

[53]Rasehorn, *supra* note 13, at 30.

[54]For the UK, see Campbell & Wiles, *supra* note 28, at 568, 572. Life-style differences were also observed elsewhere as a factor of group delineation. *See* Nicholas Mullins, *The Development of a Scientific Specialty: The Phage Group and the Origins of Molecular Biology*, 10 MINERVA 51, 72–73 (1972).

[55]His stance can be gained from Dieter Strempel, *Rechtstatsachenforschung und Rechtspolitik: Ressortforschung braucht den Dialog zwischen Wissenschaft und Politik*, *in* EMPIRISCHE RECHTSFORSCHUNG ZWISCHEN WISSENSCHAFT UND POLITIK 113 (Konstanze Plett & Klaus A. Ziegert eds., 1984).

3. Publications

The teaching of an academic subject at universities needs an agreed-upon core of content. A model curriculum for the sociology of law[56] was developed in 1975 by a working group dominated by lawyers because the subject was mainly taught at law schools. Introduction books were a further requirement for teaching purposes. Also, in the 1970s, four law professors in particular shaped the content of the sociology of law as a subject for law students by publishing introductory books, each with a different approach.[57] The most all-encompassing presentation was drafted by Klaus F. Röhl, which widened the focus on German sociology of law to the broadest review of international approaches and empirical findings of sociological or other origins.[58] The publication of introductory materials continued.[59] Susanne Baer adopted a broader law and society approach but kept the familiar label sociology of law. Several book series feature sociology of law, including a dedicated series "*Schriften der Vereinigung für Rechtssoziologie*" (today "*Recht und Gesellschaft*") by the Association for Law and Society and a bilingual, German-English series "Society and Law" by Röhl and Machura. There was an annual publication, "*Jahrbuch für Rechtssoziologie und Rechtstheorie*" which now is a book series titled "*Interdisziplinäre Studien zu Recht und Staat.*"

Generally, academic disciplines tend to have their own specialized journals. Since 1980, the "*Zeitschrift für Rechtssoziologie*," today with the subtitle "The German Journal of Law and Society," fulfils this role. Erhard Blankenburg was its "spiritus rector" in the early years.[60] The ZfRSoz was preceded by an information letter that had the form and content of an academic journal: "*Informationsbrief für Rechtssoziologie,*" edited by Wolfgang Kaupen. Articles in the ZfRSoz appear in both German and English, and there is a cooperation agreement with the French sister journal "*Droit et sociéte*" to exchange articles.

While some preconditions for the flourishing of German sociology of law are in place, it crucially lacks firm roots in the law schools and even more in sociology departments. Very few of its scholars enjoy permanent employment in positions allowing them to concentrate sufficiently on the subject. This is the main obstacle.

II. UK Situation

1. Universities

The UK Quality Assurance Agency has issued Benchmarks for the study of law, and while expressly giving faculties leeway,[61] they state:

> The study of law exposes students to a wide range of methods and techniques, some of which are specific to the discipline but some of which are drawn from the humanities and social sciences . . . . The common denominator is the requirement on the student to apply their understanding of legal principles, rules, doctrine, skills and values.

[56]Raiser, *supra* note 14.

[57]Manfred Rehbinder, Einführung in die Rechtssoziologie: Ein Textbuch für Studenten der Rechtswissenschaft (1971); Thomas Raiser, Rechtssoziologie (1987); Röhl, Rechtssoziologie *supra* note 24; Helmut Rottleuthner, Einführung in die Rechtssoziologie (1987).

[58]Röhl, Rechtssoziologie, *supra* note 24. A revised version is available online at https://rechtssoziologie-online.de/. Klaus F. Röhl, *Lehrbücher und Reader*, Rechtssoziologie-online.de, §https://rechtssoziologie-online.de/kapitel-1/§-2-fortsetzung/i-rechtssoziologie-in-lehrdarstellungen-und-readern/ (last accessed Aug 29, 2019) (listing German introductions).

[59]Erhard Blankenburg, Mobilisierung des Rechts: eine Einführung in die Rechtssoziologie (1995); Gerhard Struck, Rechtssoziologie (2011); Susanne Baer, Rechtssoziologie (3d ed. 2017).

[60]Rogowski, *supra* note 52, at 170.

[61]*Quality Assurance Agency*, Subject Benchmark Statement Law 4 (2019) https://www.qaa.ac.uk/docs/qaa/subject-benchmark-statements/subject-benchmark-statement-law.pdf?sfvrsn=b939c881_18 (last visited 5 September 2020).

Law students are required to evidence

> . . . knowledge and understanding of theories, concepts, values, principles and rules of public and private laws within an institutional, social, national and global context.[62]

A survey published in 1983 showed that sociology of law and socio-legal studies had indeed become, although to varying degrees, part of university teaching in the UK.[63] Sociology departments rarely featured sociology of law, however.[64] Earlier, Hunt saw it leading "a somewhat precarious existence predominantly located on the fringes of law departments and faculties."[65] Roughly two decades later, Foster and Osborn, commenting on law as an academic discipline, stated "the socio-legal has become the dominant approach in the UK."[66] This opinion is supported by several other scholars. Reading Cownie and Bradney's account, socio-legal studies are especially important when it comes to the research identity of legal scholars and research activity.[67] Sugarman suggested that most scholars at law schools no longer restrict themselves and their teaching to black-letter law, but take social context into account.[68] And Creutzfeldt summarizes the developments as "socio-legal scholarship is now an established focus of scholarly and institutional interest."[69] If this is indeed the situation, how did it transpire?

As is the case in Germany, the study of law in the UK has a two-stage structure. Three years of university, four in Scotland and Northern Ireland, are followed by traineeships, the latter of which, however, are organized differently from those in Germany. Some UK law faculties follow the "liberal model of legal education," where the technical study of legal skills is complemented by broader, cultural and social elements.[70] To mention an example, at Cardiff University, where the author was an external examiner, law students find not only a module in jurisprudence, but also a sociology of law module. The latter comprises major theories as well as socio-legal topics of the day. Sociology of law elements are often included in jurisprudence textbooks and in courses on jurisprudence, while dedicated sociology of law programs have been reduced.[71] Creutzfeldt explicitly mentions Bristol, Cardiff, Exeter, Glasgow, Kent, and Oxford as law schools offering socio-legal courses.[72] In contrast, Warwick, for example, offers a BA Law with Social Sciences, which is similar to other universities like Bangor, which allows students to study law with social science subjects. LLM and MA specialist degrees like "Human Rights" have strong socio-legal content[73] similar to many law and criminology MA degrees.

Law students, according to King, are preoccupied "with gaining as quickly as possible those qualifications which they believe will place them firmly on the rungs of a career ladder."[74] Yet, in defense of current student generations, it has to be said that much has changed since

[62] *Id.* at 5.

[63] Nigel Fielding & Jane Fielding, *Teaching the Sociology of Law: An Empirical Study*, 10 J.L. Soc'y 181 (1983).

[64] Max Travers, *Putting Sociology Back Into the Sociology of Law*, 20 J.L. Soc'y 438, 442 (1993).

[65] Alan Hunt, The Sociological Movement in Law 1–2 (1978).

[66] Foster & Osborn, *supra* note 32, at 3.

[67] Fiona Cownie & Anthony Bradney, *Socio-Legal Studies*, *in* Research Methods in Law, 40 (D. Watkins & M. Burton eds., 2d ed. 2018).

[68] Sugarman, *supra* note 35, at 29.

[69] Naomi Creutzfeldt, *Traditions of Studying the Social and the Legal: A Short Introduction to the Institutional and Intellectual Development of Socio-Legal Studies*, *in* Routledge Handbook of Socio Legal Theory and Methods, 9, 19 (Naomi Creutzfeldt, Marc Mason & Kirsten McConnachie eds., 2019).

[70] Julian Webb, *Education, Legal*, *in* Encyclopedia of Law and Society. American and Global Perspectives 461, 462 (David S. Clark ed., 2007).

[71] King, *supra* note 40, at 657.

[72] Creutzfeldt, *supra* note 69, at 19.

[73] Bradney, *supra* note 29, at 1532.

[74] King, *supra* note 40, at 657; Stephen Clear & Marie Parker, *A Model for Responding to UK and International Law Students' Great(er) Expectations in Wales' Internationalised Learning Environment*, 13 J. Commonwealth L. & Legal Educ. 62, 71

the 1970s when socio-legal studies were introduced. There is more doctrinal law to master, more competition for jobs in a forbidding climate for lawyers, and on top of it, UK students have to take out loans to cover substantial fees and living costs. Loan schemes have been introduced for post-graduate studies, allowing more students to extend their education to a postgraduate phase with more specialized master's studies. In these, doctrinal law is often mixed with socio-legal content.

Government-related funding—such as the ESRC and the Nuffield Foundation, a charitable organization—was instrumental in the development of socio-legal studies in the UK. Although, after initially good conditions, funding for socio-legal studies was drastically reduced in the 1980s and 1990s.[75] Michael King observes rightfully that in the current climate, the "expectations and demands of legal academics and those who make grants to them and publish their books and articles all pull in the direction of an instrumental approach to social theory."[76] It is similar to research, which has to demonstrate an impact on society.

Historically, Max Travers noted there used to be class differences between lawyers and sociologists, which were roughly similar to German society, with the former belonging to a higher category, resulting in a cultural clash.[77] This is probably no longer the case, as in Germany, professorial pay was in general significantly reduced, and in the UK, coinciding with the de facto privatization of universities, salaries of lecturers and professors slipped in real value, and many lecturers hold precarious employment contracts.

Few sociologists without a law degree are employed at British law faculties, with the notable exception of criminologists whose subject is based in law schools at some universities. In 2006, a commission tasked by the Nuffield Foundation claimed that there was not enough trained staff to conduct empirical research in socio-legal studies.[78] The situation has improved in the intervening years, in part because of efforts by the ESRC. Nevertheless, in 2015 Sugarman wrote about "the general failing of legal education to provide even basic training in empirical and socio-legal research skills."[79] In Germany, there was the opposite situation to the Nuffield Foundations' findings, and many well-trained German sociologists of law left the country. Some of them, for example, took up employment on the British Isles.

When it comes to British research institutes having a role in the history of sociology of law, the Oxford Centre for Socio-Legal Studies provided an example of how quickly winds can change for socio-legal studies. As Director, Donald Harris employed sociologists as researchers to collaborate with lawyers and sought to combine theoretical and empirical work.[80] Government funding was cut in the early 1980s, and the new director was "no longer committed to recruiting sociologists to work alongside law school researchers."[81] Luckily, things have changed again in the meantime.

2. Associations

The history of academic associations in the UK goes back, according to Campbell and Wiles, to discussion groups. Campbell and Wiles mention a "Socio-Legal Group," founded in 1971, which

(2019) (Mentioning as a representative UK student voice: "To gain a broad understanding of the skills needed to progress into the law profession").

[75]Linda Dickens, *Some Notes on the English Experience*, *in* Empirische Rechtsforschung zwischen Wissenschaft und Politik 185, 185 (Konstanze Plett & Klaus A. Ziegert eds., 1984); Travers, *supra* note 26, at 36. Social sciences were not a priority for successive governments of the Conservative party at the time.

[76]King, *supra* note 40, at 85.

[77]Travers, *supra* note 26.

[78]Hilary Genn, Martin Partington & Sally Wheeler, Law in the Real World: Improving Our Understanding How Law Works 45–46 (2006); Travers, *supra* note 26, at 36.

[79]David Sugarman, *From Legal Biography to Legal Life Writing: Broadening Conceptions of Legal History and Socio-Legal Scholarship*, 42 J.L. Soc'y 7, 14 (2015).

[80]Mavis Maclean, Prize Acceptance, RCSL Newsletter 2/2019, 17 (2019), http://rcsl.iscte.pt/rcsl_nl_2019_2.pdf; Travers, *supra* note 26, at 29, 32.

[81]Travers, *supra* note 26, at 29.

then merged with "the smaller Law Group of the British Sociological Association."[82] Their membership, which boasted 250 academics and postgraduate students,[83] was already impressive in comparison with German associations. The UK Socio-Legal Studies Association (SLSA) was established rather late by comparison in 1990, but its ranks swelled quickly, and it soon became the second largest academic association for lawyers in the UK.[84] SLSA was characterized as "deliberately ecumenical socio-legal association," bridging different conceptions of the relation of sociology and law.[85] The range of activities is much larger than that of its German counterparts. SLSA Annual Conferences occur more regularly than the Austrian-German-Swiss meetings. The SLSA membership compares favorably with the DGS section's eighty-seven, while the section's email list has 225 addresses, and the *Vereinigung's* 159, with its newsletter going out to 428 addresses.[86] Most of the SLSA members are from law schools.[87]

3. Publications

What journals mark the establishment of the subject in the UK? The main UK outlet for the subject is the Journal of Law and Society. It started in 1974, six years earlier than the German ZfRSoz, as British Journal of Law and Society. Remarkably, now-Emeritus Professor Philip Thomas of the Cardiff School of Law and Politics has served as the journal's Editor in Chief since its establishment. His first editorial stated: "We do not subscribe to the view that the social scientist is to be cast in the role of handmaiden to the lawyer."[88] A slight preference for theoretical work can be read between the lines, but an openness for empirical articles was also expressed.

On its website, the journal *Law and Critique*, established in 1990, presents itself as "the prime international critical legal theory journal,"[89] appearing under the publisher's "Philosophy and Law" portfolio. Another publication, *Social and Legal Studies*, harking back to 1992, seeks to attract "progressive, interdisciplinary and critical approaches to socio-legal study."[90] Yet another outlet, the *International Journal of the Sociology of Law*, appears today under the title *International Journal of Law, Crime and Justice*, signaling a shift to criminology.

Outlining the history of socio-legal studies, Campbell and Wiles mention the *Law and Society* book series,[91] while Folsom and Roberts additionally reference the series *Law in Context and Modern Legal Studies*.[92] From the mid-nineties onwards, Richard Hart printed many socio-legal books, and publication continues today as part of Bloomsbury. At present, there is an emphasis on articles in international peer-reviewed journals and open access, which further challenges conventional publication patterns. Open access is a requirement for the Research Excellence Framework (REF), the cyclical evaluation of university research that triggers government funding. But demand for open access is also driven by authors wishing to better disseminate their work.

[82]Campbell & Wiles, *supra* note 28, at 568.

[83]*Id.*

[84]Anthony Bradney, *Socio-Legal Studies Association*, *in* Encyclopedia of Law and Society. American and Global Perspectives 1408, 1408 (David S. Clark ed., 2007).

[85]David Nelken, *Blinding Insights? The Limits of a Reflexive Sociology of Law*, 25 J.L. Soc'y 407, 408 (1998).

[86]The current list of SLSA members has about 1,300 addresses, according to Jen Hendry, Associate Professor in Law & Social Justice, University of Leeds (Sept. 13, 2019, 13:38 CET) (on file with the author), but is reported to be inaccurate, with the number of paying full members rather being in the region of 500. For the membership of the German association: Email from Andrea Balog-Hiatt, Secretary, Vereinigung für Recht und Gesellschaft (Aug. 27, 2019, 08:24 CET) (on file with the author); Emails from Doris Schweitzer, Speaker Sektion Rechtssoziologie (Sept. 4 and 10, 2019, 12:33 and 13:02 CET) (on file with the author). It is important to note that many individuals will be in both German organizations.

[87]A fact already reported in Bradney, *supra* note 29.

[88]British Journal of Law and Society, *Editorial*, 1 British J.L. Soc'y 1, 1 (1974).

[89]*Law and Critique*, https://www.springer.com/philosophy/philosophy+of+law/journal/10978 (last visited Jan. 15, 2019).

[90]Socio & Legal Studies, *Aims and Scope*, https://uk.sagepub.com/en-gb/eur/journal/social-legal-studies#aims-and-scope (last visited Aug. 25, 2019).

[91]Campbell & Wiles, *supra* note 28, at 568, 572.

[92]Folsom & Roberts, *supra* note 30, at 173–74, 189.

In the UK, there is not the same range of books for beginners as in Germany. Roger Cotterrell's *The Sociology of Law: An Introduction* stood largely alone in the UK.[93] Travers characterized it as reflecting the legal theorist's "instrumental, and, in some respects, unashamedly eclectic interest in sociology as an academic discipline," an interest directed at power relations in society.[94]

Socio-legal studies in the UK has a much larger footprint than its counterpart in Germany. It owes its better position in part to the broader definition compared to *Rechtssoziologie* and also to the greater openness of UK law schools for ideas from other disciplines and inter- and transdisciplinary endeavors.

D. Conclusion

The development of the subject in the UK and Germany shows some initial similarities, but also significant differences. The mobilization phase in Germany was long and drawn out, interrupted for some decades, and mainly characterized by particular scholars. By comparison, in the UK, the mobilization phase was shorter, but with key scholars and government action. In both countries, its inclusion in university curriculums was more successful in law schools than in social sciences. In Germany, inclusion finds its main expression in sociology of law lectures, while in the UK, socio-legal studies are reflected across a multitude of modules. As a consequence, specialized introductory books are more of a feature in Germany. Again, in both countries, lecturers are mainly employed in law schools, and there is a preference for legally qualified staff. In Germany, the state dominates legal education to a higher degree than in the UK. This is a result of the state exams which define the professional careers of German law students. UK law faculties are influenced by the rigidities of regular research evaluation exercises. The first results in orienting studies towards black-letter law and towards the decisions of higher courts, while the second points towards what stakeholders in the legal system regard as beneficial. Another consequence of the dispersed nature of education in socio-legal studies in the UK is that the Socio-Legal Studies Association attracts more scholars, and postgraduates, than its German counterparts, allowing for a wider range of activities. In both countries, there are a plethora of publication outlets: In Germany, there is a greater concentration on one journal.

German sociology of law started earlier, but by the end of the 1970s, it had encountered strong opposition, which arguably continues today. UK socio-legal studies is more of a success story, although the core sociology of law element—as defined by Blankenburg's insistence on sociological theories and social science methods—was, and still is, the minority. Political motivations were prominent, especially in Germany. They have boosted the development of socio-legal studies and sociology of law, but because of their divisive character have also harmed the prospect of being recognized in all quarters.

Clearly, sociology of law has not yet realized its full potential in Germany. The past suggests that further developments in both countries depend on a number of factors. Funding support for research will be important to broaden the range of findings, keeping pace with the developments in society and its laws. The subject has to be represented in the universities' curriculums, and more students must become interested in studying it. An infrastructure of academic associations and publication outlets is needed to attract scholars and bring different approaches together. To keep scholars engaged with the subject, permanent positions in teaching and research are key to allow them to concentrate on the field. In addition, dedicated research institutes can further strengthen socio-legal studies and sociology of law. They allow for addressing problems that do not find enough sustained attention in universities.

[93]Roger Cotterrell, The Sociology of Law: An Introduction (2d ed. 1999).

[94]Travers, *supra* note 26, at 445.

In the end, however, many people are focusing on social problems created by law, legal problems to be approached by social research, or theoretical endeavors driven by a disciplinary or transdisciplinary approach that they may gain from each other's work.

A final consideration: To have lasting careers in academia, scholars in both countries need a strong disciplinary identity. It requires full credentials as typically a sociologist or lawyer. In the German case, the two disciplines are miles apart. There still is a deep rift between what is essentially an empirically oriented sociology working with theoretical tools that principally apply everywhere, and jurisprudence that is still mostly concentrating on norms formulated to guide the application of state law. The UK example shows that the two disciplines can meet, no doubt. But at present, they do so more often in the UK than in Germany.

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ARTICLE

Law and Society Studies in Context: Suggestions for a Cross-Country Comparison of Socio-Legal Research and Teaching

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Abstract

Cultures of legal and socio-legal scholarship, like legal cultures themselves, are shaped by their respective historical, cultural, economic, and socio-political context. Socio-legal—or law and society—studies are thus pursued and taught differently in different parts of the world. This Article suggests making socio-legal studies the object of comparative research, so as to understand and explain commonalities, differences, and context dependencies in socio-legal scholarship and teaching in different countries. Such comparative endeavors help to translate between different academic languages and to critically reflect upon one's own research methods and system of legal education. They prove useful for scholars planning research in other parts of the world or engaging in cross-country collaborative research projects, and for research institutions and policymakers involved in reforming research funding and legal education. But how do we go about comparing socio-legal studies? More specifically, why, what, and how do we compare, and what are the challenges that we may face when pursuing such comparative endeavors? This Article gives an overview of potential research questions that a comparison between socio-legal studies may address, the sources that comparativists may draw on, the methods such a comparative endeavor may use to collect and analyze data, and the challenges researchers may face when attempting to compare socio-legal studies in different parts of the world.

Keywords: Law and society studies; socio-legal scholarship and teaching; cross-country comparison; research methods; Germany and UK

A. Introduction

What are socio-legal studies? The answer to this question might differ when posed in different parts of the world. Socio-legal—or law and society—scholars in the US, Germany, or India might describe their way of working and the scope of their research in different terms. Scholarly articles, textbooks, and conferences on law and society in the UK, Japan, or Mexico might articulate different understandings of the purpose of socio-legal scholarship. This is because cultures of legal and socio-legal scholarship, like legal cultures themselves, are also shaped by their respective historical, cultural, economic, and socio-political context. How socio-legal studies emerged and developed over time, and how they are pursued and taught today thus differs, depending on where we are.

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Reflections about socio-legal studies in specific countries—such as Germany[1] or the UK,[2] as well as other parts of the world[3]—are not uncommon. They are, however, rarely comparative[4] in nature, and usually only focus on the development and operation of socio-legal studies in one particular country. It is, however, especially the comparative angle that provides for interesting insights about the context dependency of socio-legal research and teaching. Some aspects that are of interest here, such as legal education[5] or legal academia,[6] have been addressed by studies of comparative legal culture or comparative law (and society). There are, however, many more topics to explore when comparing socio-legal studies in different parts of the world. Scholarship engaging with sciences from a historical or sociological viewpoint—history of science, sociology of science, or science studies—addresses questions regarding the development of particular scientific fields and the impact of certain historical, political, cultural, or economic factors on that field. This scholarship, however, has largely focused on the natural sciences, rather than the social sciences, and does not usually address fields such as legal—or socio-legal—studies.[7]

In this Article, I suggest that looking at socio-legal studies from a comparative angle—in other words, making socio-legal studies the object of a comparative research project—is a very fruitful endeavor. I will explain how scholars, research institutions, and policymakers may benefit from such scholarly endeavors and how we can go about comparing the ways scholars pursue and teach socio-legal studies—or legal studies more broadly, for that matter. In Section B, I will first suggest some aims that a comparative project on socio-legal studies could pursue and some potential research questions it could address. I will then deal with potential research objects, first by speaking about questions of case selection—in Section C—and then by addressing sources and methods of data collection—in Section D. In Section E, I will further inquire about how to pursue the kind of comparative approach that I suggest in this Article by dealing with different methods of data analysis. Lastly, in Section F, I will address potential challenges that such comparative endeavors may face and provide a brief conclusion.

[1] *See generally* Stefan Machura, *German Sociology of Law,* 32 AM. SOCIOLOGIST 41 (2001) [hereinafter Machura, *German Sociology of Law*]; Stefan Machura, *Rechtssoziologie*, *in* HANDBUCH SPEZIELLE SOZIOLOGIEN (Georg Kneer & Markus Schroer eds., 2010); Doris Lucke, *Germany*, *in* ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES (David S. Clark ed., 2007); Stefan Machura, *German Sociology of Law: A Case of Path Dependency*, 8 INT'L J.L. CONTEXT 506 (2012).

[2] *See generally* C.M. Campbell & Paul Wiles, *The Study of Law in Society in Britain*, 10 L. & SOC'Y REV. 547 (1976); David S. Clark, *United Kingdom*, *in* ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES, *supra* note 1 [hereinafter Clark, *United Kingdom*]; Dermot Feenan, *Exploring the 'Socio' of Socio-Legal Studies*, *in* EXPLORING 'SOCIO' SOCIO-LEGAL STUDIES (Dermot Feenan ed., 2013); Hilary Sommerlad, *Developments in Socio-Legal Studies: Subjects and Methodologies—the Anglo-Saxon Model,* 36 RECHT DER WERKELIJKHEID (2015).

[3] For the Netherlands, see Marc Hertogh, *Mind the (New) Gap: A Selective Survey of Current Law and Society Research in the Netherlands*, 8 INT'L J.L. CONTEXT 137 (2012); for Denmark, see Ole Hammerslev & Mikael Rask Madsen, *The Return of Sociology in Danish Socio-Legal Studies: A Survey of Recent Trends*, 10 INT'L J.L. CONTEXT 397 (2014); for Portugal, see Pierre Guibentif, *Law in the Semi-Periphery: Revisiting an Ambitious Theory in the Light of Recent Portuguese Socio-Legal Research*, 10 INT'L J.L. CONTEXT 538 (2014); for Belgium, see Stephan Parmentier, *A Tale of Two Worlds: A (Very) Select Overview of Socio-Legal Studies in Belgium*, 12 INT'L J.L. CONTEXT 81 (2016). For more information on this topic generally, see the different country reports in the ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES, *supra* note 1.

[4] *But see* Naomi Creutzfeldt, *Traditions of Studying the Social and the Legal: A Short Introduction to the Institutional and Intellectual Development of Socio-Legal Studies*, *in* ROUTLEDGE HANDBOOK OF SOCIO-LEGAL THEORY AND METHODS (Naomi Creutzfeldt, Marc Mason & Kirsten McConnachie eds., 2019); Stefan Machura, *Milestones and Directions: Socio-Legal Studies in Germany and the United Kingdom,* in this issue [hereinafter Machura, *Milestones and Directions*].

[5] *See* Julian Webb, *Education*, *Legal*, *in* ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES, *supra* note 1; David S. Clark, *Legal Education*, *in* COMPARATIVE LAW AND SOCIETY (David S. Clark ed., 2012).

[6] *See* CHRISTOPH SCHÖNBERGER, DER "GERMAN APPROACH": DIE DEUTSCHE STAATSRECHTSLEHRE IM WISSENSCHAFTSVERGLEICH (2015).

[7] On the sociology of science more broadly, see Mario Kaiser & Sabine Maasen, *Wissenschaftssoziologie*, *in* HANDBUCH SPEZIELLE SOZIOLOGIEN, *supra* note 1.

B. Why Compare Socio-Legal Studies? Aims of Comparison and Potential Research Questions

Assessing how socio-legal studies are pursued and taught differently in different countries helps us not only to understand and explain commonalities, differences, and context dependencies but also to translate between different academic languages, and to reflect upon our own research methods and techniques or the legal education in our home country. Such scholarly endeavors may take a more sociological approach: Seeing socio-legal studies as a social institution and socio-legal scholars as a sociological group. Or it may take a more historical approach: Assessing how the field of socio-legal studies emerged in a particular context and as a reaction to particular events.

The findings of such a scholarly endeavor prove helpful for scholars planning research in other parts of the world and for cross-country collaborative research projects. They also allow scholars and institutions in different parts of the world to learn from each other, see potential gaps with regard to their own research and teaching, and close these gaps. Some personal experience might serve as an example here: Talking with socio-legal scholars from the US and the UK several years ago, I first heard about the process of "getting through ethics" before carrying out fieldwork, interviews, or ethnographic research. In the German law faculty, where I was based, legal scholars did not have to approach an ethics committee to have their research project scrutinized before pursuing such endeavors. The underlying assumption for why no such ethical scrutiny was needed might have been that research in law means doctrinal research—or, potentially, research on legal history—where ethical issues play no central role. But at German law faculties, too, some researchers engage in empirical research projects that might involve ethical questions. German law faculties could thus learn from the institutional and procedural frameworks of foreign law faculties and the experiences of scholars in other parts of the world, reflect upon their own practices, and implement new standards and requirements. Comparative scholarship about socio-legal studies goes beyond mere subjective impressions that researchers may collect during a research stay abroad or through an informal conversation with foreign scholars at international conferences. It provides us with systematic and objective findings, which are much more robust and reliable than individual experiences, and thus serves the process of self-reflection and improvement much better than vague personal impressions.

The findings of such a comparative endeavor on socio-legal studies may also be useful for political decisionmakers who decide upon reforms regarding research funding and legal education—most importantly, about the question of what kind of lawyers, judges, lawmakers, and legal academics the country aspires to "produce" and whether a socio-legal approach in legal education and scholarship may serve this purpose of educating good lawyers better than a purely doctrinal approach. Foreign examples of socio-legal elements in research and teaching, again, may lead the way for such reform. When we seek to assess how socio-legal scholarship and teaching differs in different parts of the world, we can address a large variety of potential aspects. These aspects range from the development of the field of socio-legal studies to the scholarly outcomes produced by research, the methods used in pursuing this scholarship, the people who work in this field, the institutions they work at, and the subjects that feature in teaching. Depending on our research aim, our motivation, and our fields of interest, the research questions we pose will differ. A few potential research topics and questions will be suggested here.

We may, for instance, look at the historical development of the field of socio-legal studies and ask: When, how, and why did socio-legal scholarship emerge in a particular country? What was, and is, the relationship between socio-legal studies and doctrinal legal scholarship? Which aims inform socio-legal scholarship? What do socio-legal scholars perceive as important about their work and where do they see their unique contribution? What role does the socio-legal approach play in legal education?

We could also engage with the impact that socio-legal studies have had on the law and the legal culture in a particular country by asking: Has the socio-legal education of young lawyers

influenced how they think about and interpret the law when they later find themselves in the positions of practicing lawyers, judges, lawmakers, or academics? And if so, has this different way of thinking about the law shaped the legal landscape of the particular country—that is, does the law look different in countries with strong elements of socio-legal education as compared to those where law students are only trained in doctrinal law?

Other than that, we could compare the research topics that socio-legal scholarship addresses and the research methods that scholars use across the globe by assessing: Which topics, which areas of law, and which regions of the world feature most prominently in socio-legal research and teaching? Which (inter)disciplinary methods do researchers use to deal with these topics and why?

We may also think about the institutional context of socio-legal studies and inquire: Where are socio-legal studies pursued—at universities or other research institutions, in law faculties, or in sociology departments? How does the institutional context, including the possibilities of state- or third-party funding, affect socio-legal research and teaching?

Another aspect of comparison would be to look at researchers' biographies, their self-perception, and their perception of the field of socio-legal studies, by asking: What are the academic backgrounds of socio-legal scholars? Which personal experiences led them to pursue a particular socio-legal project? How do researchers perceive the role of the field of socio-legal studies and how do they see their own role as socio-legal scholars within that field?

Once we are clear about our research aim and have chosen a corresponding research question, the next step is to decide about the objects of our comparative endeavor: First and foremost, the countries that we seek to compare.

C. What to Compare? Questions of Case Selection and the Examples of Germany and the UK

When comparing socio-legal studies, general questions that we ask—for instance, in comparative law, or comparative endeavors more generally—become important. One such question is about how we select the entities that we seek to engage with for the comparison to be meaningful—in the case of a cross-country comparison, the countries whose socio-legal studies landscape we seek to study and juxtapose. Mill distinguished between comparisons that look at very different cases in order to explain a common variable—"method of agreement"—or very similar cases that differ in a particular aspect in order to explain a variable that the two units do not share—"method of difference."[8] In the words of Creutzfeldt, Kubal, and Pirie, "the comparison may start from an assumption of similarity—in form, purposes or context—in order to identify significant differences or it may identify significant similarity across social and cultural divides."[9] Hirschl distinguishes even further and mentions five different ways of case selection: To choose 1) "most similar cases"; 2) "most different cases"; 3) "prototypical cases"; 4) "most difficult cases"; or 5) "outlier cases."[10]

Another question is how many entities we choose to compare. As with the question of case selection, this choice certainly depends on the aim that we seek to pursue by making the comparison. Single case studies or small-N studies—those that involve only one or a few countries—allow for detailed analysis and provide in-depth insights, while large-N studies—comparisons involving many countries—allow for more generalizability.[11]

[8] John Stuart Mill, Of the Four Methods of Experimental Inquiry, Comparative Methods in the Social Sciences (Alan Sica ed., 2006) (1843).

[9] Naomi Creutzfeldt, Agnieszka Kubal & Fernanda Pirie, *Introduction: Exploring the Comparative in Socio-Legal Studies*, 12 Int'l J.L. Context 377, 386 (2016).

[10] Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 Am. J. Comp. L. 125 (2005).

[11] *See also* Creutzfeldt et al., *supra* note 9.

If we look at Germany and the UK, we notice both similarities and differences with regard to the emergence and development of the field of socio-legal studies. In both countries, socio-legal approaches developed in opposition to mainstream "black letter law" or traditional doctrinal legal studies. Socio-legal approaches were "proclaimed as radically different from the work previously done in law departments in general, and by jurisprudential scholars in particular,"[12] and as "anti-mainstream within jurisprudence."[13]

In Germany, the sociology of law emerged comparatively early, in the wake of the 20th century. Importantly, unlike other special areas of sociology, the sociology of law was not founded and pursued primarily by sociologists, but by lawyers.[14] In the 1960s and 1970s, German law schools witnessed a second wave in which the sociology of law enjoyed particular prominence in research and teaching. In a third wave that has continued since the new millennium, the field has further diversified and been featured under different labels, including the sociology of law, law and society, or law in context studies and interdisciplinary legal research—here, collectively referred to as socio-legal studies. Despite its 100-year-long tradition, however, to date, socio-legal scholarship remains marginalized in Germany. In 2007, one commentator wrote:

> In Germany, there exists no scientific sociology of law community with an established association or elaborate academic visibility comparable to the Law and Society Association in the United States. Rather, there is a weakly tied circle of lawyers, sensitized in sociological thinking and informed about certain issues, and another group, consisting of sociologists interested in law. Both groups shift in the no-man's land between sociological jurisprudence and legal sociology. They are homeless minds in the landscape of German universities, outlaws in legal faculties and outsiders in the social sciences. Qualification in both subjects is unusual, and most have other responsibilities in teaching and research as well.[15]

While this situation has changed somewhat in the thirteen years since that comment was published, with the establishment of new institutes and research groups—which I will address below—overall, socio-legal studies remain a niche area in German legal scholarship and legal education. Demands by the German Council of Science and Humanities for a stronger socio-legal approach—through "strengthening the foundational subjects [which include sociology of law], intensifying exchanges within and outside the discipline and opening up legal scholarship towards other academic disciplines"[16]—have so far not led to visible changes in German legal education.

This differs significantly from the UK. Here, the emergence of socio-legal studies occurred somewhat later than in Germany and has its origins in the 1960s. But the development of the field was steadier and reached a broader audience. Scholars have even held that "socio-legal study is now the dominant approach taken by most academics in British university law schools," at least when using a broad definition and understanding socio-legal studies as "the use of concepts or methods taken from the social sciences and humanities in the study of legal phenomena," and including the work of those using critical legal theory approaches.[17]

[12]Campbell & Wiles, *supra* note 2, at 549. For a juxtaposition on doctrinal legal scholarship and socio-legal studies in Germany, see Julika Rosenstock, Tobias Singelnstein & Christian Boulanger, *Versuch über das Sein und Sollen der Rechtsforschung: Bestandsaufnahme eines interdisziplinären Forschungsfeldes*, *in* Interdisziplinäre Rechtsforschung: Eine Einführung in die Geistes- und Sozialwissenschaftliche Befassung mit dem Recht und seiner Praxis (Christian Boulanger, Julika Rosenstock & Tobias Singelnstein eds., 2019).

[13]Machura, *German Sociology of Law*, *supra* note 1, at 506.

[14]*Id.*

[15]Lucke, *supra* note 1.

[16]Wissenschaftsrat, Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations 13 (2012), https://www.wissenschaftsrat.de/download/archiv/2558-12_engl.pdf.

[17]Clark, *United Kingdom, supra* note 2.

I will revisit the examples of socio-legal studies in Germany and the UK—in the following sections on sources, methods, and challenges in comparative endeavors—to illustrate my broader arguments and suggestions.

D. What to Compare? Sources and Methods of Data Collection

What do we look at when we seek to compare socio-legal studies? Again, potential objects of research are manifold. They include—among others—research institutions, publications, socio-legal scholars, and teaching, as I will elaborate in the following sections. The choice of research objects is closely linked to the choice of methods for data gathering. In particular, when we research in and about a country that is not our home country, the feasibility of the data collection needs to be considered carefully. "If we want to go beyond 'comparison by juxtaposition' we will need to establish some sort of working relationship with those who know more about other systems than we do," states Nelken.[18] He distinguishes three different approaches in conducting research in a foreign environment: 1) "[B]eing virtually there"—the researcher relies on reports and scholarship by local experts; 2) "researching there"—short research visits to the respective country, for instance, to conduct interviews; and 3) "living there"—conducting ethnographic research over a long period of time, for instance, as an "observing participant."[19] Our choice of a research object determines our choice of how to conduct the research and collect the data, and vice versa. For instance, if we seek to study journal articles to learn more about socio-legal studies in a particular country, "being virtually there" might suffice for our research project. If, however, we attempt an ethnographic study of a particular socio-legal research institution, "living there" or "researching there" is a precondition.

I. Institutions

Studying institutions of socio-legal scholarship provides us with insights about the locales in which socio-legal studies emerged and through which socio-legal scholars—or the socio-legal "movement," as it has been termed—stay connected. I understand institutions here in a broad sense, including not only university departments, research clusters, centers, and independent research institutes but also socio-legal associations, conferences, publishing houses, journals, and blogs. I thus refer to journals and blogs not as conglomerates of the articles therein—in other words, the publications that I address below—but as institutional entities, which through their editorial boards or their members and their agreed upon thematic focuses position themselves as actors in the field of socio-legal studies.

In the UK, the law schools at the Universities of Warwick and Kent, which were founded by the government in the late 1960s, were dedicated to the study of "law in context."[20] Later, several other law schools, including those at Birkbeck College, London, Cardiff, and Keele, as well as the London School of Economics, joined Warwick and Kent in their socio-legal approaches.[21] In 1972, the University of Oxford created the Centre for Socio-Legal Studies. In the same year, a number of academic lawyers and social scientists organized the Socio-Legal Group to hold regular conferences.[22] In 1990, the group developed into the Socio-Legal Studies Association (SLSA), which runs one of the key annual conferences on socio-legal studies. Central journals for socio-legal research include the Journal of Law and Society, Feminist Legal Studies, the International Journal for the Sociology of Law, Social and Legal Studies, Law and Policy, and

[18]David Nelken, *Doing Research into Comparative Criminal Justice*, *in* THEORY AND METHOD IN SOCIO-LEGAL RESEARCH 284 (Reza Banakar & Max Travers eds., 2005).

[19]*Id.*

[20]Clark, *United Kingdom*, *supra* note 2.

[21]*Id.*

[22]Feenan, *supra* note 2.

Law and Critique.[23] Furthermore, longstanding law journals, such as Legal Studies, also largely publish socio-legal research.[24]

In Germany, the second wave of socio-legal studies in the 1960s and 1970s led to the establishment of university institutes and chairs to focus on the sociology of law, both in the faculties of law and, less often, in the social science faculties. Two of these newly established institutes included the *Institut für Rechtssoziologie und Rechtstatsachenforschung* at Free University Berlin and the *Arbeitskreis für Rechtssoziologie* at the University of Cologne.[25] The Universities of Stuttgart, Freiburg, Konstanz, and Munich—and later Halle—followed.[26] Since 1972, sociologists of law have organized in the *Sektion Rechtssoziologie* of the German Sociological Association and, since 1976, in the *Vereinigung für Rechtssoziologie*—later renamed *Vereinigung für Recht & Gesellschaft*. A third wave of socio-legal activity has occurred since the new millennium, with the establishment of the Law and Society Institute—today the Integrative Research Institute Law & Society—in 2008, the research Network Law in Context (*Recht im Kontext*) in 2010—both at Humboldt University—and the *Käte Hamburger Kolleg* Law as Culture (*Recht als Kultur*) in 2010, at the University of Bonn. In 2019, the *Institut für Sozialforschung* in Hamburg and the Chair for *Rechtssoziologie* of the University of Bern formed a new Research Cluster on Legal Sociology. Socio-legal studies also take place at different Max Planck Institutes—such as the one for the Study of Societies in Cologne and the one for Social Anthropology in Halle—which bring together international researchers from around the world who contribute to discussions with new perspectives. In Germany, the main medium for socio-legal studies is *Zeitschrift für Rechtssoziologie*. Other journals that publish theoretical or empirical research on law and society include *Kritische Justiz*, *Rechtstheorie*, *Demokratie und Recht*. More recently, blogs, such as *Rechtswirklichkeit*,[27] have also become important sites for the dissemination of socio-legal scholarship.

For the purpose of comparing these and other institutions, data can be gathered in different ways. First of all, we can use texts about sites of socio-legal studies as data. This could be self-descriptions of certain institutions, such as university departments, associations and conferences, conference reports, or scholars' descriptions about specific institutions. Articles in journals or the self-descriptions of particular journals on their websites and through editorials also serve as data. Seron, Coutin, and White Meeusen, for instance, studied addresses delivered by presidents of the US Law and Society Association (LSA) and LSA meeting calls. They argue that these "demonstrate how the boundaries of the field are established and contested."[28]

To collect data on institutions, we may also draw on ethnography and conduct fieldwork in a particular locale of socio-legal research, such as a research center, an association, or a conference. The methods used in organizational ethnography[29] might be helpful here. For instance, observational research, a well-established strategy to study the performance of organizational settings,[30] can be used to gather data about sites of socio-legal studies. It requires that the process of observation is recorded through field notes, which then serve as a—necessarily selective—representation of what occurred.[31]

[23]*See* Clark, *United Kingdom, supra* note 2.

[24]*Id.*

[25]*See* Lucke, *supra* note 1.

[26]*Id.*

[27]Rechtswirklichkeit, https://barblog.hypotheses.org/ (last visited Aug. 5, 2020).

[28]Carroll Seron, Susan Bibler Coutin & Pauline White Meeusen, *Is There a Canon of Law and Society?*, 9 Ann. Rev. L. & Soc. Sci. 287, 287 (2013).

[29]On the ethnography of organizations, see Helen B. Schwartzman, Ethnography in Organizations (1995); *see also* Organizational Ethnography: Studying the Complexities of Everyday Life (Sierk Ybema et al. eds., 2009).

[30]Sharyn Roach Anleu & Kathy Mack, *Law and Sociology*, *in* Routledge Handbook of Socio-Legal Theory and Methods, *supra* note 4, at 150.

[31]*Id.* at 151.

II. Publications

A second object of research could be publications. Here, I speak about the texts that have been published, rather than the journals or publishing houses that I mentioned above in the section on institutions. A first set of publications worth analyzing are monographs and articles that engage with specific socio-legal phenomena and are located at the interface of law and other disciplines, including anthropology, cultural studies, economics, geography, history, international relations, philosophy, politics, psychology, and sociology. A second set of texts worth studying includes reflections upon the emergence and development of the field of socio-legal studies, and its methods, aims, and shortcomings. Textbooks often provide both an overview of the field as well as detailed engagements with specific socio-legal questions.[32] Comparing textbooks cross-nationally "can give a sense of the way the field is conceptualized and taught in different states" and allows the reader to "see the field through different eyes."[33]

Publications can tell us, among other aspects, something about the history of socio-legal studies and its protagonists, the topics that socio-legal scholarship addresses, the countries it is mostly concerned with, and the methods that socio-legal researchers use. At the same time, by merely looking at the written text, a number of questions usually remain unanswered. For instance, these could regard scholars' motivation for delving into the particular research project and their broader aims in pursuing socio-legal studies. Therefore, we have to engage with scholars themselves to get a more coherent picture of socio-legal scholarship.

III. Scholars

Scholars and their biographies are a third potential object of research when comparing socio-legal studies in different parts of the world. Textbooks and articles about socio-legal studies frequently relate the history of the field by referring to a number of influential—mostly male—scholars and their key texts.[34] Commentators thereby frequently invoke those scholars' biographies as well as the socio-political context in which they lived as being particularly influential in shaping scholars' research, and thereby the development of the field of socio-legal studies or a particular subfield. When speaking about Eugen Ehrlich, for instance, commentators rarely fail to address the fact that Ehrlich lived in the Bukowina—a rural region where official state law played a subordinate role and people instead tended to organize their lives according to various customary norms—to explain why Ehrlich came up with his concept of living law.[35] Commentators have also shown that national socialism in Germany destroyed the early attempts of socio-legal studies and pushed out Jewish socio-legal scholars.[36] With respect to the UK, researchers have demonstrated how British scholars—who had gained experiences with law and society studies in the US—brought their knowledge back to the UK, thereby transforming both British scholarship and teaching.[37]

It is not only the personal history, but also the academic background of socio-legal studies, that is informative when assessing socio-legal studies. As Machura points out, unlike in the UK, in German law schools, permanent employment usually requires legal qualifications and thus excludes social

[32] *See* Susanne Baer, Rechtssoziologie: Eine Einführung in die interdisziplinäre Rechtsforschung (2d ed. 2015).

[33] Anthea Roberts, Is International Law International? 32, 34 (2017).

[34] On the role of the "canon" in socio-legal studies, see Carroll Seron & Susan S. Silbey, *Profession, Science, and Culture: An Emergent Canon of Law and Society Research*, *in* The Blackwell Companion to Law and Society (Austin Sarat ed., 2004); *see also* Seron et al., *supra* note 28.

[35] Machura, *German Sociology of Law*, *supra* note 1, at 41; Baer, *supra* note 32, at 30; Brian Z. Tamanaha, *A Vision of Social-Legal Change: Rescuing Ehrlich from "Living Law,"* 36 L. & Soc. Inquiry 297, 311 (2011); Walter Fuchs, *Erkundung der Theorielandschaft: Klassische rechtssoziologische Ansätze*, *in* Interdisziplinäre Rechtsforschung: Eine Einführung in die Geistes- und Sozialwissenschaftliche Befassung mit dem Recht und seiner Praxis, *supra* note 12, at 34–35.

[36] *See* Thomas Raiser, *Krise der Rechtssoziologie in Deutschland*, Neue Juristische Wochenschrift (July 26, 2007).

[37] *See* Creutzfeldt, *supra* note 4, at 15–16.

scientists.[38] This means that socio-legal scholarship taking place at German law schools is conducted by scholars formally trained in law and not usually in sociology or any other discipline.

Studying scholars and their experiences and views allows us to assess "a mass of lived experience and wisdom"[39] about socio-legal studies, which we can access using different methods of data collection. Autobiographical, oral, or written accounts by scholars who reflect upon their own role in shaping the field of socio-legal studies provide for interesting data. The Centre for Law and Society at the University of Cardiff, for instance, makes available online the videos of a "socio-legal conversation" series in which scholars narrate their personal stories.[40] We may also conduct (expert) interviews or surveys with scholars ourselves. Cownie, for instance, examined "the everyday lives of legal academics, their attitudes towards, and beliefs about, teaching, research and administration, their contacts with colleagues in other institutions" by conducting semi-structured interviews with academics teaching and researching law in English universities.[41] Creutzfeldt interviewed British and US-American socio-legal scholars to assess "how the interviewees experienced and saw themselves during the socio-legal movement" and to "give voice to some of the personal developments that coincided with and contributed to the institutional development of law and society."[42] She notes that "being a socio-legal scholar today means something very different to being a socio-legal scholar 50 years ago."[43] In her interviews with the early generation of socio-legal scholars, she noticed in particular their "emotions and enthusiasm about wanting to make a difference and needing to change the status quo"—something that she misses among today's scholars, whose agendas are too often guided by "a notion of angst" about promotion, tenure, or research funding, "rather than wanting to change the world."[44]

While research is the one central pillar of the professional life of academic scholars, teaching is the other, and I suggest making it a fourth object of research in the attempt to compare socio-legal studies.

IV. Teaching

Looking at how law in general and socio-legal studies in particular are taught at different institutions around the world could help answer the question of whether the aim of the early socio-legal studies, which was "to broaden the study of law from within" or to teach "contextual law,"[45] has been fulfilled. In the UK, scholars have held that socio-legal studies are today "an important dimension of mainstream legal education,"[46] thereby referring to findings that about half of the British legal academics claim to adopt a socio-legal approach in their teaching, and many others believe it is important to refer to "contextual issues" in their teaching.[47] For Germany, scholars have pointed out that socio-legal studies play a less important role in legal education than the core doctrinal subjects: The sociology of law usually features in the German legal curriculum only as an elective *Grundlagenfach* (foundational subject), and scholars perceive it as an "auxiliary science" to the law.[48] Scholarship has also shown that while most universities offer courses on law and society,

[38] *See* Machura, *Milestones and Directions*, *supra* note 4.

[39] Creutzfeldt, *supra* note 4, at 9.

[40] *Centre of Law and Society*, Cardiff U., https://www.cardiff.ac.uk/research/explore/research-units/centre-of-law-and-society (last visited Aug. 5, 2020). For a similar format offered by the Center for the Study of Law and Society at Berkeley Law, see *Conversations in Law and Society*, U.C. Berkeley Sch. L., https://www.law.berkeley.edu/research/center-for-the-study-of-law-society/conversations-in-law-and-society/ (last visited Aug. 5, 2020).

[41] Fiona Cownie, Legal Academics Cultures and Identities 2 (2004).

[42] Creutzfeldt, *supra* note 4, at 10.

[43] *Id.* at 32.

[44] Creutzfeldt, *supra* note 4, at 32.

[45] Campbell & Wiles, *supra* note 2, at 550.

[46] Sommerlad, *supra* note 2, at 60.

[47] Cownie, *supra* note 41.

[48] Machura, *German Sociology of Law*, *supra* note 1, at 42.

the teaching of socio-legal topics in law faculties and sociology departments runs somewhat parallel, without any connections.[49]

Curricula, course descriptions, syllabi, and teaching modules are important data here. Seron, Coutin, and White Meeusen, for instance, compared eighteen syllabi of law and society courses—as taught around the United States—in order to compile a list of commonly assigned books and articles.[50] They categorize the key texts that form part of this list into five broad themes: 1) "Situating Law and Society," 2) "Disputing—Individual and Collective," 3) "Law and Social Change," 4) "Law in Everyday Life," and 5) "Law as Institution." In a similar fashion, Dollmaier and De Souza analyzed course descriptions of university courses across the globe on "Law and Development" and found "highly diverse approaches to both 'law' as well as 'development.'"[51] Apart from gathering such textual material, we can also generate data through the observation of classes or surveys, and interviews with teachers and students.

As this short overview has shown, we have a number of methods of data collection at hand when studying research institutions, publications, scholars, and teaching to understand socio-legal studies. The data collected can be large aggregate data—such as textbooks or articles—or smaller sets of properly, randomly selected, samples of data—such as course descriptions or surveys—as well as observations, conversations, and (expert) interviews. Having chosen our research object and a method of data collection, a next question in our endeavor to assess socio-legal studies in different parts of the world would be to choose a method to analyze the data collected and actually compare the findings from our research in different contexts.

E. How to Compare? Methods of Data Analysis

To assess the data we have collected—such as textbooks, articles, course descriptions, or transcribed interviews—and actually pursue a comparison, again, we have a number of very different methods at our disposal. We can distinguish between qualitative and quantitative methods of data analysis. Quantitative methods serve to test or confirm theories and assumptions, and enable researchers to establish generalizable facts about a topic. Qualitative methods help to understand concepts, thoughts, or experiences, and to gather in-depth insights. Here again, the specific research question we have in mind paves the way to the method we should choose. Therefore, there is no "correct" method as such. In this section, I mention a few selected methods to suggest options for the analysis and comparison of data on socio-legal studies, leaving aside a vast number of other methods that might serve this purpose too. The methods I discuss are content analysis, critical discourse analysis, thick description, causal process tracing, and framing analysis.

The attempted research project could seek to assess which topics, areas of law, and regions of the world feature most prominently in socio-legal research and teaching, and which (inter)disciplinary methods researchers use most often. Such questions can be tackled with content analysis. Content analysis observes patterns of content in a given text to draw text-external inferences. It does so by annotating the text with different codes to assess the absolute or relative frequencies of words, or larger syntactic or semantic units in a given text corpus.[52] For example, to explore how international law is understood and taught differently in different parts of the world, and how "nationalized" or "denationalized" the field is in different contexts, scholarship has assessed the content of international law textbooks from different states—in particular, whether the books primarily cited domestic, international, or foreign case law.[53]

[49] *See* Barbara Heitzmann, *Lehre der Rechtssoziologie an deutschen Hochschulen*, 25 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 249 (2003).

[50] Seron et al., *supra* note 28, at 287.

[51] THOMAS DOLLMAIER & SIDDHARTH DE SOUZA, BEYOND "MOMENTS" AND INTO DIFFERENT "TIME ZONES"?: EXPLORING THE TEACHING OF LAW AND DEVELOPMENT (forthcoming).

[52] *See* STEFAN TITSCHER, MICHAEL MEYER, RUTH WODAK & EVA VETTER, METHODS OF TEXT AND DISCOURSE ANALYSIS: IN SEARCH OF MEANING (2000).

[53] *See* ROBERTS, *supra* note 33.

Other scholars looked at the shifts in the subject area of books and journal articles on political economy to learn more about the identity and the development of the field,[54] and to find out about the methods that are primarily used in the respective research projects and the gender and country of origin of the authors.[55] Content analysis of specific journals, textbooks, book series, conference proceedings, blogs, and newsletters from the field of law and society could identify which thematic focuses featured prominently in different countries, how these focuses shifted over time, or which methods socio-legal scholars have predominantly used. With respect to the UK, Clark holds that some areas—among them, civil and criminal justice, family law, and gender relations—have received great attention among the socio-legal community, while others areas—such as land law and equity—have been largely neglected.[56] He also states that in socio-legal research in the UK, large-scale empirical research is "relatively underdeveloped," and that "most socio-legal work has focused on theoretical analysis, policy work, qualitative analysis, or small-scale empirical enquiry."[57] Content analysis could support these claims with statistical data and compare the findings from the UK with those from other parts of the world.

If we seek to go beyond very specific questions on the content of specific text corpuses—and are instead interested in broader discourses in the field of socio-legal studies over a long period of time and across countries—we could assess and compare these, with the help of discourse analysis, and relate them to their respective social, cultural, and political context. Discourse analysis is the analysis of relationships between a text or other forms of concrete language use and its social conditions, ideologies, and power relations.[58] Discourse analysis is interpretative, explanatory, and based on the premise that discourses "are not only embedded in a particular culture, ideology or history, but are also connected intertextually to other discourses."[59]

If our research project regards a particular site of socio-legal knowledge production—a research center, a conference, an association—and the people that interact in this site, we may use methods such as thick description,[60] a method used, among others, in anthropology, sociology, and history. Thick description "refers to an idea of highly detailed, intricate description of particularities, emphasising personal experience of a culture 'from the inside,' or through a kind of empathy allowing sensitive, rich appreciation of the outlook of those living in a particular environment."[61] This includes the scientific observation of people's behavior, and not only the description of that behavior, but also their subjective explanations for their behavior and the context in which these people act, to add deeper meaning to the observation.

Another central question we may pose in our research pertains to the impact that the socio-legal studies "movement" had on traditional legal studies and teaching, and whether and how it has shaped the way legal academics, practicing lawyers, and lay people think about the law. Creutzfeldt, Mason, and McConnachie state that "[s]ocio-legal studies has had an enormous influence on legal scholarship" in that it has challenged assumptions about "the nature of law, rules and legal thought; the relationship between law and ethics, morality and religion; law, government, and governance; and law and community," and provided "an understanding of the meaning of legal culture and legal

[54]*See* J.P. Sharman & Catherine Weaver, *RIPE, the American School and Diversity in Global IPE*, 20 Rev. Int'l Pol. Econ. 1082 (2013); Renate Mayntz, Changing Perspectives in Political Economy (July 2019) (unpublished Discussion Paper 19/6, Max-Planck-Institut für Gesellschaftsforschung) (on file with author).

[55]*See* Lima, Enzo, Melina Morschbacher & Paulo Peres, *Three Decades of the International Political Science Review (IPRS): A Map of Methodological Preferences in IPRS Articles*, 39 Int'l Pol. Sci. Rev. 679 (2018).

[56]Clark, *United Kingdom, supra* note 2.

[57]*Id.*

[58]*See* Titscher et al., *supra* note 52, at 146.

[59]*Id.*

[60]*See* Clifford Geertz, The Interpretation of Cultures: Selected Essays (1973).

[61]Roger Cotterrell, *Comparative Sociology of Law*, *in* Comparative Law and Society, *supra* note 5, at 47.

consciousness."[62] And indeed, in many countries, legal scholarship and teaching today looks different than it did fifty or 100 years ago. The role that the socio-legal studies movement has played in this shift can be assessed through causal process tracing. Causal process tracing is engaged with revealing "the process that leads from a causal factor to an outcome" and "makes it possible to enhance the internal validity of a causal claim that 'x matters.'"[63] It is particularly useful when we seek to not only explain a single important social event, but to identify and explain more generally the necessary and sufficient conditions that lead to a specific type of outcome.[64] With the help of causal process tracing, we could also assess other causal relations—for instance, how the field of socio-legal studies was shaped by particular personalities and their biographies—by particular research projects and influential publications, or by political decisions regarding university regulation and funding. With respect to the UK, Clark stresses the impact of the "personal inclinations of the relatively small number of scholars" on the development of the field.[65] He also refers to the importance of the "availability of external funding, the research needs of various government departments and charitable trusts, and the activities of a variety of pressure groups" in shaping the development of socio-legal studies.[66] Causal process tracing could disentangle these different impact factors and compare the developments in the UK with those in other countries.

Lastly, if we are interested in analyzing how the socio-legal studies movements in different countries "re-framed" discourses about the law, we might draw on frame analysis. This method includes a variety of approaches to studying social constructions of reality, or how people understand specific situations and activities. Goffman, who is credited with coining the term "frame analysis," understood a frame to be the culturally determined definitions of reality that allow people to make sense of objects and events.[67] But the term has since been used in various forms and by scholars of different disciplines, including social movement studies and political communication.[68] Frames call our attention to particular aspects and direct our attention away from others,[69] and can thus be used by movements or other forms of organized interest to guide audiences in a particular direction and to certain conclusions and actions.

Thus, with regard to methods of data collection, methods of data analysis vary widely, and our choice of one or several of these methods depends most importantly on our research aim and our research question. While each method has its advantages, all of them also bear challenges that need to be kept in mind.

F. What to Keep in Mind? Challenges of Comparative Endeavors on Law and Society Studies and Concluding Thoughts

As with other socio-legal or comparative legal endeavors, projects seeking to assess socio-legal studies in different parts of the world also confront challenges, five of which I want to briefly discuss here.

[62]Naomi Creutzfeldt, Marc Mason & Kirsten McConnachie, *Socio-Legal Theory and Methods: Introduction*, *in* Routledge Handbook of Socio-Legal Theory and Methods, *supra* note 4, at 3.

[63]Joachim Blatter & Markus Haverland, Designing Case Studies: Explanatory Approaches in Small-N Research 79 (2012).

[64]*Id.* at 80.

[65]Clark, *United Kingdom*, *supra* note 2.

[66]*Id.*

[67]*See* Erving Goffman, Frame Analysis: An Essay on the Organization of Experience (1974).

[68]*See* Mieke Verloo, *Mainstreaming Gender Equality in Europe: A Critical Frame Analysis Approach*, 117 Greek Rev. Soc. Res. 11, 20 (2005) (defining policy framing as "an organising principle that transforms fragmentary or incidental information into a structured and meaningful policy problem, in which a solution is implicitly or explicitly enclosed").

[69]*See* Martin Rein & Donald Schön, *Frame-Reflective Policy Discourse*, *in* Social Sciences and Modern States: National Experiences and Theoretical Crossroads (Peter Wagner, Carol Hirschon Weiss, Björn Wittrock & Hellmut Wollman eds., 1991).

First, socio-legal studies is a vast field of scholarship that includes a huge number of subfields, and sometimes its contours are not quite clear. Feenan has prominently asked what the "socio" in socio-legal studies means and pointed out that "[a] number of studies define it in terms of the study of law in its social context. Some other studies broaden that context to include the 'political and economic' . . . or add the 'cultural' . . . . However, the precise relationship between these fields is rarely elaborated."[70] Due to this broadness of the field and its loose definition, any comparative endeavor will have to deal with a vast amount of material and must necessarily be selective when deciding about the data to deal with. Setting clear boundaries for our specific research project and stipulating clear methods on how to select representative data is thus crucial.

Second, socio-legal studies might use different media and different forms of knowledge distribution in different countries. While the textbook, for example, is a prominent form of publication in socio-legal studies in Germany and the dominant tool in teaching, this is not so much the case in the UK, where academic papers might be more important. We thus need to pay attention in the data selection to ensure that we do not overlook a particularly important medium, but we also must not compare apples with oranges.

Third, different terminology is used in different languages to refer to similar things. This has already begun with terms such as socio-legal studies, law and society studies, sociology of law, and empirical or interdisciplinary legal research, but it might also be relevant with regard to research methods and the like. Being aware of these different terminologies is crucial when, for instance, browsing through databases of journals or coding journal articles.

Fourth, those scholars with a legal education are often not formally trained in using empirical methods and often not familiar with nonlegal literatures and concepts. Attempting to pursue a research project for which doctrinal analysis is not enough and seeking to speak to an audience beyond the field of law, however, demands us to be familiar with those sets of methods, concepts, and literature that are used in the social sciences. This requires self-teaching or pursuing courses to acquire those skills and knowledge, an endeavor that might be time consuming and challenging.

Finally, a number of those challenges that comparative endeavors naturally encounter play a role in the comparison of socio-legal studies too. Among other aspects, this concerns questions regarding language barriers and the possibilities to pursue research abroad.

If, however, we overcome these challenges, the endeavor to compare socio-legal studies in different parts of the world promises fruitful outcomes. As I suggested in this Article, it allows us to assess a number of aspects, ranging from the historical development of socio-legal studies to the role of research institutions and the lives of socio-legal scholars. The research questions, objects of research, and methodological approaches that I suggested in this Article are certainly not comprehensive, and comparative endeavors may well look at other aspects and use other tools. Ideally, such comparative endeavors should not only take into account the usual suspects of countries in Europe and North America, but also look at socio-legal studies in other parts of the world, particularly in the global South. The outcomes of such comparative studies would certainly enrich our understanding of socio-legal scholarship and contribute to a cross-national dialogue.

[70]Feenan, *supra* note 2, at 4.

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ARTICLE

Gender in Socio-Legal Teaching and Research in Germany

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Abstract
Gender in socio-legal teaching and research in Germany is a story of impediments, hindrances, and of single-person initiatives—my personal history being a part of this. But it is also a story of influences upon the impulse and inspiration to undertake socio-legal work. My Article is therefore influenced by (feminist) standpoint theory (Harding 1991). Germany has had a very conservative family culture and, over the past decades, many of the legal regulations that infringed upon women have had to be adapted, in what was quite a tedious political process, to comply with the German Constitution's gender equality clause. Only in the past decade has gender awareness in law faculties increased and gained acceptance, usually as a result of greater focus on diversity issues, and anti-discrimination legislation. Obstacles have resulted from a lack of cooperation between the actors in social sciences and law, as well as in academia and gender equality practice, and a lack of understanding between more conservative and more progressive women. Socio-legal research was, and is, needed to deliver empirical evidence and provide theoretical foundations for cultural and legal changes as societies progress towards gender equality. Socio-legal teaching is needed to alert lawyers to necessary change, to enable them to undertake informed critique, and to prepare them to act. There are, however, marked deficits in socio-legal teaching and research on gender. In spite of an increased political acceptance, gender equality is still mainly a women's project.

Keywords: gender; sociology of law; Germany; academia; gender equality practice

A. Gender in Sociology of Law

What is the role of gender in sociology of law, and what is the relevance of sociology and law for gender? Law has traditionally been made by men, and even if today women and others are included in the law-making process, this demands a critical view of legal norms from a gender perspective. Among other goals, this Article aims to provide that view by raising questions and identifying where empirical and theoretical socio-legal research can and has contributed to the law-making process. For example: Does law do justice to all? Are legal regulations fair? In terms of such queries, empirical and sociological research can help to find deficits and discrepancies. Further questions include: In what way does sex or gender matter in legal professional work? Are there differences in acting and decision-making? In this regard, sociological theory can help explain power relations and bring previously unseen gender effects to the attention of society.

The operation of sex and gender in society, and their influence on law and vice versa, is not only the subject of socio-legal teaching and research, but also of performance and transformation in

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arts, along with providing a basis for political action and social measures. Given the historical development and circumstances, this activist element is particularly important and strong.

Speaking about gender in Germany needs a clarification in terminology. We use the term "*Geschlecht*" to refer to the biological sexes, the socially constructed gender, the genitals, and the ancestry or old family. The word "sex" is about sexual intercourse. As Anglo-American scholars and politicians were trailblazers and influenced the discussion in Europe, the English word "gender" became common in German academia, being used for sex and gender issues. The result of this was confusion and friction across the population at large, who neither understood the term nor the concept. This, further, had the effect of weakening action for gender equality, and providing a fertile ground for anti-genderist movements and polemics. The picture has since become ever more complex as—beyond the initial dichotomy of the sexes, with men on one side and women on the other—trans- and intersex—that is, diverse sexes and genders—now have to be included.

B. A Personal Account of the Beginnings, the 1960s and Early 1970s

Sociology of Law became a study subject in German law faculties in the course of the students' movement of the 1960s—now colloquially referred to as the "68 movement." In 1969 or 1970, I attended the first seminar in the sociology of law at the Chair of Andreas Heldrich at the University of Münster. The first socio-legal paper I heard was by Klaus Ziegert[1] on Podgorecki, and I also remember a paper on "*Divorce in Ticino and Comasco*," which was just about the procedure, and not about either men's or women's specific problems, within divorce proceedings. Gender and women's issues were still largely absent. Particular note should be made of the social context at that time; if families could afford it, then women—usually middle class women—were housewives in charge of the "interior" life of the family while men were the breadwinners and the family's agent in the outside world.

Research on Knowledge and Opinion about Law (KoL) in the 1960s[2] had delivered empirical data on a general remoteness of women from the law—for example, women had been to law courts less often than men, had fewer contacts with lawyers, and would try to avoid legal action—noting what was referred to as women's "negative legal consciousness."[3] There were few female law students: In the early 1960s, only ten to fifteen percent of the law students were female, rising to seventeen percent by 1970. When women—with their higher voices—were asked to talk in a lecture, a loud laughter of many male throats resonated through the room, with the effect of—intentionally or not—creating doubt about the competence of the speaker. The result of this was that in seminars, women rarely raised their voices—a situation that has been described as "women´s classroom silence."[4]

It can thus be said that the law had neglected women's particular needs and had yet to catch up with the gradually modernizing roles in society. For example, in the 1960s and early 1970s, there were hardly any women in Parliament. Until 1987, their share was less than ten percent. The law professors were men—often old—who naturally taught from a male perspective—that is to say, with male roles and behavior as the standard. Even more problematically, these professors had a habit of employing old-fashioned gender stereotypes in the usual made-up cases through which law is taught in Germany—scenarios that often diminished women.[5] Female legal academics, by

[1]Retired senior academic at FernUniversität in Hagen and current President of the Research Committee for the Sociology of Law (RCSL).

[2]Wolfgang Kaupen, Holger Volks & Raymund Werle, Compendium of Results: Of a Representative Survey Among the German Population on Knowledge and Opinion of Law and Legal Institutions (KOL) (1970).

[3]I can recall my mother shouting at someone, "I do not want to have to do with the law courts." This was in spite of her daughters studying law!

[4]*See* Ulrike Schultz et al., De jure und de facto: Professorinnen in der Rechtswissenschaft: Geschlecht und Wissenschaftskarriere im Recht 236 (2018).

[5]*See* Ulrike Schultz, Frauen im Recht: 'Wie männlich ist die Juristenschaft?' 319–59, 330 f. (Ulrich Battis & Ulrike Schultz eds., 1990); Schultz et al., *supra* note 4, at 226 ff.

contrast, were few and far between; the first woman law professor, Anne Eva Brauneck, a criminologist, was only appointed to a Chair in 1965—a year before I started to study. Female law students therefore felt estranged in their studies much more than men.[6] In terms of my own self-reflection on that time, I can say that I too found the usual dogmatism rather dull, as what I had to learn had nothing to do with my life, and this made me unhappy. With a view to changing this state of affairs I took seminars in English law, French law, comparative law, and the reception of law, all of which gave me a perspective on German law from the outside, and not only led me to compare legal regulations, that is, positive law, but also societies more generally, and their history. It helped me to come to terms with my legal education.

This was a time of critical thinking about society, which, in Germany, was coupled with an impetus to overcome the Nazi past and to create a better—in other words, a politically left-wing—society. This movement was fueled by U.S. students and the civil rights movement. It was predominantly about class and race barriers, however, which meant that gender—as an important socially interpretative category—was still absent. Pictures of students' demonstrations in Germany at that time show men; of the very, very few women, many of those basically had the role of making the tea.

From 1971 to 1973, I spent two years at what is now the German University of Administrative Sciences in Speyer. It is worth noting that Niklas Luhmann had been working in Speyer for some years during the 1960s, and by the early 1970s, his systems theory was already widely read and cited. There, I attended a seminar in Sociology of Law with Hans Ryffel, presented a paper on "*Rechtstatsachenforschung,*"a paper about the forerunners of the sociology of law, such as Arthur Nussbaum and Eugen Ehrlich, and studied administrative sciences and sociology with the sociologist Renate Mayntz, the first woman ever to teach in Speyer. I also started an empirical research project on *Freedom of Establishment for Lawyers in Europe*. While interviewing Frederic A. Mann—an emigrated, high-profile lawyer—in London, he criticized me, alleging my approach to be *unwissenschaftlich* ("unscientific") and far from reasonable jurisprudence. Pregnant at the time, upon leaving the room, I started to cry and wondered whether he would have said the same thing to a man.

A glance through the contents of older texts on sociology and the sociology of law confirms my recollection that the prominent scholars of the time paid little heed to issues of or concerning women, women rights, or gender. For example, Niklas Luhmann's *Sociology of Law*[7] makes no mention of either women or gender, nor does Jakobus Wössner's *Introduction to Sociology*[8]—at the time, a very popular student text. *Fischer's Dictionary of Sociology*[9] includes no article explicitly on gender. But gender is briefly referred to in an article on "institution," which makes the argument that status in societies depends on sex/gender and age, and that there is a separation of work between the sexes. In its article on social change, it is mentioned that population movement is influenced by birth and death, to which questions of gender distribution and age distribution have to be added. Continuing along these lines: In Walter Rüegg's *Funk Kolleg Sociology*,[10] there are brief remarks on gender roles in society, mainly in connection to "primitive societies" and anthropology; Rudolf Wiethölter's *Funk Kolleg Jurisprudence*,[11]—at the time, a must-read for all young critical jurists—only touches upon "*Geschlechtsverkehr*" (sexual intercourse) between engaged couples, in the context of discussing some amazing reasonings within judgments of the Highest Federal Court. In fact, with the exception of Susanne Baer's recent textbook,[12] the

[6] *See* Margarete Fabricius-Brand et al., Juristinnen: Berichte, Fakten, Interviews (2d ed. 1986); Schultz, *supra* note 5, at 331 f.

[7] *See* 2 Niklas Luhmann, Rechtssoziologie (1972).

[8] *See* Jakobus Wössner, Einführung in die Rechtssoziologie (2d ed. 1970).

[9] *See* Fischer Lexikon Rechtssoziologie (René König ed., 1971).

[10] *See* Walter Rüegg, Funk Kolleg Soziologie (1969).

[11] *See* Rudolf Wiethölter, Funk Kolleg Rechtswissenschaft (1968).

[12] *See* Susanne Baer, Rechtssoziologie: Eine Einführung in die interdisziplinäre Rechtsforschung (3d ed. 2016).

terms "*Geschlecht*," "gender," "female," or "woman" are not featured in German-published books on the sociology of law.

C. Developments in the 1970s and 1980s

I. Women's Rights and Women in Law

As a result of the first wave of the women's movement in the nineteenth and early twentieth centuries, by 1918, women got the right to vote. Only thirty years later, after the second World War, in 1949, a gender equality clause was included in the new Constitution of the Federal Republic. However, this did not automatically abolish gender deficits and disparities in the law; the private law, for example, was still lagging behind. The first Gender Equality Law of 1957 abolished some of these deficits, notably the rule that a husband—with permission of the guardianship court—could terminate his wife's employment if it affected the "marital interests." Furthermore, until 1978—and the coming into force of the act on the adaptation of family law, *Familienrechtsänderungsgesetz* of 1977—the common family model accorded to a conservative ethos, that is to say, that the wife was in charge of the household, while the husband had to go to work and thus secure the family means.[13]

By and by, however, women lawyers—many of them organized in the German Women Lawyers Association (*Deutscher Juristinnenbund*)—dealt systematically with these disadvantages and discriminations, taking cases in which the gender equality clause was infringed to the Federal Constitutional Court, and working on proposals for legislative change.[14] It was not an easy task, as some fields of law had no, or very few, female legal experts engaging with a gendered perspective—for example, social security law and tax law. Moreover, this task needed a thorough analysis of social reality. There were still few women in Parliament, legal academia, and legal practice, which in turn meant almost no female law professors and very few women in positions in the higher courts. From 1949 till 1987, out of sixteen judges at the Federal Constitutional Court, there was just a single female judge.

In the early 1970s, the women's movement gained in momentum, in what became known as its "second wave." It began with the famous article "*I Have Aborted*," in the journal *STERN* on June 6, 1971, in which 374 women—some of them prominent and many in higher occupations—confessed that they had infringed the applicable law by terminating a pregnancy. This was the starting signal for women's own "march through the institutions," with the aims of: Undermining and destabilizing traditional gender concepts, making the private public, making women more visible, breaking men's power monopolies, and implementing alternative female counterprojects to existing and dominant male worldviews. In research and science, these aims demanded critique, a radical "breaking [of] the [traditional] disciplines,"[15] a call for interdisciplinarity,[16] and a renewed commitment to systematically involving women's issues in research and science.

[13]*See* Ulrike Schultz, *Equal Rights for Men and Women in Germany: How a Constitutional Principle Was Transformed into Reality*, *in* THE FIGHT FOR THE PUBLIC SPACE: WHEN PERSONAL IS POLITICAL 85–96 (Heinrich Boell Stiftung South Caucasus 2016).

[14]*See* Ulrike Schultz, *Zeitleisten: Die Entwicklung der Rechtsstellung von Frauen in Deutschland*, *in* RECHTSHANDBUCH FÜR FRAUEN- UND GLEICHSTELLUNGSBEAUFTRAGTE (Sabine Berghahn & Ulrike Schultz eds., 2020) [hereinafter Schultz, *Zeitleisten*] (giving a full overview of the development of women's and gender issues in European law and German law).

[15]*See* Gudrun-Axeli Knapp & Hilde Landweer, *"Interdisziplinarität" in der Frauenforschung: Ein Dialog*, 6 L'HOMME: ZEITSCHRIFT FÜR FEMINISTISCHE GESCHICHTSWISSENSCHAFT ("EUR. J. FEMINIST HIST.") 6, 6 (1995); *see also* JUDITH LORBER, BREAKING THE BOWLS: DEGENDERING AND FEMINIST CHANGE (2005).

[16]Ulla Bock, *Der Anspruch von Interdisziplinarität in der Frauen- und Geschlechterforschung*, *in* INTERDISZIPLINARITÄT: MÖGLICHKEITEN UND GRENZEN FÄCHERÜBERGREIFENDER LEHRE UND FORSCHUNG 65–77 (Wolf D. Hutter, Ulla Bock & Ralf Isenmann eds., 1999); Ulrike Schultz, *Interdisziplinäres universitäres Lehren und Lernen am Beispiel der "Virtual International Gender Studies,"* *in* INTERDISZIPLINÄRES LEHREN UND LERNEN: ZWISCHEN AKADEMISCHEM ANSPRUCH UND GESELLSCHAFTLICHEM BEDÜRFNIS 115–37 (Pasqualina Perrig-Chiello & Werner Arber eds., 2002); QUER DENKEN – STRUKTUREN VERÄNDERN: GENDER STUDIES ZWISCHEN DISZIPLINEN (Heike Kahlert, Barbara Thiessen & Ines Weller eds., 2005).

Table 1. Proportion of women in the legal professions

	Advocates (*Anwältinnen*) percent	Judges (*Richterinnen*) percent	Public Prosecutors (*Staatsan-wältinnen*) percent	Women Law Students and percent	Women Law Professors percent
1960	<2.0	2.6		10-15	
1970	4.5 1,035 of 22,882	6.0	5.0	17	0.1
1980	8.0 2,756 of 36,077	13.0	11.0	32	1.4 10 of 725
1989*	14.7 7,960 of 54,108	17.6 2,109 of 17,627	17.6 661 of 3,759	41	2.1 16 of 765
2001	25.3 27,924 of 110,367	27.7 5,780 of 20,880	30.9 1,559 of 5,044	50	7.6 73 of 962
2011	32.0 49,872 of 155,679	38.5 7,848 of 20,411	41.03 2,152 of 5,246	53.7	13.5
2019	35.1 57,999 of 165,104	45.7 9,761 of 21,339	48.6 2,856 of 5,882	56.1 63,135 of 112,604	16.7 (W3 and W2) 153 of 914
	Newly admitted 51.7	On probation 58	On probation 59		14.2 (W3)**

*The increase in numbers after 1989 is due to reunification. The data before is only for West Germany.
**W3 are the fully equipped Chairs.

The following table shows the meager participation of women in law until well into the 1980s, juxtaposed with the current proportion of women in legal studies, the judiciary, in legal practice, and the legal academy, where the number of women is still strikingly low[17].

II. Sociology of Law Still Ignoring Gender Issues

At the beginning of the 1970s, discussions of a reform of legal education in Germany were started, which resulted in models of single-phase legal education with an integration of theory and practice, and an interdisciplinary approach with a stronger integration of the so-called foundation subjects. Alongside the sociology of law, there was also legal history, legal philosophy, legal theory, and law and economics. Even under these reformed educational models (*Reformmodell*), however, neither women's rights nor gender issues were explicitly on the agenda, although the number of female law students had slowly started to rise. These models, which were to lead to the creation of several new law faculties throughout the country, lasted from 1971–1984.

In 1976, I went to the first meeting of the *Vereinigung für Rechtssoziologie*, now the Association for Law and Society, in Munich. To name a few of the other attendees: Gunther Teubner was there talking about autopoiesis, Klaus Röhl asking what added value autopoiesis could provide for his students, Erhard Blankenburg and Hubert Rottleuthner were the rising stars, and Thomas Raiser was also present. I had the opportunity to make the acquaintance of Blankenburg, with whom I shared a strong empirical inclination.[18] Gender issues were, however, absent from the academic program.

[17]In Germany, there are the big Chairs: W 3—in former times, C 4—and the Chairs with less assistants and money: W 2—in former times, C 3. This shows that considerably more men hold "better" Chairs than women.

[18]We agreed on contributing to the big international project on Lawyers in Society. In the end, I wrote the article and he revised it very marginally. Erhard Blankenburg & Ulrike Schultz, *German Advocates: A Highly Regulated Profession*, *in* Lawyers in Society: Vol. 2: The Civil Law World 124 (Richard Abel & Philip Lewis eds., 1988).

Ten years later, at the same association's biannual meeting in 1987, I recall similarly few female contributors. I presented on "*German Advocates: A Highly Regulated Profession*," my contribution to the large international comparative project "*Lawyers in Society*,"[19] and Vera Slupik presented her dissertation on the decision of the German Constitution for Parity in Gender Relation.[20] As far as I remember, we were the only women to present and were both given a brief time slot in the work-in-progress, non-thematic panel. Also in attendance was Jutta Limbach, who was the fifth woman to get a Chair in a law faculty in West Germany and—at the time—the only female law professor who specialized in sociology of law, but there was no stream, section, or panel for either gender-related topics or women's issues more broadly. This brief exposition is simply to characterize the value which was given to gender subjects and to give some sense of the general atmosphere for women in legal academia at the time,[21] where—of course—only a few had elevated positions. Unfortunately, this remains much the case to this day; there are few women law professors who specialize in sociology of law, and gender has remained largely absent in both socio-legal teaching and in the teaching of law, although—and to a limited extent—this is arguably not the case in either criminology or sociology.[22]

III. The First Gender Chairs in Law Faculties

In the 1980s, the former reform faculty of Bremen set up a first Chair in "law of gender relations." The faculty was afraid of its own courage, as a dismal recruitment process started and was then stretched over several years,[23] affecting several prominent women. For example, Jutta Limbach, who—since 1972—had a Chair for civil law at the Free University in Berlin, went on to be the Senator of Justice in Berlin and the first female President of the Federal Constitutional Court in Germany. Another example is Ninon Colneric, who became President of the State Labor Court in Schleswig-Holstein and one of the first female judges at the European Court of Justice; Ute Gerhard got the first Chair in Women and Gender Studies and Research in Germany—in the sociological faculty—in Frankfurt in 1987, and initiated the foundation of the Cornelia Goethe Centrum for Women and Gender Studies at the University of Frankfurt in 1997. Finally, in 1991, Ursula Rust got the Chair. In 2001, the denomination was changed to Gender Law, Labor Law, and Social Law, reducing the importance of gender. In 2007, Konstanze Plett was additionally appointed Professor of Gender and Law.[24]

Doris Lucke, a sociologist who has published widely on gender issues in law, was appointed Titular Professor at the Institute for Political Sciences and Sociology in Bonn, in 1998.[25] She has a habilitation but never got a regular Chair.

In 1986, the FernUniversität in Hagen had been offered a Chair for a law professor in the context of the newly created Women's & Gender Research Network NRW, which was to initiate and strengthen teaching and research on gender issues in all faculties in Northrhine-Westphalia.[26] The faculty wanted the Chair—which was paid out of a special fund—but not the gender expert. A long quarrel started, the idea of a Chair on women's or gender issues in law got lost, and in 1993—finally—a man got the Chair. He was later the leading head in destroying my program on women's rights, a kind of irony of fate. In 1997, Katharina von Schlieffen became the first female law

[19] *See* Schultz, *Zeitleisten*, *supra* note 14.

[20] *See* Vera Slupik, Die Entscheidung des Grundgesetzes für Parität im Geschlechterverhältnis (1988).

[21] The moderator, Strempel, asked me not to be as aggressive as Vera Slupik.

[22] *See* Schultz et al., *supra* note 4, at 97 ff.

[23] *See id.* at 112.

[24] But Plett did not get a Chair.

[25] *See* Doris Lucke, Recht ohne Geschlecht? Zu einer Rechtssoziologie der Geschlechterverhältnisse (1996) (Lucke was appointed "due to excellent performance in research and teaching").

[26] *See The Women's & Gender Research Network NRW*, NRW, https://www.netzwerk-fgf.nrw.de/en/the-network/about-us (last visited July 31, 2020). NRW holds, besides Berlin, an undisputed leading position in the field of gender research.

professor at the law faculty. For some time, her Chair had sociology of law in its denomination. Currently, the Network consists of 160 professors and 249 scientists, but there is no special Chair in gender and law, and only one law professor has a Chair in criminal law and criminology that is connected to it.[27]

D. Institutionalization of Gender Equality Politics

In the 1970s, the need to catch up on equality for women was internationally discussed and gradually gained wide recognition. The United Nations (UN) declared 1975 the International Year of Women. In 1979, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the UN General Assembly. Gender equality issues also became part of European politics. The EEC Treaty of 1957 had a clause on equal pay for men and women—Article 119 EEC Treaty, later Article 141 EC-Treaty—which aimed less at achieving gender equality and closing what was later called the gender pay gap, but rather to counterbalance competition imbalances between the member states. The ECC passed the Equal Pay Directive in 1975, and in 1976, the Equal Treatment Directive regarding access to employment, vocational training and promotion, and working conditions—76/207/EEC—was passed.[28] In Germany, after long deliberations, the Equal Treatment Directive was only incompletely transformed into national law in 1980. It had to be adapted, but gradually led to changes in labor law—often only initiated after court decisions.[29] In 1989, the Women's Advancement Act was passed in Northrhine-Westphalia, introducing the first legal gender quota regulation. However, this is a soft quota which is only applicable in the civil service. Its impact was more symbolic, as it was difficult to prove equal qualification, particularly for higher positions. Therefore, the number of cases that have appeared in the German courts is limited.[30] As it turns out, the quota rule has proven highly effective, as it kept discussions about equal rights going, in spite of the wide-reaching disapproval it caused.

In the course of the 1980s equality politics was institutionalized. Some regretted this "socialization process of the women's question" (*Verstaatlichung der Frauenfrage*), as they feared that women's activism would lose in force as a consequence. However, change happened in the creation of the first positions for equal opportunities officers, for example. The Green Party was founded in 1980 and had gender as a core topic of interest. Initially, it had a strong conservative wing with eco-feminism, which subscribed to "difference models" of gender. In 1987, a Mothers' Manifesto was published, favoring a model of society which cared for living together with

[27]There are also three female professors at Universities of Applied Sciences, but only one of them, Maria Wersig at *Fachhochschule Dortmund*—the current President of the German Women Lawyers Association—has a strong gender orientation.

[28]Between 2000 and 2006, four more equality and antidiscrimination directives were passed; one of these was a recast of the Equal Treatment Directive. Ulrike Schultz, *The Gender and Judging Project: Equity in Germany: Diversity and the Courts*, *in* RESEARCH HANDBOOK ON LAW AND COURTS (Susan Sterett & Lee Walker eds., 2019). A critical view, however, is necessary in the evaluation of EU gender politics. On March 5, 2020, the European Commission published the strategy for gender equality 2020–2025, with the aims of improving working conditions for women and the work-life balance, equal pay, equality between women and men in decision-making, combating gender-based violence, and promoting gender equality and women's rights beyond the EU. These sound ideal, but many forget that EU politics is still driven by economic objectives. In spite of the officially declared aims of ecological sustainable growth and strengthening social politics, it is about competition as promulgated in the Lisbon strategy 2000 and boosting of growth and employment as promulgated in the European Strategy 2010. This is not necessarily in line with the demands of the second women's movement for better living conditions, which cannot only be measured in economic terms.

[29]One of the most important decisions was on suspending the ban on night work for women in 1992 by the Federal Constitutional Court (*Urteil zum Nachtarbeitsverbot*) BVerfGE 85, 191, NJW 1992, 964.

[30]The Federal Constitutional Court has never decided on the quota. The European Court of Justice has passed a string of judgments on equal treatment issues in Germany. The EU Court took two major decisions on quota regulations—*Kalanke* in 1995 (C-450/93) and *Marschall* in 1997 (C-409/95). Another milestone was the decision on admission of women to the army—*Tanja Kreil* in 2000 (C-285/98).

children. After this, handicrafts and knitting became popular throughout Germany. The social democrats, and later the left party, reinforced the socialist tradition of the fight for women's rights. In other words, women's politics were professionalized, but women's and gender issues were still absent in mainstream socio-legal teaching and teaching of law.

The institutionalized movement for gender equality, equal status, and standing gained momentum in the 1990s as the Federal and State Gender Equality Acts were passed.[31] In the 2000s, Gender Equality Offices had a solid legal and—more or less—solid financial basis in universities and throughout the civil service more generally. The Ministries for Women—established in the 1990s—disappeared again in the course of the first decade of the 2000s after the introduction of the gender mainstream strategy, which made gender issues a cross-sectional task for all Ministries. Women's issues found their way into coalition agreements between the Social Democrats and the Green Party, money was available for research, and teaching and activist projects on women's rights flourished. The rising number of female politicians, members of Parliament in ministries, and members of the German Women Lawyers Association pushed the discussion of women's and gender issues, and demanded necessary reforms in the law. In spite of all adaptations of legal regulations to the gender equality clause in the constitution, a lot remained to be done. The Ministry for Women in Northrhine-Westphalia commissioned four comprehensive handbooks for equal opportunities officers: *Women and Law* 2003, *Images of Women* 2004, *Women and Demographic Change—The City, the Women and the Future* 2006, and *Women Change EUROPE Changes Women* 2008. The first and the last had more legal foundations and a strong political stance; the other two had a focus on body perceptions, politics, and social change—a truly interdisciplinary project. For each, I assembled a host of authors: Mainly women, a few men—amongst them, scholars, practitioners, artists, and activists.[32] This helped me widen my meanwhile huge network of gender specialists on which I could draw for various projects.

E. Gender and Sociology of Law in the 1990s

Throughout the course of the 1990s, a few Chairs in sociology of law started to disappear when those who had held them retired. In line with international development, sociology of law shifted to a broader concept of law and society in Germany,[33] and with it, the duality of socio-legal research in sociology and the socio-legal research in law extended. Initially, there may have been curiosity between the disciplines. Now, it happened more often that sociologists criticized lawyers for a lack of theory, and the lawyers worried about complex theoretical concepts and incomprehensible language.

Interdisciplinary cooperation was on the agenda of the BAR (*Berliner Arbeitskreis Rechtssoziologie*),[34] which was founded in 2001 by a small group of scholars in social sciences and legal academics, all of whom were looking for an outlet for their research beyond the traditional disciplines. The longstanding institutions were the aforementioned German Association for Sociology of Law, which used to be dominated by lawyers. It changed its name, in 2010, to the "Association for Law and Society."[35] There is also the small "Section Sociology

[31]*See* Ulrike Schultz, *Von der Interessenvertreterin zur Gleichstellungmanagerin: Recht und Rechte der Gleichstellungsbeauftragten – Diskrepanzen zur Praxis? Am Beispiel der Situation in NRW*, *in* RECHTSHANDBUCH FÜR FRAUEN- UND GLEICHSTELLUNGSBEAUFTRAGTE (Sabine Berghahn & Ulrike Schultz eds., 2013).

[32]The manuscripts are still stored on my personal website. *Gleichstellung und Geschlechterforschung (Equality and Gender Studies)*, ULRIKE SCHULTZ, http://www.ulrikeschultz.de/gleichstellung.shtml (last visited July 31, 2020).

[33]*See* Michael Wrase, *Rechtssoziologie und Law and Society – Die deutsche Rechtssoziologie zwischen Krise und Neuaufbruch*, RECHTSWIRKLICHKEIT (May 12, 2007), https://barblog.hypotheses.org/647.

[34]*See* LEGAL REALITY: THE BLOG OF THE BERLIN WORKING GROUP ON LEGAL REALITY, https://barblog.hypotheses.org/ (last visited July 31, 2020).

[35]*German Association for Law and Society*, RECHTSSOZIOLOGIE, https://rechtssoziologie.info/en/german-association-for-law-and-society/ (last visited July 31, 2020).

of Law" of the German Sociological Association,[36] which mainly represents sociologists. The involvement of both in gender issues is still low. There are almost no links of the Section Sociology of Law to the Section "Women and Gender Research," and gender issues are only occasionally dealt with in single presentations at meetings of the Association for the Sociology of Law.

Teaching sociology of law became obligatory within the law curriculum—for example, Section 11 (3) Law Education Act of Northrhine-Westphalia: "The compulsory subjects [for the first state examination] include their references to European law, taking particular account of the relationship between European law and national law, their philosophical, historical and social foundations, as well as the legal methods and methods of legal advisory practice." However, gender is not explicitly mentioned. Socio-legal contents are usually offered by public law Chairs in which some gender competence is accumulated, as the interpretation of the equality clause—Article 3, Section 2 in the German Constitution—is a necessary part of teaching constitutional law and anti-discrimination law. Some reflections on gender can be taught by Chairs of criminal law and criminology—in the context of abortion, sexual and domestic violence, female genital mutilation, and more—but still, no foundations of gender are included in the German legal curriculum.

Gender issues became overall more accepted in research and teaching since the 1990s. However this did not mean that they spread throughout universities or became popular in law faculties. I was part of an initiative led by Klaus Röhl and taught women's rights at the law faculty in Bochum. After eight years, I stopped teaching due to a lack of interested students signing up for the class—a fate shared by courses in the sociology of law. Women's rights and gender subjects were seen, with suspicion, as sectarian, and judged as irrelevant for the dogmatic contents of the legal state examination. At the same time, I held seminars in the humanities faculty in Essen, which were (more than) well attended.

Since the late 1980s, equal opportunities officers and women's groups invited me to innumerable lectures to empower them in legal questions and to motivate them to stand up for, and to promote legal change. However, they often could only gather small groups of attendees. A stable increase in participants has occurred only in the last decade.

In 1991, the first big international socio-legal meeting took place in Amsterdam—a milestone to remember. Gender was one of the central topics and was dealt with in plenaries. U.S. feminist legal academics "had impacted the philosophy of American Law since the 1980s to bring about new legal ideas ("memes") and causes of action that reframed women's issues and new interpretations of mainstream legal concepts."[37] We, the continental European women, listened intensely. A post-conference meeting with many of our American colleagues was organized in Bremen, giving motivation and impulses to gender in teaching and research. In 1995, Ursula Rust organized a Symposium called "*Women Jurists at Universities—Women and Law in Research and Teaching*" (*Juristinnen an den Hochschulen—Frauenrecht in Forschung und Lehre*) in Bremen, which brought together just about all women in legal academia interested in gender issues.

F. Gender in Socio-Legal Teaching and Research

I. Theoretical Underpinnings

The second wave feminist movement—in the 1980s—was influenced by gender difference theory, which—like the first women's movement—assigned women gender-specific characteristics, be

[36] *Kurzportrait*, Deutsche Gesellschaft für Soziologie, https://soziologie.de/sektionen/rechtssoziologie/kurzportrait (last visited July 31, 2020).

[37] *See* Carrie Menkel-Meadow, *Feminist Legal Academics: Changing the Epistemology of American Law Through Conflicts, Controversies and Comparisons*, *in* Gender and Careers in the Legal Academy (Ulrike Schultz, Gisela Shaw, Margaret Thornton & Rosemary Auchmuty eds., 2020).

they cultural or biological. The leading idea was that women have "another voice" and are morally as good or even better than men.[38] The problem with this theory is that it drifts towards the "patriarchal dilemma," reinforcing those men who always knew that "women are different"—meaning weaker.

In the 1990s, German feminist mainstream was dominated by sociologists[39] and political scientists, committing itself to structuralism and the deconstruction of gender. Its aim was to overcome social gender—with its traditional gender roles and character constructed by the patriarchy[40]—criticizing or even despising difference theorists[41] as backwards and deprecatingly labelling them as essentialist, although many feminists cherished a "we, the women" rhetoric, which in itself presupposes difference. There was a change in paradigm from women's rights to gender equality, in line with gender mainstreaming, which had been introduced as a strategy of European equality politics at the fourth World Conference on Women in Beijing, in 1995. Gender mainstreaming was integrated in the Treaty of Amsterdam 1997/1999 and adopted as a guiding principle by the German federal government in 1999. Women's offices and councils were renamed gender equality bodies (*Gleichstellungsstelle*). Additionally, women's committees and other women's institutions were kept to safeguard women's particular interests and protect women against discrimination.

After the turn of the millennium, theories stressing diversity prevailed. This put the focus on the individual, with his or her complex bundle of qualities, character traits, and different biographical factors—including age, education, financial situation, family status, political views, health, sexual orientation, and more—sex being just one factor among others. The problem with individualistic theories is that it is difficult to build research hypotheses on them, and it is further complicated by intersectional discrimination.[42]

In the past two decades, it has become evident that the binary two-sex model did not fit accepted social reality anymore, that legal adaptations were necessary, and that the gender perspective was opened to include queer. Rüdiger Lautmann, a trained lawyer and professor of sociology and sociology of law in Bremen, had already set up a department on Gender and Sexual Relationship in the Institute for Empirical and Applied Sociology in 1988. Further, in 1995, he founded the first center for gay-lesbian studies in Germany. There were only loose connections and almost no cooperation between Lautmann and the women who specialized in gender and law. In 2006, an Institute for Queer Theory was founded.[43] In recent years, the theoretical concepts were further expanded, and concepts of masculinities were included in legal gender work.

II. The First Comprehensive Program on Women and Law

In 1985, I got the chance at my university to organize a series of lectures on "Women and Law." There were still hardly any women in the faculties; the first female professor, a psychologist, had just got a Chair. At the time, I was head of the didactics unit for the law faculty in a central didactic facility. The university, in a reform model, aimed to offer higher education to disadvantaged groups who could not attend on-site teaching: "[W]orkmen, women, disabled persons, [and]

[38]*See* Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982).

[39]*See* Ursula Beer, Klasse Geschlecht: Feministische Gesellschaftsanalyse und Wissenschaftskritik (1998).

[40]*See* Seyla Benhabib et al., Der Streit um Differenz: Feminismus und Postmoderne in der Gegenwart (1993).

[41]*See* Mary Field-Belenky et al., Women's Ways of Knowing: The Development of Self, Voice and Mind (1986).

[42]*E.g.*, Anna Lawson, European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination (Anna Lawson & Dagmar Schiek eds., 2016); *see also* Susanne Burri & Dagmar Schiek, Multiple Discrimination in EU Law: Opportunities for Legal Responses to Intersectional Gender Discrimination? (European Commission 2008), https://eige.europa.eu/library/resource/aleph_eige000008236.

[43]*See* Insitute for Queer Theory, http://www.queer-institut.de/en/ (last visited July 31, 2020).

prisoners." Teaching occurs through a combination of written course materials, new media, and via the internet.

My position opened up the possibility to deal with "non-conventional" subjects. However, in spite of reform ideas, in the 1980s, didactics of law became a subject doomed to a shadowy existence until well into the 2000s. Law faculties in Germany have a very traditional teaching culture. There is no stringent curriculum leading to the examination—just a catalogue of subjects relevant for the examination, which is defined by the Ministries of Justice of the Federal States, who also organize the examination.[44]

As I was in charge of media work, the lectures on women and law were video-recorded and presented in our university TV series, which gave a lot of visibility and high prestige to the project.[45] The aim of the lectures was to inform about legal questions relevant for women: To find deficits, articulate critique, make proposals for law reform, and lobby for reform. Over ten years, the lectures mapped the areas of law with—at the time—the most important inequalities: Disadvantages and discrimination in family law, social law, labor law and quota regulations, pension and tax law, problems of non-marital partnerships, violence against women, the medieval procedural code against witchcraft, abortion, in-vitro fertilization, women migrants and the law, male legal language, the masculinity of the legal profession, and the impact of the constitutional reform after reunification on women's rights. Presenting were practitioners, members of Parliament, the first female federal Minister of Justice, scholars, activists, high judges, leading politicians, and the few female law professors dealing with women and gender questions in law—in other words, the most knowledgeable women on questions of women's rights, who—at the time—were still quite rare. They were all lawyers, as the focus was on law reform, but with a solid empirical foundation. The few law professors included were Jutta Limbach, who taught civil law, Heide Pfarr, who taught labor law, and Monika Frommel, who taught criminal law. We were pioneers and felt like it. Meeting decades later, as gray-haired women, we still remember the importance of our project.

Based on the collected material, I set up a one-year certification program of further education on Women and Law which became increasingly used by the growing number of equal opportunities officers as proof of qualification. I had no special resources for the program except my enthusiasm. The rector was my mentor; when he left in 1993, I was considered to be "masterless"—putting me in a vulnerable position. In 1987, the all-male law faculty at FernUniversität in Hagen decided to abolish "*Frauen im Recht*" on the grounds that "[w]e do not have these problems anymore." I had been watched suspiciously as one who was questioning the legal system and organizational structures: A dangerous woman with dangerous, inconvenient knowledge. The few female professors at FernUniversität in Hagen—there were still none in law—had been afraid to fill the gap and jump in to support a contested program.

I received a big grant for virtual international gender studies from the government, supported by the NRW Ministry for Research, between 2000–2004. This funding and recognition enabled me to bring my subject back into the conversation and the university. In the framework of the project, I set up a qualification for equal opportunities work. As gender and law deals with issues in all fields of law, I had to draw on the expertise of many authors who specialized in different subjects. I had to be creative in keeping the program going. I managed this through obtaining money from additional small research projects and making use of other publications in which I was involved.

[44] *See* Ulrike Schultz, *Legal Education in Germany - an Ever (Never?) Ending Story of Resistance to Change*, 4 Revista de Educación y Derecho (J. Educ. & L.) 1, 1–24 (2011); Schultz et al., *supra* note 4, at 189 ff.

[45] I got a lot of criticism for dominating the TV series with women's issues; externally, it was a highly prestigious project. Some of the lectures are still accessible in the FernUni video archive. *Archiv der Videoproduktionen*, FernUniversität Hagen, https://www.fernuni-hagen.de/videostreaming/zmi/video/#rewi (last visited Aug. 7, 2020). Later, we changed the title to Women in Communication and opened the scope to all disciplines. All in all, I organized—over thirty years—about 200 public lectures on women's issues—all with women, to counterbalance the usual male hegemony of speakers.

III. Gender Recognized as Element for Quality of Teaching

Since the 2000s, measures to strengthen the quality of teaching ("*Qualität der Lehre—QdL*")[46] have called for gender content to be included in teaching. High-quality teaching should be designed to be gender- and diversity-friendly. Corresponding guidelines are anchored in women's promotion plans and equality policies of universities; some universities have specific gender portals. In the accreditation of degree programs, which was introduced as part of the Bologna process, the criterion "equal opportunities" is also used to check whether sufficient gender content is offered in teaching. In the legal field, this concerns the bachelor's and master's in business law. As already stated, classical law studies are exempt from accreditations. Overall, the offer of gender content in law faculties is still sparse.[47]

In the mid-2000s, my university was undergoing restructuring, and this put my course for equal opportunities at risk. I returned in 2008, after thirty years, to the faculty which had—in the meantime—changed its structure. Men and women had Chairs, and I had the chance to offer a module on gender in the master's of laws. In the accreditation for the master's, the demand had explicitly been put forward to add gender in teaching law. For the first time in my life, I was received—more or less—with open arms in the faculty. Meanwhile, teaching on gender and appointing women to a Chair had also become success factors at universities, which gave the faculty extra funding until I retired in 2014. In 2016, limited for five years, the faculty had the chance to appoint a gender Chair. For two years, Ulrike Lembke held it; and since then, Anja Böning has held it.

IV. A Gender Curriculum

In 2008, I contributed a gender curriculum for law to a gender curricula website of the "Network for Women's and Gender Research,"[48] which I updated in 2012.[49] In the introduction, I stated: "In classical teaching, gender aspects are negated or overlooked. In the past decade, in the course of a shortening of legal education, the dogmatic training came to the fore and a clear tendency towards positivism (an orientation of the teaching to the applicable law and its application) was ascertained."[50]

I further characterized my approach as follows:

> The ... proposals for imparting legal gender competence follow the ideas of a critical jurisprudence. In the course of feminist criticism of science, a fundamental curriculum revision would be required, which would lead to a different structuring and weighting of the course content. Abstract theoretical interpretation of the law would take a back seat in favor of practical knowledge and application transfer. This would also remove the distinction between substantive law and formal procedural law. It is important to strengthen legal didactics and to ultimately rethink traditional ideas about the goals of law studies and the methods of mediation.[51]

[46]*E.g.* Gute Lehre: Frischer Wind an deutschen Hochschulen (Hochschulrektorenkonferenz ed. 2011), https://www.hrk-nexus.de/fileadmin/redaktion/hrk-nexus/07-Downloads/07-02-Publikationen/Gute_Lehre_9.4_FREI_200_Hoch.pdf.

[47]*See* Schultz et al., *supra* note 4, at 207 f.

[48]Gender Curricula, http://www.gender-curricula.com/ (last visited July 31, 2020).

[49]Of course, further updating and input from others is necessary.

[50]Ulrike Schultz, *Gendercurriculum für die Rechtswissenschaft, Portal Gender Curricula für Bachelor und Master des Netzwerks Frauen- und Geschlechterforschung NRW,* Gender Curricula (2012), http://www.gender-curricula.com/gender-curricula/; Ulrike Schultz, *Ein Gendercurriculum für die Rechtswissenschaft: Ein Vorschlag zur Integration von Lehrinhalten der Genderforschung in das rechtswissenschaftliche Studium*, 21 djbZ Zeitschrift des Deutschen Juristinnenbundes 225, 225–28 (2018).

[51]*Id.* The English version of the curriculum is accessible via my personal website. *Gleichstellung und Geschlechterforschung* ("*Equality and Gender Studies*), Ulrike Schultz, http://www.ulrikeschultz.de/gleichstellung.shtml (last visited July 31, 2020).

As the gender aspect is a cross-cutting issue, I proposed that it should be a focus of study in the basic subjects: Introduction to law, legal history, legal sociology, and legal philosophy and methodology. In addition, the gender perspective should be an integral part of all courses with regard to justice issues and legal criticism. In addition, a special module on women/gender and law could be offered. Although I tried to publicize the draft widely—and asked for comments and additions—in all these years, only one colleague contacted me, but just to ask me for advice in relation to her teaching.

V. Research and Teaching on Gender and Law

In 2002, Susanne Baer got a Chair at Humboldt University in Berlin for public law and gender studies. Between 2003–2010, she founded and organized a gender competence center and was subsequently also co-founder and first head of the Gender Studies Association, founded in Berlin in 2010. In 2011, she was elected to be a judge at the Federal Constitutional Court. Her work combines—in a unique way—gender with socio-legal competence, and she has written a study book on Sociology of Law as an introduction to interdisciplinary legal research, which includes feminist perspectives.[52] Her Chair, which is represented during her term at the court by Ulrike Lembke,[53] is the Centre for Manifold Activities and Research Projects on Gender Issues. Attached to the Chair is the Humboldt Law Clinic for Basic and Human Rights (HLCMR), which takes a feminist stance.

An active group of young women from Berlin and Hamburg—among them, Dana-Sophia Valentiner and Selma Gather, linked to the German Women Jurists Association—is dealing with feminist demands for improving legal education,—that is, the use of gender neutral language and gender adequate and sensitive construction of cases used in training, tests, and examinations.[54] The various offers on gender issues in law show a clear north/south divide, however. Financing options have an impact, which means that some programs which emerged will disappear again. A center for research and teaching on gender and law has been set up in Frankfurt, connected to the Chair of Ute Sacksofsky and the Cornelia Goethe Centrum for Women and Gender Studies. At the University of Hamburg courses are offered in Legal Gender Studies, (also at the University of Vienna connected to Elisabeth Holzleithner[55] and the University of Basel connected to Andrea Maihofer[56], and Gesine Fuchs in Luzern[57]). At the University of Marburg a "Mobile Study Day Feminist Law" is held regularly, individual courses and courses on gender

[52]*See* Schultz et al., *supra* note 4.

[53]Ulrike Lembke set up a website on Legal Gender Studies in 2018; however, it has not been updated since. Legal Gender Stud., https://www.legal-gender-studies.de/ (last visited Aug. 7, 2020).

[54]Dana-Sophia Valentiner et al., (Geschlechter)rollenstereotype in juristischen Ausbildungsfällen: Eine hamburgische Studie (Universität Hamburg 2017), https://www.jura.uni-hamburg.de/media/ueber-die-fakultaet/gremien-und-beauftragte/broschuere-gleichstellung.pdf; Dana-Sophia Valentiner, *Checkliste gender- und diversitätsbewusste Fallgestaltung in der rechtswissenschaftlichen Lehre*, *in* Freie Universität Berlin Toolbox Gender und Diversity in der Lehre (2018), http://www.genderdiversitylehre.fu-berlin.de/toolbox/_content/pdf/Valentiner-2018.pdf; Lucy Chebout et al., *Sexismus in der juristischen Ausbildung: Ein #Aufschrei dreier Nachwuchswissenschaftlerinnen*, 4 djbZ Zeitschrift des Deutschen Juristinnenbundes 190, 190–93 (2016); *see also* Ulrike Schultz, *Stereotype und Sozialdünkeln - Für eine Gendersensibilität in der juristischen Ausbildung: Gegen veraltete Geschlechterbilder und Diskriminierung*, *in* Rechtshandbuch für Frauen- und Gleichstellungsbeauftragte (Sabine Berghahn & Ulrike Schultz eds., 2019); Anja Böning & Ulrike Schultz, *Juristische Sozialisation*, *in* Studienbuch Interdisziplinäre Rechtsforschung 191 (Christian Boulanger & Julika Rosenstock eds., 2018).

[55]See also her book, Elisabeth Holzleither, Recht Macht Geschlecht: Legal Gender Studies: Eine Einführung (2002). *See also* Diemut Majer, Der lange Weg zu Freiheit und Gleichheit: 14 Vorlesungen zur Rechtsstellung der Frau in der Geschichte (1995).

[56]She was the head of the Centre for Gender Studies in Basel.

[57]*See also* Manuela Annette Hugentobler, Legal Gender Studies und feministische Rechtswissenschaft als Kernprojekt von demokratischen Jurist_innen (2018), https://boris.unibe.ch/125637/.

issues in law are offered at the Universities of Bremen, Bielefeld, Frankfurt,[58] and a few others in Germany. Lectures on relevant topics are offered by a number of faculties—for example, connected to the Chair of Friederike Wapler in Mainz, Eva Kocher in Frankfurt/Oder, and Katharina Mangold at the newly founded European University in Flensburg, which—it should be noted—has no law faculty, prioritizing business studies.[59]

While there is little in the mainstream legal literature on gender issues in law, there are some publications on women's rights, law and gender, and anthologies and monographs: For example, the study book *Feminist Law*, published by Lena Foljanty and Ulrike Lembke[60]; the collection of sources *Legal Gender Studies*, published by Andrea Büchler and Michelle Cottier[61]; the feminist legal journal *STREIT*; and the journal of the German Women Lawyers' Association *djbZ*.[62]

In spite of the limited institutionalization in law faculties, a lot of gender research is done in individual single projects within the forty-three law faculties in Germany. In the past two decades, almost all socio-legal conferences—except for those on special subjects—have had sessions on gender issues. Impressive evidence of it has been given at meetings of the socio-legal scholars in the German-speaking countries in the past ten years, where gender issues were dealt with in several streams, giving impulses to new socio-legal research.

The socio-legal blog[63] that Klaus Röhl runs provides an inexhaustible source of inspiration—tracking the developments in law and society and discussions on gender. An entry, for example, of the 8th of November 8, 2019, is titled "Feminist Legal Studies have Arrived at the Center of Jurisprudence" and deals with some of the contributions to a section on "Broadening Perspectives Through Gender Research in Law" in the 2019 yearbook of public law.[64] There are, however—as is obvious from the names cited—few men who engage in gender issues beyond the interpretation of the gender equality clause in constitutional law.

After the turn of the millennium, with the introduction of gender mainstreaming strategy, gender education became obligatory in the civil service and the judiciary. For a couple of years, gender training was arranged, which encountered incomprehension and objection.[65] It was then included as a mandatory requirement in guidelines for further education, functioned as fig leaves, and was forgotten after some time. This was partly compensated by the growing number of women involved as trainers, who included gender issues in their regular teaching, and acceptance was reinforced by the growing number of women in leading positions.

[58]These are universities with a former single-phase models of legal education.

[59]I have interviewed most of those mentioned in this section, on questions of gender and law, for the web-portal: *Herzlich Willkommen bei Recht und Gender*, FernUniversität Hagen, www.fernuni-hagen.de/rechtundgender (last visited July 31, 2020).

[60]Lena Foljanty, Feministische Rechtswissenschaft (Lena Foljanty & Ulrike Lembke eds., 2d ed. 2011). The third edition is announced for the end of the year.

[61]*See* Andrea Büchler & Michelle Cottier, Legal gender studies = rechtliche Geschlechterstudien: eine kommentierte Quellensammlung (2012). Michelle Cottier has built a program on legal gender studies at the University of Zurich, funded by the Swiss National Fonds, but the program has been discontinued. Michelle Cottier is currently teaching in Geneva.

[62]Compare also the following list of literature. *Studienliteratur*, Legal Gender Stud., https://www.legal-gender-studies.de/studium/literatur (last visited July 31, 2020). In contrast to mainstream legal literature, the journals tend to include arts work, stressing the aesthetical side.

[63]Rsozblog.-de, https://www.rsozblog.de (last visited July 31, 2020).

[64]He criticizes, however, for example—positions of dominance feminism and the alliance of feminism with queer theory, which hinders feminism to develop a positive image of women.

[65]*See* Ulrike Schultz, *Do German Judges Need Gender Education?*, *in* Gender and Judging 585 (Ulrike Schultz & Gisela Shaw eds., 2013); Ulrike Schultz, *Raising Gender Awareness of Judges – Elements for Judicial Education in Germany*, 21 Int'l J. Legal Prof. 345, 345–55 (2014); Ulrike Schultz, *Sexism in Law and the Impact of Gender Stereotypes in Legal Proceedings*, *in* The Fight for the Public Space: When Personal is Political, *supra* note 13, at 97–108; Ulrike Schultz, *Do Female Judges Judge Better?*, *in* Women Judges in the Muslim World 23 (Nadia Sonneveld & Monika Lindbekk eds., 2017).

VI. Research on Women/Gender in the Legal Profession(s)

My own research is focused on women and gender in the legal profession. It was only loosely connected to my work at FernUniversität in Hagen, and is more of a private passion. In 1994, I became head of a Women in the Legal Profession Group, a subgroup of the Working Group on Comparative Studies of Legal Professions.[66] This led to several workshops, a triad of three big comparative international publications,[67] and several special issues in the *International Journal of the Legal Profession*.[68] We also organized a collaborative research network on gender and judging in the framework of the American Law and Society Association. The next project will be on Women in Customary Law and Proceedings.[69]

In 2008, I received a grant from the Ministry of Justice in Northrhine-Westphalia for empirical research on women in leading positions in the judiciary—or rather, why there were so few of them.[70] In 2011, I received a governmental grant from the funding line "Women to the Top" for nationwide research into the dismal situation of female law professors,[71] who still—in 2020—hold only about sixteen percent of the Chairs. In the framework of the project, I set up a website on Gender and Law, with video interviews of experts on gender issues in law and with personality portraits of female law professors, for which I was awarded some additional funding.[72]

G. Problems for Institutionalizing Gender in Socio-Legal Teaching and Research

Why is it so difficult to institutionalize gender in teaching and research in law faculties and gain recognition for it? As mentioned above, legal education is resistant to change, and gender is not part of traditional law faculty culture. Women's and gender issues have been regarded as representing special interests not deserving to be consolidated as concrete study subjects.

Another problem is the divides between actors in gender equality teaching, research, and practice. In the nineteenth and early twentieth centuries, there was a divide between the bourgeois and the socialist women. The moderate and the radical wing of the women's movement had different focuses:

[66]The Legal Profession Group was founded in 1996, after the legendary Bellagio meeting of the Lawyers in Society Project, and has been meeting biannually since. I chaired it from 2010–2014. A new big, international collection on Lawyers in twenty-first Century Societies has been launched; the first issue with forty-two country reports has just come out. RICHARD ABEL, HILARY SOMMERLAD, OLE HAMMERSLEV & ULRIKE SCHULTZ, LAWYERS IN 21ST CENTURY SOCIETIES: VOL. 1 (2020). The next issue, which deals with comparative theories and methods, is due in early 2021.

[67]*See* ULRIKE SCHULTZ, WOMEN IN THE WORLD'S LEGAL PROFESSIONS (Ulrike Schultz & Gisela Shaw, 2003); ULRIKE SCHULTZ, GENDER AND JUDGING (Ulrike Schultz & Gisela Shaw eds., 2013); ULRIKE SCHULTZ, GENDER AND CAREERS IN THE LEGAL ACADEMY (Ulrike Schultz et al. eds., 2020).

[68]*See* ULRIKE SCHULTZ & GISELA SHAW, WOMEN IN THE LEGAL PROFESSION (2003); ULRIKE SCHULTZ & GISELA SHAW, WOMEN IN THE JUDICIARY (2012); ULRIKE SCHULTZ ET AL., GENDER AND JUDICIAL EDUCATION (2014); ULRIKE SCHULTZ & TABETH MESENGU, GENDER AND JUDGES (2020).

[69]Since 1991, I have organized a considerable number of sessions on women's rights and gender issues in the legal profession and the judiciary, at all annual meetings of the Research Committee for the Sociology of Law, and at the big joint international meetings —Glasgow 1996, Budapest 2001, Berlin 2007, Honolulu 2012, and Mexico City 2017.

[70]*See* Ulrike Schultz, *Women's Careers in the Judiciary: Results of an Empirical Study for the Ministry of Justice in Northrhine-Westfalia, Germany*, *in* GENDER AND JUDGING 145 (Ulrike Schultz & Gisela Shaw eds., 2013) ("I was noticed and I was asked."); ULRIKE SCHULTZ ET AL., FRAUEN IN FÜHRUNGSPOSITIONEN DER JUSTIZ. EINE UNTERSUCHUNG DER BEDINGUNGEN VON FRAUENKARRIEREN IN DEN JUSTIZBEHÖRDEN IN NORDRHEIN-WESTFALEN PROJEKTBERICHT (Institut für Geschlechterforschung und Gleichstellungsrecht und –politik 2011).

[71]*See* SCHULTZ ET AL., *supra* note 4; Ulrike Schultz, *Bisher wenig Wechsel im Genderregime an deutschen juristischen Fakultäten. Kommentar zum Artikel von Margaret Thornton: 'The Changing Gender Regime in the Neoliberal Legal Academy*, 33 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 253, 253–64 (2014); ULRIKE SCHULTZ, GENDER AND CAREERS IN THE LEGAL ACADEMY IN GERMANY: WOMEN'S DIFFICULT PATH FROM PIONEERS TO A (STILL CONTESTED) MINORITY (Schultz et al. eds., 2020).

[72]*See Herzlich Willkommen bei Recht und Gender*, FERNUNIVERSITÄT HAGEN, https://www.fernuni-hagen.de/rechtundgender/ (last visited July 31, 2020).

The former with a focus on women's roles as housewives and mothers, the socialist women feeling closer to the male labor movement, but both with a positive evaluation of motherliness and femininity, united in their striving for women's access to education and professional work. Today, it is the gulf between conservative and progressive women. Gender specialists differ in their standpoints and political stances, and differing opinions are not always treated with tolerance.

Some of the gender experts in law and sociology of law self-identify as feminists. For scholars in the Anglo-American world, it is common, while continental—particularly German—lawyers shy away from the word feminist, as -isms may signal ideological attitudes. Some of the women label themselves as women's rights lawyers (*Frauenrechtlerin*), which sounds somewhat old-fashioned. The question is whether these labels—which signal a preoccupation with women's issues—still fit in times when the focus of gender has opened to include masculinities and when the boundaries between the sexes and genders have been dissolved, and equal rights and fair treatment of the multiple sexes and genders are discussed.

The big divide is that between social sciences and law. Gender research is mainly anchored in the humanities, sociology, and cultural sciences, and has started to boom in the past fifteen years. Sociology dominates theory building within the field of gender studies. Many gender Chairs were established in the disciplines, and many more Chairs got an additional denomination, "gender." Innumerable gender conferences are held. The rising number of women in politics and in higher positions in ministries—backed up by left, social-democratic, and green pro-women, and later "gender" party politics—created possibilities for funding of research, teaching projects, and Chairs. There is only a limited cooperation with the small number of women in the legal academy who are engaged in women's and gender issues. Except for a handful of us, women legal academics rarely present at gender conferences in Germany. The concepts and language used in social sciences—often with many anglicisms, particularities, aloof issues, and conferences in the English language when maybe just one participant does not speak German—have created a special segment in academia, which of course is necessary, but remote from the usages in law which has a strong orientation to practice. This causes frictions.

Additionally, there is a funding dilemma for socio-legal research. The Ministries of Justice, and the federal and state ministries, have very limited resources. The Ministry for Research and Education BMBF would rather fund projects in the humanities, sociology, and cultural sciences,[73] and the law has no culture of externally-funded projects.[74]

There is a comparable divide between the academic gender research, and the institutionalized women's movement and gender work in equal opportunities offices, despite many of the EO officers in the civil service and public administration having a degree in sociology or political sciences. Theoretical concepts do not help them in their daily work, although they need impulses and ideas from outside.[75] To bridge the gap, since 2006, I have been editing—with Sabine Berghahn—a legal handbook for equal opportunities officers with regular supplements and a website.[76]

One of the biggest obstacles is, however, that overall gender equality is still considered a women's project, and that in spite of all the political support, most men have not accepted it as their task—by and large, they stand on the margins and avoid being involved.

[73]In 2016, I had applied with several colleagues for a project on law and practice in family court proceedings. It was considered to be a strong project, but too legal for the funding line, DFG.

[74]*See* SCHULTZ ET AL., *supra* note 4, at 272 f.

[75]In 2013, I edited a publication titled "Desire for Equality" for the twenty-fifth anniversary of the State Working Group of Equal Opportunities officers in Northrhine-Westphalia, which gives an insight into their work and needs. *See Publikationen*, NRW, http://www.frauenbueros-nrw.de/service/publikationen.html (last visited July 31, 2020).

[76] *See* DASGLEICHSTELLUNGSWISSEN, https://www.dasgleichstellungswissen.de/ (last visited Aug. 7, 2020). I have also been deeply involved in equal opportunities work at my university, as the longstanding head of the Equality Commission, as an EO officer for the law faculty, and in other equal opportunities functions.

H. Where to?

Considering equal rights for women, and the political and economic situation of women in society, a lot has been achieved.[77] The development in the past decades has been breathtaking. Of course, the balance for gender justice is sensible; society changes, gender arrangements are modernizing, and with it, the perceptions and demands of people change. The development has to be carefully observed and the law always needs readjustment. There are still battles left to be fought, and there are always issues to be discussed critically. As described, scholars and practitioners of the German Women Lawyers' Association—but also women in legal academia and social science—played a leading role in the process of change. Since 2005, the government has commissioned gender equality reports to which they have contributed.[78] The reports give an account of the status of society and the identified needs of further change. The first one, "New Ways—Equal Opportunities. Equality Between Women and Men in Their Life-Course," was published in 2011. The second, on "Shaping and Implementing Employment and Care Work," was published in 2017. The work on the third one has started.

This means that socio-legal perspectives of gender are as important as ever, and they have to be included in regular teaching. But gender cannot be seen separate from other aspects of diversity. For example, of growing importance is ethnicity due to increased migration. In the end, the aim is that theory has to find answers for the question: What is the life we—men, women, trans, intersex, and non-binary people—want to have? Therefore, politics needs to build on socio-legal empirical evidence.

[77] At FernUniversität in Hagen, the leading positions are meanwhile in the hands of women.

[78] *See* GLEICHSTELLUNGSBERICHT DER BUNDESREGIERUNG, https://www.gleichstellungsbericht.de/ (last visited July 31, 2020).

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ARTICLE

The Comparative Sociology of Legal Doctrine: Thoughts on a Research Program

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Abstract
In the context of the encounter of UK and German socio-legal studies in this issue, this Article develops preliminary thoughts on a research agenda for the comparative interdisciplinary empirical study of legal doctrine. Based on a working definition of doctrine as an institutionally legitimized practice of making statements on the law, it presents an overview of sociological and comparative theorizing about doctrine in Germany, and of the data and methods being used to study it, in order to identify similar or diverging trends in the UK and elsewhere. This Article aims to show that legal doctrine, which is often regarded by non-lawyers as arcane and/or tedious, is an interesting and important subject for comparative socio-legal research.

Keywords: legal doctrine; jurisprudence; socio-legal studies; sociology of law; legal academics

A. Introduction

Socio-legal studies[1] as an academic pursuit cannot be understood without its "other"—the doctrinal study of law—and vice versa. The relationship between these different perspectives on the law has varied over time and has developed in disparate ways across the globe. A comparison of Germany and the UK is an example of this: Whereas in the UK, Socio-legal Studies have a relatively strong presence in the law schools, German *Rechtssoziologie* has not been able to gain substantial ground in law schools nor in other departments.[2] Often, the relationship between doctrinal and non-doctrinal study of the law has been strained.[3] Ever since Kelsen argued with Ehrlich over the right way to do *Rechtswissenschaft*, the "science of the law," many scholars on both sides have been accusing the other of not understanding what the law is really about.[4]

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[1]As explained in the introduction to this Special Issue, the term is used here as an umbrella concept for the various forms of the empirical study of the law, whether they are institutionally recognized academic disciplines or intellectual movements within the established disciplines.

[2]See Machura, *Milestones and Directions: Socio Legal Studies in Germany and the United Kingdom,* in this issue. On the relationship between sociological and doctrinal approaches to law in Germany, see Julika Rosenstock, Tobias Singelnstein & Christian Boulanger, *Versuch über das Sein und Sollen der Rechtsforschung, in* INTERDISZIPLINÄRE RECHTSFORSCHUNG 3–29 (Christian Boulanger, Julika Rosenstock, & Tobias Singelnstein eds., 2019).

[3]For the UK, *see generally* Neil Duxbury, *A Century of Legal Studies*, *in* THE OXFORD HANDBOOK OF LEGAL STUDIES 950–74 (2005). For Germany, *see generally* Alfons Bora, *Sociology of Law in Germany: Reflection and Practice*, 43 J.L. & SOC'Y 619–46 (2016).

[4]An excellent summary of this debate at the beginning of the 20th century can be found in HANS KELSEN UND DIE RECHTSSOZIOLOGIE: AUSEINANDERSETZUNGEN MIT HERMANN U. KANTOROWICZ, EUGEN EHRLICH UND MAX WEBER (Stanley L. Paulson ed., 1992).

This rift might be the reason that the doctrinal study of law has received surprisingly little attention from socio-legal scholars.[5] Though vivid, the often-used distinction between the "law on the books" and the "law in action" is unhelpful in this respect, as long as it conjures the image of a body of text on paper—"black-letter law"—which is largely irrelevant for the "real" law out there in society. This Article argues that it is precisely the connection between law on the books and the law in action that makes studying legal doctrine, from a sociological and comparative perspective, in its various forms worthwhile. Instead of looking at doctrine as the antithesis of their work, socio-legal scholars might gain insight about the social mechanisms of legal knowledge production. As a side effect, this research focus might help enhance collaboration between doctrinal and non-doctrinal scholars because both sides are necessary for this endeavor to be successful.

When I speak of "doctrine," I use this term as "legal dogmatics," which would be etymologically closer to the German *Rechtsdogmatik* although it is much less commonly used.[6] Both "doctrine" (from Latin *doctrina*) and its continental sibling concepts that are derived from the Greek *dogma* have a double etymology that provide notions of both craftsmanship and religious orthodoxy.[7] The traditional German understanding of statute-based *Rechtsdogmatik* has been defined as the "academic study of the law,"[8] which expresses the close connection of German doctrine to legal scholarship. In the UK, doctrine has been defined to express "authoritative juridical ideas that may direct the course of legal decisions,"[9] which hints at the high influence of courts in the development of doctrinal statements. It is clear that "doctrine" is what lawyers deal with and that it goes beyond positive law. As I will argue in Section D, a socio-legal analysis of doctrine will look beyond ideas and texts and look at social practices of making statements about what the law is—within the institutions—giving these statements authority and legitimacy.

The following sections present some preliminary thoughts on one of many possible research agendas for the comparative empirical study of legal doctrine. After a short survey on the state of the art, I will justify why it is important to look more closely at legal doctrine, provide a working definition of doctrine as an institutionally legitimized practice of making statements on the law, and give an overview about empirical theorizing about doctrine and about data and methods that are being used to study doctrine in Germany. In line with the exploratory character of the workshop that gave rise to this Special Issue and the early stage of my project,[10] this Article does not attempt to give a comprehensive picture of existing research. Instead, I will be focusing on a few exemplary lines of research in Germany to show that there is a lot to be learned by looking at doctrine from a sociological perspective. My hope is to contribute conceptually to a future Sociology of doctrine which is done comparatively—with attention to the social, political, and historical context—while using international and interdisciplinary collaboration.

[5] *See* Section B, below.

[6] The Google Books Ngram Viewer shows almost no occurrences of "legal dogmatics" until the mid-1970s, with a peak in the mid-1980s, but even then "legal doctrine" occurs five times more frequently. *See* GOOGLE, *Google Books Ngram Viewer*, https://tinyurl.com/y7j9erjy (last visited May 23, 2020).

[7] The meaning of the original Latin and Greek terms refer to teachings or to established rules of a craft, for example, in medicine. In early Christian Theology, *doctrina* and *dogma* continued to be understood as teachings or decisions—based on the exegesis of biblical texts—that answered a specific question. The modern connotation of officially ordained truths that are not to be questioned—expressed, for example, in the term "dogmatism"—was only a later development. *See* MAXIMILIAN HERBERGER, DOGMATIK: ZUR GESCHICHTE VON BEGRIFF UND METHODE IN MEDIZIN UND JURISPRUDENZ (1981). For uses of "doctrine" in English legal history, *see* Joshua Getzler, *Legal History as Doctrinal History*, *in* THE OXFORD HANDBOOK OF LEGAL HISTORY 1 (Markus D. Dubber & Christopher Tomlins eds., 2018).

[8] "Die rechtswissenschaftliche Bearbeitung des Rechts nennt man Rechtsdogmatik." Christian Starck, *Die Bedeutung der Rechtsdogmatik für die Rechtsvergleichung*, *in* RECHTSVERGLEICHUNG—SPRACHE—RECHTSDOGMATIK 11 (Frank Schorkopf & Christian Starck eds., 2019).

[9] Getzler, *supra* note 7, at 2.

[10] This Article was motivated by the workshop and written afterwards, which did not leave enough time to integrate a survey of the UK research landscape.

B. An Emerging Research Program on Empirical and Comparative Study of Doctrine

In a 2004 article, Ingo Schulz-Schaeffer remarks that Sociology of law has, "from the beginning up to today, shown very little interest for the doctrinal study of law, i.e. the practice of interpretation of the codified positive law in jurisprudence (*Jurisprudenz*)."[11] He cites a similar diagnosis to that of Niklas Luhmann in 1986, where he finds Luhmann's statement that "there is no adequate Sociology of legal doctrine"[12] still holds. Schulz-Schaeffer found it bewildering that the empirical study of a social field such as law would almost completely disregard what most legal scholars, and certainly those in Germany, consider the "core" of their enterprise.[13]

Another sixteen years later, have things changed? There is little evidence that it has, at least in a systematic way. No German textbook on the Sociology of law treats *Rechtsdogmatik* in depth—mostly, it serves as a reference point for what the Sociology of law is not.[14] In the UK, the situation seems not much different. The debates which have been held in the last few decades on the question as to whether "doctrinal legal studies" have academic credentials at all,[15] have produced a number of important studies that reflect on the social practice of the production of legal doctrine.[16] However, there seems to be no systematic empirical research on legal doctrine itself.[17] Therefore, it is not surprising that, given this gap in research at the national level, systematic comparative empirical research on the subject is hard to come by.[18]

A major challenge for this research is that it is quite unclear what terms like *Rechtsdogmatik,*[19] *la doctrine,*[20] or legal doctrine/dogmatics/jurisprudence actually refer to when seen from a comparative perspective. One indication of this is the quote by Schulz-Schaeffer above, whose definition of the doctrinal study of law as "the practice of interpretation of the codified positive law in jurisprudence" does not work very well in common law jurisdictions such as England, Wales, or the U.S.[21] There, "doctrine" is mainly equated with judicial lawmaking,[22] while "doctrinal analysis" means, in the majority of cases, the examination of "the content of a legal opinion to evaluate whether it was effectively reasoned or to explore its implications for future cases."[23] Even if the importance of statutory law has been steadily increasing, the main debate seems to center on

[11]Ingo Schulz-Schaeffer, *Rechtsdogmatik als Gegenstand der Rechtssoziologie: für eine Rechtssoziologie "mit noch mehr Recht,"* 25 Zeitschrift für Rechtssoziologie 141, 141 (2004) (author translation).

[12]Admittedly, Luhmann would not consider any sociological theory on the subject to be theoretically "adequate" unless it were derived from System Theory.

[13]*See* Susan Bartie, *The Lingering Core of Legal Scholarship*, 30 Legal Stud. 345, 345–69 (2010); Martin Eifert, *Zum Verhältnis von Dogmatik und pluralisierter Rechtswissenschaft*, *in* Was weiß Dogmatik? 79–96 (Gregor Kirchhof, Stefan Magen & Karsten Schneider eds., 2012).

[14]*See, e.g.*, Manfred Rehbinder, Rechtssoziologie 1 (8th ed. 2014).

[15]On this debate, see Bartie, *supra* note 13. *See also* Geoffrey Samuel, *Is Law Really a Social Science? A View from Comparative Law*, 67 The Cambridge L.J. 288 (2008).

[16]Most notably, of course, Fiona Cownie's seminal study on legal academics. Fiona Cownie, Legal Academics: Culture and Identities (2004).

[17]Unlike in the United States, where empirical studies on legal doctrine has existed for some time now. *See, e.g.*, Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 Nw. Univ. L. Rev. 517 (2006); Jessie Allen, *Empirical Doctrine*, 66 Case W. Res. L. Rev. 1 (2015).

[18]At least such research is not reflected in handbooks that reflect the state of the art in the discipline. *See, e.g.*, Comparative Law and Society (David Scott Clark ed., 2012).

[19]Rolf Gröschner, *Rechtsdogmatik*, *in* Handbuch Rechtsphilosophie 61–66 (Eric Hilgendorf & Jan C. Joerden eds., 2017).

[20]Horatia Muir Watt, *The Epistemological Function of 'la Doctrine,' in* Methodologies of Legal Research: What Kind of Method for What Kind of Discipline? 123–32 (Mark Van Hoecke ed., 2011).

[21]The "mixed system" in Scotland is a special case. *See* Stephen Thomson, *Mixed Jurisdiction and the Scottish Legal Tradition: Reconsidering the Concept of Mixture*, 7 J. Civ. L. Stud. 51 (2014).

[22]See, for example, Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. Cal. L. Rev. 1989 (1995).

[23]Tiller & Cross, *supra* note 17, at 518.

the role of judicial precedent in determining the law of the land.[24] It is clear that doctrine is about making authoritative statements about the law, but it is less clear what this entails in practice, and what the role of courts, legal scholarship, and lawyers in general is within this practice. The ambiguity of the term "doctrine" is not due to "the lack of a supra-jurisdictional lingua franca."[25] The problem is more fundamental. As I will argue, national forms of "doctrine" are not primarily systems of thought, but institutionally framed social practices inseparably connected with temporal-spatial social context of the individual nations.

The challenge of undertaking comparative empirical research on doctrine is thus threefold. First, given the multiplicity of concepts, we need to find a suitable "sociological concept" of "doctrine," which will work across legal cultures and histories and which can be operationalized in very different contexts. If such a concept can be found, the second challenge is to define the comparative "research questions." It is to be expected that the questions researchers are interested in will differ substantively in terms of their legal and academic context, because both the normative and empirical studies of law have very different trajectories in different countries.[26] Third, given the vast array of theoretical approaches and empirical methods available to social scientists, such a research program will have to decide on the right mix of these "theories and methods"—determining which will best serve to answer the research questions. It seems plausible to assume that no single theory or method will be sufficient.

These challenges are further complicated by the fact that such a research program is by definition an interdisciplinary enterprise that involves social scientists as well as lawyers.[27] Fortunately, it seems that today, the unproductive antagonisms of the past are slowly being overcome.[28] Legal and socio-legal researchers—at least in both disciplines' cutting edge research—are taking each other seriously and are working together to better understand "the force of law."[29] Despite this, significant differences remain in the kind of questions legal and socio-legal scholars are interested in, how they define problems and concepts, and what kind of methods they are trained in and which they find relevant to their research questions.[30]

Such a project, I argue, needs input from many disciplines. First, it should entail a strong historical component. The great variety of legal systems and cultures makes it obvious that law is a historically contingent, path-dependent phenomenon.[31] The specific form in which a practice of legal doctrine can be observed in a particular legal system and geographic area is thus a consequence of lengthy historical developments that shape discourses and thought patterns. The social practice of legal doctrine is subject to constant change, whereby the interesting question

[24]Ugo Mattei & Luca G. Pes, *Civil Law and Common Law: Toward Convergence?*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS (Gregory A. Caldeira, R. Daniel Kelemen & Keith E. Whittington eds., 2008). This is not a critique of Schulz-Schaeffer's article—as he is explicitly focusing on German Sociology of law and German doctrine.

[25]Duxbury, *supra* note 3, at 968.

[26]*See* Jennifer Hendry, Naomi Creutzfeldt & Christian Boulanger, *Socio-Legal Studies in Germany and the UK: Theory and Methods*, in this issue.

[27]This mirrors the demands on the side of legal scholars that their doctrinal research should involve non-doctrinal scholarship, which effectively means communicating with social scientists. *See generally* Matyas Bodig, *Legal Doctrinal Scholarship and Interdisciplinary Engagement*, 8 ERASMUS L. REV. 43 (2015).

[28]*But see* Samuel, *supra* note 15.

[29]*See generally* Pierre Bourdieu, *The Force of Law: Towards a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814 (1987). For a less optimistic view about the cooperation between lawyers and scientists, see generally Reza Banakar, *Law Through Sociology's Looking Glass: Conflict and Competition in Sociological Studies of Law*, *in* THE ISA HANDBOOK IN CONTEMPORARY SOCIOLOGY 58–73 (Ann Denis & Devorah Kalekin-Fishman eds., 2009).

[30]On methods in the UK and other English-language research contexts, see generally NAOMI CREUTZFELDT, *Traditions of Studying the Social and the Legal*, *in* ROUTLEDGE HANDBOOK OF SOCIO-LEGAL THEORY AND METHODS 9–34 (Naomi Creutzfeldt, Marc Mason & Kirsten McConnachie eds., 2019).

[31]On path dependence and institutional analysis, see generally PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS (2004). *See also* Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2000).

concerns which elements remain constant over a long period of time and which elements must be adapted to social developments. Thus, any research on these differences must include insights from legal history, in particular the socio-historical study of the legal method. Luckily, we can build on a large body of historical-comparative work on the development of doctrinal practices.[32]

We also need to involve and integrate the knowledge about legal doctrine that exists in the research field of comparative law. Comparative lawyers know that, without knowledge of contextual factors such as "legal culture, legal argumentation, judicial decision making, styles of legal writing, diverging approaches to legal sources and to statutory interpretation (e.g., the use of travaux préparatoires), the role of legal doctrine, the respective role of the legal professions, the role of form in law in relation to substance,"[33] any comparison between laws and legal systems will be deficient. Additionally, there is increasing interest in connecting comparative law with socio-legal theory and methods.[34] However, if the Oxford Handbook of Comparative Law is any indication of the current state of the art, it seems like the phenomenon of doctrine or, in a broader sense, the legal method, is not regarded as a topic that requires a separate chapter.[35]

C. Why Comparing Legal Doctrine is Important

Identifying a gap in research says little about its relevance. Why should we study doctrinal practices beyond the fact that it is still possible to say something new? One reason is that from a sociological perspective, legal doctrine is about the power to make decisions. Lawyers and legal scholars use doctrinal arguments in their attempt to influence, *inter alia*, administrative agencies and the courts, and judges use it to justify their decisions. This has two implications: An analytical one that concerns academic theory development, and a "critical legal studies" one concerning the social and political legitimacy of doctrinal power.

Some proponents of legal realism have claimed that doctrinal argumentation amounts to a post-hoc rationalization for what are arbitrary political or other value choices.[36] In the tradition of the legal realists, some scholars in U.S. Political Science research have been almost obsessively studying the Supreme Court judgments with the aim of demonstrating that the impact of

[32]In Germany, Stefan Vogenauer has produced extensive historical and comparative work on Germany and the UK. *See generally* STEFAN VOGENAUER, DIE AUSLEGUNG VON GESETZEN IN ENGLAND UND AUF DEM KONTINENT: EINE VERGLEICHENDE UNTERSUCHUNG DER RECHTSPRECHUNG UND IHRER HISTORISCHEN GRUNDLAGEN (2001); *see also* Stefan Vogenauer, *An Empire of Light? Learning and Lawmaking in the History of German Law*, 64 THE CAMBRIDGE L.J. 481 (2005) (providing an English language summary on the German history). In English, one usually finds references to the classic comparative treatises by JOHN PHILIP DAWSON, THE ORACLES OF THE LAW (1968) and by RAOUL C. VAN CAENEGEM, JUDGES, LEGISLATORS AND PROFESSORS: CHAPTERS IN EUROPEAN LEGAL HISTORY (1987).

[33]Mark Van Hoecke, *Methodology of Comparative Legal Research*, *in* LAW AND METHOD (2015). On the history of comparative law methods, see Günter Frankenberg, *Critical Histories of Comparative Law*, *in* THE OXFORD HANDBOOK OF LEGAL HISTORY (2018).

[34]*See* Annelise Riles, *Comparative Law and Socio-legal Studies*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW (Reinhard Zimmermann & Mathias Reimann eds., 2006); Naomi Creutzfeldt, Agnieszka Kubal & Fernanda Pirie, *Introduction: Exploring the Comparative in Socio-legal Studies*, 12 INT'L J.L. CONTEXT 377 (2016); Michelle Cottier, *Interdisziplinäre Rechtsvergleichung*, *in* INTERDISZIPLINÄRE RECHTSFORSCHUNG 109–23 (Christian Boulanger, Julika Rosenstock & Tobias Singelnstein eds., 2019).

[35]The subject is touched on in the chapter on "Sources of Law and Legal Method." Stefan Vogenauer, *Sources of Law and Legal Method in Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 870-99 (Reinhard Zimmermann & Mathias Reimann eds., 2006).

[36]For an exposition of this claim, see generally Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1980) (outlining a brilliant polemic about this claim). For a response, see Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 THE UNIV. OF CHICAGO L. REV. 462 (1987).

"legal" factors is insignificant in explaining the court's rulings, compared to ideological and strategic considerations.[37] No matter how convincing one finds radical or simplified versions of the legal indeterminacy thesis, legal realists' annihilation of law's pretenses to be an objective "science" has, by now, been almost universally accepted, irrespective of the conclusions that one draws from that insight.[38] Many scholars do not believe that doctrine is simply a smokescreen for "something else," at least not in all cases. Instead, their data points them to the assumption that doctrine does actually influence the behavior of judicial or other actors by constraining, or positively influencing, the available outcomes.[39] From a sociological perspective, it is necessary to clarify how the knowledge about "what the law is" is produced, and what social mechanisms are at play when doctrinal practices are involved in the social construction and reproduction of legal knowledge. This goes beyond simply stating causal effects evidenced by statistical correlations in our data, as valuable as such empirical knowledge is. Socio-legal scholars are typically also interested in how those empirical insights fit into existing social-scientific theorizing. In addition, the picture we will get will be very complex, and we can expect each area of law to function very differently—criminal law's doctrinal practices are different from public law's, and, say, family law and commercial law are worlds apart. There will be empirical cases where doctrine truly is nothing but a rationalization of extra-legal motivations; in other cases, we might find that it actually constrains the range of possible legal outcomes.

In contrast, the "critical legal studies" aspect concerns the fact that looking at what lawyers do or say is not just a special application of the Sociology of knowledge or the Sociology of professions.[40] Rather, it leads to the question of how much influence the legal profession has on central political and social decisions, and to what extent this influence can be justified—or instead—in what respects this influence has to be criticized. Thus, the question about how legal knowledge is produced also becomes a problem of democratic theory and the rule of law.[41] It needs to be empirically analyzed, not with the primary aim of "unmasking" and debunking its pretenses, but of making its mechanisms transparent and open for critical discussion. As Dieter Grimm has argued, if a legal norm finds its final form not at the time of its entering into force, but at the time of its application in a specific case, then the rules and metarules of its application are as important as the

[37]For classic works on this see generally Segal & Spaeth, The Supreme Court and the Attitudinal Model (1993); Segal & Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002); Epstein & Knight, The Choices Justices Make (1998).

[38]Duxbury, *supra* note 3; Brian Z. Tamanaha, *Understanding Legal Realism*, 87 Tex. L. Rev. 731 (2008). The legal realists in the United States were not the first to point this out, but their influence on legal thinking was much stronger than that of their precursors and counterparts in Europe. *See also* Klaas Hendrik Eller, *Comparative Genealogies of "Contract and Society,"* in this issue. In Germany, the "scientific" basis of "legal science" is still an important topic. *See, e.g.*, Helmuth Schulze-Fielitz, Staatsrechtslehre als Wissenschaft (2017).

[39]More recently, some protagonists in U.S. political science research on judicial behavior have called for revisiting some of the main assumptions of this literature. They have hinted at the possibility that one of the factors motivating judges might, after all, be "a simple desire to 'follow the law.'" *See* Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 Ann. Rev. Pol Sci. 11, 25 (2013). *See also* Daniel L. Chen, Jens Frankenreiter & Susan Yeh, *Judicial Compliance in District Courts* (2017), *Available at* https://papers.ssrn.com/abstract=2740594 (last visited Apr. 27, 2020); Tiller & Cross, *supra* note 17; Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 Yale L.J. 2155 (1998).

[40]This is Luhmann's reservation against the study of judicial behavior or the legal profession. *See* Niklas Luhmann, Rechtssoziologie 3–9 (1972).

[41]See generally Liza Mattutat, *Das Problem der Unbestimmtheit des Rechts – Konsequenzen für die theoretische und die praktische Rechtskritik*, Kritische Justiz 496–508 (2016). See also Tushnet's claim that because of the indeterminacy of law, the "rule of law" is nothing but untenable liberal ideology. Tushnet, *supra* note 36. On Critical Legal Studies, see generally Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561 (1983) (the canonical article on the subject), although critiques of doctrinal truth-claims are not limited to the political left, as the example of Carl Schmitt shows. William E. Scheueman, The End of Law: Carl Schmitt in the Twenty-First Century (2d ed. 2019).

norm itself.[42] As the method of interpretation can drastically change the meaning of a legal rule, it is not surprising that, as Grimm points out, most important debates in German jurisprudence have concerned themselves with methods rather than substantive content.[43] The power to interpret legal norms[44] implies the power to choose the rules of interpretation. This power is always shared with the community to which doctrinal texts are addressed, because the approval of this audience is critical to the authority of the interpreter.[45] However, the takeaway is that when we are talking about doctrine, we are always also talking about power issues. This is obvious in high-level cases in apex courts on a national or international level, but equally true for lower-level courts,[46] or questions of legal education[47] or career paths in legal academia.[48]

D. Legal Doctrine as Institutionally Legitimated Practice

Before turning to the questions that a comparative inquiry might address, it is necessary to define the concept of doctrine that such an inquiry might be based upon. As comparative lawyers know, the use of one's own vocabulary to describe a different legal system is highly problematic. The same is true for a socio-legal approach. One can introduce a new, alien vocabulary, as System Theory does, to get rid of historical and cultural connotations.[49] Another option is to redefine the existing one—with Max Weber as the obvious example[50]. The advantage with the latter approach is that the resulting analysis is more accessible, in particular when dealing with an interdisciplinary audience, and that approach is chosen for this Article. However, it is important to keep in mind that one has to distinguish between the analytical concept of doctrine as used in this Article to cover doctrinal practices in general, and the term as it is used when describing actual "doctrine" as it is understood in various English-language legal systems.

In contrast to legal philosophy, a sociological perspective will define terms that refer to observable practices that go beyond the systems of thought that are communicated mainly through printed texts. Texts are the outcome of a whole chain of events in which actors do something; ideas are developed and communicated in social contexts which make some ideas easier to express than others.[51] Doctrinal practice usually requires making arguments that are considered to be

[42]Dieter Grimm, *Methode als Machtfaktor*, *in* Europäisches Rechtsdenken in Geschichte und Gegenwart 469, 470 (Norbert Horn ed., 1982).

[43]A vivid example is the principle of proportionality, which was developed in nineteenth century administrative law, to experience a remarkable career in German constitutional law and European Union law. Moshe Cohen-Eliya & Iddo Porat, Proportionality and constitutional culture (2013). Because it allows courts to control the rationality of political decisions, it was fiercely opposed by parts of legal scholarship who defended the discretion of governmental decision-makers and/or the sovereignty of parliament.

[44]For recent discussions of this power in German political science, see generally Hans Vorländer, *Deutungsmacht—Die Macht der Verfassungsgerichtsbarkeit*, *in* Die Deutungsmacht der Verfassungsgerichtsbarkeit (Hans Vorländer ed., 2006).

[45]Lawrence Baum, Judges and Their Audiences (2006); Nuno Garoupa & Tom Ginsburg, *Judicial Audiences and Reputation: Perspectives from Comparative Law*, 47 Colum. J. Transnat'l L. 451 (2011).

[46]One classical example from the German literature is Rüdiger Lautmann, Justiz—die stille Gewalt: Teilnehmende Beobachtung und Entscheidungssoziologische Analyse (1972).

[47]For example, there are feminist critiques of gender stereotypes in the contrived examples that are used in German law schools to teach students how to solve legal cases. *See generally* Dana-Sophia Valentiner, (Geschlechter) rollenstereotype in Juristischen Ausbildungsfällen (2017). For a critical view on legal education, see also Sonja Buckel, *Die Mechanik der Macht in der juristischen Ausbildung*, 35 Kritische Justiz 111–14 (2002).

[48]Fiona Cownie, Legal Academics: Culture and Identities (2004).

[49]Niklas Luhmann, Law as a Social System (Klaus A. Ziegert & Fatima Kastner trans., 2008).

[50]For a look at his "Basic Sociological Terms" or the ideal types of "Formal and Substantive Rationalization" in law, see Max Weber, Economy and Society (Guenther Roth & Claus Wittich eds., 1978).

[51]Michel Foucault, in particular, stressed this point. On the uses and the limits of Foucauldian discourse theory for socio-legal research, see Doris Schweitzer, *Diskursanalyse, Wahrheit und Recht: Methodologische Probleme einer Diskursanalyse des Rechts*, 35 Zeitschrift für Rechtssoziologie 201 (2015).

"legal" by the local epistemic community of lawyers[52] at a particular place and time. In all instances, "the normative content of any doctrine will fall to be determined by the dynamic interpretation of the legal community."[53]

This is why I argue that from a sociological perspective, doctrine refers to institutionally legitimized practices of making statements on what the law is. Defining doctrine as "making statements on what the law is" is hardly original and probably not controversial. The stress here is on "institutionally legitimized," because it signals the context-sensitivity of the approach. The form and behavior of legal institutions varies significantly in different locations, as do the ways these institutions confer legitimacy—in its empirical sense—on its members to make authoritative statements. This way of understanding doctrine as a social practice is general enough to cover the very distinct legal cultures in the UK and Germany without claiming to provide a universal definition.[54]

Doctrinal practices can be observed in judicial decision-making, in legal advocacy, and in legal scholarship. Each use involves different, but partly overlapping, institutionalized contexts: The judicial system, the market for legal services, and the academy. The first form has been thoroughly studied in the U.S. context, with a focus on higher courts,[55] and with the qualification that the "mainstream" research held for a long time that the actual impact of doctrine on judicial decision making was negligible. Lawyers have been a popular research object.[56] Lawyers use "applied doctrine," ready-made pieces of argumentation that do not have to be consistent as long as they are effective. For them, "legal expertise," which entails much more than strictly legal knowledge,[57] is much more important than the doctrinal quality of their argument. However, recent research on strategic litigation and "cause lawyering"[58] sheds a light on the attempts by lawyer activists to influence doctrine in order to change political or social outcomes.

The third form of doctrine, legal scholarship, is developed mainly, but not exclusively, at universities. For Susan Bartie, in the case of the UK, it is controversial to try and "define a 'standard' form of legal scholarship in circumstances where the concept of law and how it ought to be studied has been in a state of constant flux".[59] Bartie identifies the "core" of doctrinal legal scholarship, or the "concept of 'doctrinalism' or 'black letter law'" in the following way: "[F]ocusing on legal principle (largely that generated by courts but also the legislature); basing argument and prescription on a normative premise which is not unpacked or explained; reacting to events comprising of changes to the law by judges or legislators; and, looking for deficiencies in legal principles,

[52]On epistemic communities in the context of EU legal integration, see Jennifer Hendry, *The Double Fragmentation of Law: Legal System-internal Differentiation and the Process of Europeanisation*, *in* "Integration through Law" Revisited: The Making of the European Polity 157–70 (Daniel Augenstein ed., 2013). In Germany, Britta Rehder has used the concept to study developments in labor law. *See* Britta Rehder, Rechtsprechung als Politik: Der Beitrag des Bundesarbeitsgerichts zur Entwicklung der Arbeitsbeziehungen in Deutschland (2011).

[53]Getzler, *supra* note 7, at 173.

[54]Such an understanding is part of what Robert Merton has called "theories of the medium range," which are "theories that lie between the minor but necessary working hypotheses that evolve in abundance during day-to-day research and the all-inclusive systematic efforts to develop a unified theory that will explain all the observed uniformities of social behavior, social organization and social change." Robert K. Merton, Soc. Theory and Social Structure 39 (1957). On the difference between normative and empirical legitimacy, see Rodney Barker, *Legitimacy: The Identity of the Accused*, 42 Pol. Stud. 101, 101–02 (1994) (providing a succinct summary on the difference).

[55]The advanced state of research is evidenced by the existence of specialized handbooks such as the Routledge Handbook of Judicial Behavior (Robert M. Howard & Kirk A. Randazzo eds., 2018); and The Oxford Handbook of U.S. Judicial Behavior (Lee Epstein & Stefanie A. Lindquist eds., 1st ed. 2017).

[56]A lot of this literature deals with the influence of the legal profession on political outcomes. *See* Terence C. Halliday, *The Politics of Lawyers: An Emerging Agenda*, 24 L. & Soc. Inquiry 1007, 1007–11 (1999), and Lawyers in 21st-Century Societies (Richard L Abel et al. eds., 2020).

[57]For example, to know which judge is susceptible to what kind of argument. On "legal expertise," see Alexander Somek, Rechtliches Wissen (2006).

[58]*See, e.g.*, Lisa Hahn, *Strategische Prozessführung*, *in* Zeitschrift für Rechtssoziologie 5–32 (2019).

[59]Bartie, *supra* note 13, at 349.

suggesting ways to improve them or clarifying the law so that judges or legislators can better understand their development." For her, the methodology adopted is "likened to that of the courts with the primary focus resting on the internal logic of judgments or statute[s]."[60]

Despite the seemingly stronger continuity and stability of the practice of doctrinal analysis in Germany, no consensus exists about what exactly *Rechtsdogmatik* means.[61] German lawyers, when speaking of it, refer to texts—such as legal decisions, law review articles, commentary literature, or monographs. "Rechtsdogmatik," according to Christian Bumke, "endeavours to sift through and to secure the ideas and insights about the law. To this end, it forms and develops legal concepts or principles and organizes the legal material"[62] for the use in judicial argument and legal education. There is no consensus as to whether positive law is to be considered part of "Rechtsdogmatik."[63]

Both descriptions of doctrine hint at the generative, or creative, aspect of doctrinal legal scholarship only in passing. For Bumke, legal dogmatics "forms and develops legal concept or principles" only to the end of systematizing the law that is somehow "out there." Bartie equally portrays doctrinal analysis in the subservient role of a service provider for judges and legislators, which might occasionally make suggestions to improve legal principles. Legal doctrinal scholarship, in its many forms, is not simply reproducing decisions by legislatures and courts, but often "creating" legal principles, interpretative choices, and other normative ideas which are picked up and sanctified as law later on in the courts or in Parliament. As a rule, legal doctrinal texts aim to become part of legal knowledge—meaning they are read and cited by other lawyers. They create new law inasmuch as they do not simply reproduce something given, but make a choice as to what should count as the law. Dogmatic texts contain normative statements that, ultimately, are meant to be used in a judicial decision. In this way, a doctrinal text unfolds social effectiveness in a completely different way than, for example, a political science essay. This aspect of power is usually excluded from legal reflection. In empirical research, however, it is of great importance.

E. The Empirical Study of Legal Doctrine

How can we go about studying doctrinal practices empirically and comparatively? As I have argued, the Sociology of doctrine is a field of research that has yet to take definitive shape. The aim of this section is to identify, from a bird's eye view, existing theoretical and methodological work which can be brought together in order to advance the state of the art. As my research into the history and present state of this research in the UK is still very much at the beginning, the following observations are limited to a description of some recent developments in theoretical and methodological approaches in the German literature—in order to be able to identify similar research in the UK and elsewhere later.[64]

I. Theory

Traditional sociological theory has focused on observable human behavior and has regarded law as an epistemic object. Legal knowledge in this perspective consists of information, practices, discourses, et cetera, which are regarded, "known," and (re-)produced by actors as "legal." The

[60]*Id.*

[61]Martin Eifert, *Zum Verhältnis von Dogmatik und pluralisierter Rechtswissenschaft*, *in* WAS WEIß DOGMATIK? 79, 80 (Gregor Kirchhof, Stefan Magen & Karsten Schneider eds., 2012).

[62]Christian Bumke, *Rechtsdogmatik: Überlegungen zur Entwicklung und zu den Formen einer Denk- und Arbeitsweise der deutschen Rechtswissenschaft*, 69 JURISTENZEITUNG 641, 641 (2014).

[63]Rosenstock, Singelnstein, and Boulanger, *supra* note 2, at 9.

[64]Much more current and past research exists than what I present here. *See, e.g.*, NEUE THEORIEN DES RECHTS (Sonja Buckel, Ralf Christensen & Andreas Fischer-Lescano eds., 2d ed. 2008).

acting persons—for example judges, lawyers, legal academics, clients, or citizens—approach the law with often antagonistic interests and world views that can be in some way empirically determined or are theoretically presumed.

Max Weber's work falls into this tradition and is still quite influential, both in the social sciences and in the law in Germany. This is not surprising because Weber was a lawyer himself who used concepts from legal doctrine[65] to analyze the law sociologically. Weber pointed out the societal embeddedness of the law with his concept of "legal thinking," which was not about legal ideas alone, but also how they developed in response to social and economic needs, institutional constraints and incentives, and self-interests of the legal profession.[66] Weber's ideal typical description of what continental, or more specifically, German, legal doctrine purported to do at the turn of the twentieth century is that "the jurist, taking for granted the empirical validity of the legal propositions, examines each of them and tries to determine its logically correct meaning in such a way that all of them can be combined in a system which is logically coherent, in other words, free from internal contradictions."[67] For him, this "rational" system of doctrine was the outcome of the monopolization of legal education at the universities. Weber contrasted this type of "legal thinking" with the situation in England, where the "empirical training in the law as a craft training" prevented such rationalization to take place.[68] At the same time, this form of legal thinking implies contrasting visions of the role of the judge—anonymous legal "automaton" in Germany, charismatic judge in the UK.[69] Taking into account the deficiencies of a work that is more than one hundred years old,[70] the basic tenets of Weberian thinking continue to inspire general theorizing and often provide a common ground for lawyers and social scientists.[71] However, few studies apply Weberian theory for actual empirical research.[72]

In recent years, Pierre Bourdieu's work on law has become influential in German socio-legal studies.[73] Bourdieu builds on Weber's actor-centered and institutional analysis but adds the idea of the legal "field" in which individuals and groups with different "legal capital" and distinctive forms of "habitus" struggle for hegemony over the authoritative interpretation of the law. In his writings on law, which are exclusively concerned with the French case, the conflictual nature of the legal field is emphasized in a particularly strong manner: It is a matter of struggles over symbols and interpretations, but also over institutional hierarchies and financial resources.

[65]For example, note his use of "formal" and "substantive" to categorize types of legal thinking in different religions and parts of the world. *See* WEBER, *supra* note 50, at 654.

[66]*Id.* at 654–58.

[67]*Id.* at 311. From the context, it becomes clear that Weber does not claim that the legal method would actually bring laws into a logically coherent system. For him, lawyers in the continental European legal act as if this were the case, which has an effect on how the law works.

[68]*Id.* at 784. It is important to remember that "rational" in the Weberian sense is an analytical, not evaluative term. *See generally* Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031 (2003).

[69]WEBER, *supra* note 50, at 979, 763. On the notion of a "charismatic judge," see Isher-Paul Sahni, *Max Weber's Sociology of Law: Judge as Mediator*, 9 J. CLASSICAL SOCIO. 209 (2009).

[70]For an English language overview of some of the criticism of the empirical basis of Weber's historical and cross-cultural generalizations, theoretical inconsistencies and political biases, see STANISLAV ANDRESKI, MAX WEBER'S INSIGHTS AND ERRORS (2013).

[71]WOLFGANG SCHLUCHTER, HANDELN IM KONTEXT: NEUE ABHANDLUNGEN ZU EINEM FORSCHUNGSPROGRAMM IM ANSCHLUSS AN MAX WEBER (2018). More specifically on legal doctrine, see JENS PETERSEN, MAX WEBERS RECHTSSOZIOLOGIE UND DIE JURISTISCHE METHODENLEHRE (2008).

[72]I have used Weber's ideal typical method to study the Constitutional Courts in Germany and Hungary. *See generally* CHRISTIAN BOULANGER, HÜTEN, RICHTEN, GRÜNDEN: ROLLEN DER VERFASSUNGSGERICHTE IN DER DEMOKRATISIERUNG DEUTSCHLANDS UND UNGARNS (2013).

[73]DAS RECHTSDENKEN PIERRE BOURDIEUS (Andrea Kretschmann ed., 2019); ANJA BÖNING, JURA STUDIEREN: EINE EXPLORATIVE UNTERSUCHUNG IM ANSCHLUSS AN PIERRE BOURDIEU (2017); Michael Wrase, *Rechtsinterpretation als soziale Praxis—eine rechtssoziologische Perspektive auf juristische Methodik*, *in* POLITIK UND RECHT: UMRISSE EINES POLITIKWISSENSCHAFTLICHEN FORSCHUNGSFELDES 63–84 (Verena Frick, Oliver W. Lembcke & Roland Lhotta eds., 2017).

Bourdieu's concept of "habitus" is especially useful if we want to conceptualize doctrine as a social practice—meaning the sum of behaviors, attitudes, and ways of thinking that an individual has been socialized into as a part of a social group, such as lawyers, judges, professors, or bureaucrats.[74] Bourdieu is skeptical of the doctrinal habitus[75] but does not speak to the thesis of the indeterminacy of law. Instead, Bourdieusian insights are useful to identify social factors that affect the autonomy of legal discourse from within the legal field.[76]

The most individualistic approach surveyed here is the research on Behavioral Law and Economics that has gained prominence in Germany in the last couple of years following developments in economics in the United States.[77] It is premised on the theoretical model of utility maximizing actors, but unlike the original rational choice model of the *homo economicus* with fixed preferences, it allows for corrections of that model, for example, via controlled experiments, or by using large legal datasets—which I will analyze in greater detail below. Even though the research in this tradition is empirical, it so far has remained largely unconnected to socio-legal studies, which has to do, *inter alia*, with the fact that this line of research is interested in empirical questions mainly to solve legal questions rather than advance social scientific theorizing.[78] Law and Economics has traditionally regarded itself as an alternative to doctrinal analysis.[79] Because there are many ways in which the production of legal doctrine can be analyzed from an economic perspective, even those skeptical of economic perspectives should not discount the heuristic value of these approaches.[80]

Radically opposed to approaches that look at individuals and groups is the Systems Theory perspective developed by Niklas Luhmann and Gunther Teubner.[81] Such approaches understand law as an epistemic subject. From this perspective, law is a communicative system that creates its own reality, including the acting "persons," who appear only as "semantic artefacts" created by the system itself. System Theory views law as a self-referential system of communicative operations[82] that differ from other communications by using the binary distinction

[74]Mikael R. Madsen & Yves Dezalay, *The Power of the Legal Field: Pierre Bourdieu and the Law*, *in* An Introduction to Law and Social Theory (Reza Banakar & Max Travers eds., 2002).

[75]For his characterization of jurists as the "gatekeepers of collective hypocrisy," see Pierre Bourdieu, *Les juristes, gardiens de l'hypocrisie collective*, *in* Normes Juridiques et Regulation Sociale 195–99 (Francois Chazel & Jacques Commaille eds., 1991).

[76]Mauricio García Villegas, *On Pierre Bourdieu's Legal Thought*, *in* Droit et Société 57 (2004).

[77]An example of this is seen at the Max-Planck-Institute for Research on Collective Goods in Bonn. Christoph Engel, The Proper Scope of Behavioral Law and Economics (2018), http://www.coll.mpg.de/pdf_dat/2018_02online.pdf (last visited July 24, 2019). For a central reference point of the U.S. literature, see generally Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471 (1998).

[78]Christoph Engel, Rechtswissenschaft als angewandte Sozialwissenschaft: Die Aufgabe der Rechtswissenschaft nach der Öffnung der Rechtsordnung für sozialwissenschaftliche Theorie (1998), http://www.mpp-rdg.mpg.de/pdf_dat/9801.pdf (last visited May 23, 2020). Another reason might be continuing reservations of socio-legal studies towards Law and Economics. But the most important factor certainly is that publication in socio-legal and/or German legal journals is unattractive for Law and Economics scholars, who must publish in highly competitive, law and economy-focused journals to advance their careers.

[79]*See* Emanuel V. Towfigh, *Empirical Arguments in Public Law Doctrine: Should Empirical Legal Studies Make a "Doctrinal Turn"?*, 12 ICON 670 (2014).

[80]Dogmatic knowledge production, especially outside the courts, is subject to the rules of supply and demand. Depending on the context, certain types of doctrinal productions "pay off" more than others. On the one hand, financially—depending on the market for textbooks, commentaries, or expert opinions—and on the other hand, structurally, which is probably more important as a factor in the accumulation of reputational capital or career opportunities. It is also important to keep in mind the limits of an ahistorical focus on incentives when explaining the behavior of legal actors. *See* Craig Green, *What Does Richard Posner Know About How Judges Think?*, 98 Cal. L. Rev. 625, 626 (2010).

[81]*See* Ioannis Kampourakis, *Empiricism, Constructivism, and Grand Theory in Sociological Approaches to Law: The Case of Transnational Private Regulation*, in this issue.

[82]Gunther Teubner, *Die Episteme des Rechts. Zu erkenntnistheoretischen Grundlagen des reflexiven Rechts*, *in* Wachsende Staatsaufgaben—sinkende Steuerungsfähigkeit des Rechts 114–55 (Dieter Grimm ed., 1990), in which Teubner emphasizes that "Law is communication and nothing but communication!" (p. 127).

between "legal" and "illegal."[83] For Luhmann, *Rechtsdogmatik* in its specific German characteristic is "one of several functionally equivalent solutions" of how the legal system is controlling its operations.[84] Systems-theoretical legal analysis has often been criticized for taking tortuous detours to address the fact that "questions of interpretation are questions of power and sovereignty,"[85] a problem that "Critical Systems Theory" aims to address.[86] System Theory is probably the best theory we have to describe the emergence of the precarious and, according to Luhmann, highly unlikely autonomy of law, via a process of functional differentiation.[87] However, as Matthias Mahlmann has argued, System Theory is not particularly well-suited to identify the specific social forces or purposeful interventions—for example, by moral entrepreneurs—that very often drive real legal development.[88]

II. Methods

In German Sociology of law, different empirical methods have been used to look at what lawyers are doing. In the 1970s, Ekkehard Klausa called for an empirical "Sociology of Jurisprudence" and used survey research to gather information on law professors.[89] More influential was Rüdiger Lautmann's study from 1972, which engaged in covert participant observation to study how first-instance court judges actually decide cases.[90] After that, most work was theoretical and hermeneutic. It took roughly forty years before new empirical work in this tradition was produced, such as a study by Peter Stegmaier, who relied on interviews and overt participant observation to analyze how private and administrative judges deal with cases.[91] But it was not the Sociology of Law that was most productive in this respect.[92] Instead, the most influential works came from German Political Science, where partly interview-based research shed new light on doctrinal practices at the apex courts, such as studies by Uwe Kranenpohl and Oliver Lembcke on Justices of the Federal Constitutional Court,[93] or by Britta Rehder on the interaction between the Federal Labor Court and labor law lawyers.[94]

[83]Niklas Luhmann, Law as a Social System (Klaus A. Ziegert & Fatima Kastner trans., 2008).

[84]Niklas Luhmann, Rechtssystem und Rechtsdogmatik 18, 24 (1974). This is the "early" Luhmann, who does not yet use the language of autopoiesis.

[85]Eckard Bolsinger, *Autonomie des Rechts? Niklas Luhmanns soziologischer Rechtspositivismus — Eine kritische Rekonstruktion*, 42 Politische Vierteljahresschrift 3, 21 (2001).

[86]*See* Marc Amstutz & Andreas Fischer-Lescano, Kritische Systemtheorie: Zur Evolution Einer Normativen Theorie (2014).

[87]Luhmann, *supra* note 83, at ch. 6.

[88]Matthias Mahlmann, *Katastrophen der Rechtsgeschichte und die autopoietische Evolution des Rechts*, 21 Zeitschrift für Rechtssoziologie 247, 275 (2000).

[89]*See generally* Ekkehard Klausa, Deutsche und amerikanische Rechtslehrer: Wege zu einer Soziologie der Jurisprudenz. (1981). Klausa's "Program for a Sociology of Juridical Science" from 1975 had no lasting influence. *See* Ekkehard Klausa, *Programm einer Wissenschaftssoziologie der Jurisprudenz*, *in* Wissenschaftssoziologie 100–21 (Nico Stehr & René König eds., 1975).

[90]Because of the covert nature of the observation, the study was very controversial and would probably not pass today's research ethics review. Most of the stir it caused, however, was due to the fact that the study revealed how much the reality of judicial decision-making diverted from the official account of the legal process. Rüdiger Lautmann, Justiz—die stille Gewalt: Teilnehmende Beobachtung und entscheidungssoziologische Analyse (Wiederabdruck ed. 2011).

[91]Peter Stegmaier, Wissen, was Recht ist: Richterliche Rechtspraxis aus Wissenssoziologisch-Ethnografischer Sicht (2009).

[92]On this, see Christian Boulanger, *Bundesverfassungsgerichtsforschung und Rechtssoziologie*, 56 Recht und Politik (forthcoming 2020).

[93]Uwe Kranenpohl, Hinter dem Schleier des Beratungsgeheimnisses: der Willensbildungs und Entscheidungsprozess des Bundesverfassungsgerichts (2010); Oliver W. Lembcke, Hüter der Verfassung: Eine institutionentheoretische Studie zur Autorität des Bundesverfassungsgerichts (2007).

[94]Rehder, *supra* note 52.

Using survey research, interviews, or ethnographic methods[95] can produce valuable empirical data. One reason why these works are so rare is that applying these methods involves a lot of additional effort and time—sometimes also financial resources—usually more than is required when doing desk-based research, not to mention the fact that German lawyers do not receive training in empirical methods. The general reluctance by legal professionals to publicly reflect on the various non-legal influences on their craft has been very strong in Germany,[96] although this might be changing with new generations of increasingly interdisciplinary-minded legal scholars and practitioners. In many cases, however, only trained lawyers have access to, and can report from, what is going on inside the legal black box.[97]

An alternative approach is to return the focus to doctrinal text production. Recent literature has taken up concepts from literary studies to differentiate the ways in which textual data can be approached. On the one hand, "close reading" pays attention to the meaning of individual texts, and traces the development, diffusion, and transformation of doctrinal ideas against the social context in which they exist. An example of this kind of research in German constitutional law history would be Thomas Henne's and Arne Riedlinger's edited volume on the *Lüth* Decision of the German Federal Constitutional Court,[98] which works out the historical context in which the doctrine of the "direct third-party effect" in German constitutional law was developed. Another example is Gunter Frieder's work on the competition between the Smend and Schmitt "schools" over doctrinal dominance in constitutional law scholarship in post-war Germany.[99] Recently, Verena Frick traced the internal struggles within the German Association of Constitutional Law Teachers and the influence of these debates on constitutional law from a political science perspective.[100] These works emphasize the importance of biographical detail, academic lineages, institutional competition, and historical events for the development of doctrinal thought. They call for the "historicization" of doctrine as opposed to the decontextualization and abstraction to which German legal thought tends.[101]

On the other hand, "distant reading" digests a large number of texts by having algorithms "read" the texts.[102] Algorithmic reading of judicial or academic doctrinal texts is a newer branch of research into legal doctrine that differs from the traditional social scientific method of using texts as data with which to test hypotheses.[103] Another method for inferring causal relationships

[95]For yet another approach, see micro-sociological work by Thomas Scheffer and others who have been comparatively studying interactions in German and UK courts. Thomas Scheffer, Kati Hannken-Illjes & Alexander Kozin, Criminal Defence and Procedure: Comparative Ethnographies in the United Kingdom, Germany, and the United States (2010).

[96]See the preface of Lautmann, *supra* note 90. There are also good reasons for this, such as keeping judicial deliberations confidential. Kranenpohl, *supra* note 93, at ch. 5.

[97]*See* Hartmut Rensen, *Wie funktioniert die Interpretation des Rechts in der Praxis?*, *in* Politik und Recht: Umrisse eines politikwissenschaftlichen Forschungsfeldes 41–62 (Verena Frick, Oliver W. Lembcke & Roland Lhotta eds., 2017).

[98]*See* Das Lüth-Urteil in (rechts-)historischer Sicht. Die Konflikte um Veit Harlan und die Grundrechtsjudikatur des Bundesverfassungsgerichts, (Thomas Henne & Arne Riedlinger eds., 2005).

[99]Frieder Günther, Denken vom Staat her: die bundesdeutsche Staatsrechtslehre zwischen Dezision und Integration 1949–1970 (2009). A different example from outside Germany would be recent work on the socio-historical genesis of the proportionality principle. *See* Cohen-Eliya & Porat, *supra* note 43.

[100]Verena Frick, Die Staatsrechtslehre im Streit um Ihren Gegenstand: die Staats und Verfassungsdebatten Seit 1979 (2018).

[101]Das Lüth-Urteil in (rechts-)historischer Sicht, *supra* note 98.

[102]The classic reference there is to Franco Moretti, Graphs, Maps, Trees: Abstract Models for a Literary History (2005). *See* Katherine Bode, *The Equivalence of "Close" and "Distant" Reading; or, Toward a New Object for Data-Rich Literary History*, 78 Mod. Language Q. 77–106 (2017).

[103]This methodology is based on "coding" the texts. In other words, a researcher takes documents like judicial decisions and translates the texts into a number of static, mostly binary, variables. These variables are entered into a database; statistical methods are then used to calculate if the hypotheses can be confirmed or not. *See, e.g.*, Sylvain Brouard & Christoph Hönnige, *Constitutional Courts as Veto Players: Lessons from the United States, France and Germany*, Eur. J. Pol. Res. 529 (2017); Benjamin G. Engst et al., *Zum Einfluss der Parteinähe auf das Abstimmungsverhalten der Bundesverfassungsrichter – eine quantitative Untersuchung*, 72 JuristenZeitung 816 (2017).

using a large number of texts is network analysis, which has been used, inter alia, to uncover citation networks in the jurisprudence of apex courts.[104] A third often-used quantitative methodology is to use topic modeling algorithms, which have been defined as "statistical text mining or information retrieval methods used for uncovering the main themes underlying a collection of documents."[105] This, for example, is used to show how rules of procedure affect the material content of decisions of the German Constitutional Court.[106] Finally, I should mention recent efforts to bring together quantitative legal studies and legal linguistics, which will certainly have to be a part of a comparative study of doctrine.[107]

These text-based quantitative methodologies have been almost exclusively applied to digital text collections of judicial decisions. Unlike most other forms of legal data, collections of judicial decisions can, in many cases, be freely downloaded. In contrast, the access to digitized forms of legal scholarship is, in the majority of cases, encumbered by corporate paywalls and publisher's copyright—not to mention the complication of the fragmented state of ownership over the documents. This is probably the reason why legal doctrinal scholarship has not yet been the subject of much quantitative research. As legal scholarship increasingly moves to open access publishing and historical doctrinal scholarship falls into the public domain, we can expect growing opportunities for research on legal doctrinal scholarship. Given the availability of doctrinal "big data," we will be able to trace the emergence and development of doctrinal figures, trace citation networks, and academic lineages, as well as pursue other research questions that have occupied qualitative research for a long time.

E. Conclusion and Outlook

I have presented some of the theoretical and methodological approaches in German research on law that can be brought to bear on the interdisciplinary study of doctrine. The existing variety of theories and methods provides multiple angles from which to choose and explain historical and contemporary data. Combined with similar efforts in the UK and elsewhere, there is great potential for the comparative analysis of doctrinal knowledge production.

In the literature that I have surveyed, we have seen a diverse set of research questions, which could be brought together and pushed forward in a systematic interdisciplinary and comparative research program. One of them has been the question: To what extent do judicially or academically produced doctrinal rules determine judicial decisions? This concerns the varying degrees to which scholarship influences judges in their decision-making and whether this influence is openly acknowledged or not.[108] However, it is important to ask what relationship exists between doctrinal practices and the character of the political regime in which it is embedded.[109] Another, more

[104] *See generally* Mattias Derlén & Johan Lindholm, *Peek-A-Boo, It's a Case Law System! Comparing the European Court of Justice and the United States Supreme Court from a Network Perspective,* 18 German L.J. 647 (2017); Jens Frankenreiter, *Network Analysis and the Use of Precedent in the Case Law of the CJEU – A Reply to Derlén and Lindholm,* 18 German L.J. 687 (2017); Niels Petersen & Emanuel V. Towfigh, *Network Analysis and Legal Scholarship,* 18 German L.J. 695 (2017). For Germany, *see* Corinna Coupette, Juristische Netzwerkforschung. (2019).

[105] Luisa Wendel, Anna Shadrova & Alexander Tischbirek, *Variations in Prevalent Themes in the German Federal Constitutional Court's Decisions* (unpublished manuscript on file with the author).

[106] *Id.*

[107] *See* Hanjo Hamann & Friedemann Vogel, *Evidence-Based Jurisprudence Meets Legal Linguistics-Unlikely Blends Made in Germany*, 2017 BYU L. Rev. 1473 (2017).

[108] Neil Duxbury, in particular, has studied the relationship between courts and legal academia in the cases of the U.S., France, and the UK. *See* Neil Duxbury, Jurists and Judges: An Essay on Influence (2001). Classical comparative works which also touch this question are John Philip Dawson, The Oracles of the Law (1968) and also Raoul Van Caenegem, Judges, Legislators and Professors: Chapters in European Legal History (1987).

[109] See generally the classic work by Mirjan R. Damaška, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process (1986).

theoretical line of inquiry, has been to ask about the function of law, and therefore legal-doctrinal practices in society.[110] In what ways does doctrine support law's role as a tool of social control in the hands of the economically powerful, as scholars in the Marxian tradition have argued?[111] How does doctrine, as a practice, preserve inequalities in terms of, for example, gender and race?[112] And, on the contrary, in which cases can doctrinal practices be employed towards the aim of inducing progressive social change?[113] How does doctrine help sustain law's role as a medium of social integration envisioned by classical Sociology in the tradition of Durkheim and Weber?[114] Finally, what do the widely divergent doctrinal practices in different jurisdictions tell us about law's function of stabilizing normative expectations postulated by System Theory?[115]

In addition, one can look at other theoretical perspectives that I have not mentioned. For example, it would be useful to connect the comparative Sociology of academic disciplines on one side,[116] with the comparative study of legal scholarship, and of socio-legal studies, on the other. In addition, further empirical research is needed to determine how processes of doctrinal argumentation and persuasion actually work in the different legal arenas given the solid evidence of various cognitive biases that affect the "rationality" of legal argumentation and decision-making.[117] This research would be crucial in covering the middle ground between the equally implausible, and largely abandoned, theoretical positions that maintain that doctrine either is the product of an internal "scientific" legal logic, or simply mirrors external influences—such as societal power relations, judges' ideological preferences, et cetera.

In German legal discourse, some argue that "through doctrinal work, objectification and value neutrality can and should be achieved."[118] Most empirical theorists are doubtful of earlier claims that legal doctrine is actually able "to transform value judgements into questions of knowledge and truth."[119] As we have seen, whereas earlier social science theorizing, in particular in the United States, was convinced that legal arguments mattered little in the decision-making of courts, empirical research in the meantime has "established the very important point that

[110] *See, e.g.*, Die Funktion des Rechts in der modernen Gesellschaft (Rüdiger Lautmann, Werner Maihofer & Helmut Schelsky eds., 1970). I have examined this question in more detail. *See* Christian Boulanger, *Die Soziologie juristischer Wissensproduktion*, *in* Interdisziplinäre Rechtsforschung 173, 183–88 (Christian Boulanger, Julika Rosenstock & Tobias Singelnstein eds., 2019).

[111] One text that has been influential in Germany and found an audience in the UK is Karl Renner, The Institutions of Private Law and Their Social Functions (1949). For newer critiques of "Juridism" or the legal form, see Daniel Loick, Juridismus: Konturen einer kritischen Theorie des Rechts (2017); *see also* Christoph Menke, Kritik der Rechte (2015). None of these works are sociological in nature, however.

[112] Valentiner, *supra* note 47; Cengiz Barskanmaz, *Rassismus, Postkolonialismus und Recht – Zu einer deutschen Critical Race Theory?*, 41 Kritische Justiz 296 (2008).

[113] Many forms of civil rights litigation are aimed not only at affecting a certain outcome in a court case, but to establish judicial precedents that effectively change judicial doctrine. For Germany, where this is a rather recent topic, see Christian Boulanger & David Krebs, *Strategische Prozessführung*, 39 Zeitschrift für Rechtssoziologie 1, 1–4 (2019); Alexander Graser, *Strategic Litigation – oder: Was man mit der Dritten Gewalt sonst noch so anfangen kann*, 10 Rechtwissenschaft 317 (2019). The U.S. literature—for example, by Austin Sarat, Stuart Scheingold, or Michael McCann—is well established. Newer works stress the fact that strategic litigation can also be used for aims that are contrary to the progressive agenda. *See generally* Amanda Hollis-Brusky, *Support Structures and Constitutional Change: Teles, Southworth, and the Conservative Legal Movement: Support Structures and Constitutional Change*, 36 L. & Soc. Inquiry 516 (2011).

[114] Mathieu Deflem, Sociology of Law: Visions of a Scholarly Tradition (2008).

[115] Or more precisely, of the expectation of expectations, see Luhmann, *supra* note 84, at ch. 3.

[116] Michèle Lamont, How Professors Think: Inside the Curious World of Academic Judgment (2010).

[117] *But see* Daniel M. Klerman & Holger Spamann, *Law Matters – Less Than We Thought* (2019), https://papers.ssrn.com/abstract=3439526 (last visited Nov. 22, 2019).

[118] Wahl, *supra* note 21, at 129.

[119] Josef Esser, Vorverständnis und Methodenwahl in der Rechtsfindung: Rationalitätsgrundlagen richterlicher Entscheidungspraxis 98 (1972).

doctrine does matter in future decisions."[120] How exactly this plays out in the interaction between courts, legal practitioners and the legal academy can be the subject of future interdisciplinary and comparative research. I have tried to show that doctrine, which many regard as arcane and/or boring by non-lawyers, is actually an interesting and important subject for comparative socio-legal research, and that it can elucidate some of the very marked legal-cultural differences between countries such as Germany and the UK.

[120]Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 NW. UNIV. L. REV. 517, 525 (2006).

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ARTICLE

Finding New Ways of "Doing" Socio-Legal Labor Law History in Germany and the UK: Introducing a "Minor Comparativism"

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Abstract
Labor law scholars have been receptive to socio legal methods, going beyond doctrinal legal sources and looking to other disciplines including industrial relations, sociology, and history. This Article revisits the development of socio legal labor law scholarship in Germany and the UK in order to understand the different approaches within the context of two different legal and academic cultures, and considers how a comparison can provide new insights at a time when the discipline is in a state of flux. In particular, this Article focuses on how history can provide an entrée into different ways of comparing labor law and labor relations systems. It seeks to start a methodological debate on "how to do" labor law history within the context of the discipline's socio legal origins. In a final section, it uses insights from history and comparative law in order to develop a new methodology—a "minor comparativism"—which unearths the processes and influences underpinning the historical development of labor law which have hitherto escaped the legal record. Such an approach enables scholars to reassess traditional narratives—a worthwhile endeavor at a time when the future role of labor law in regulating work is under scrutiny.

Keywords: Labor law; comparative law; legal history; labor history

A. Introduction

Labor law, comprising individual employment laws and the collective regulation of work by trade unions and employers at different levels, lends itself to socio-legal approaches. Labor law not only involves the legal regulation of the work relationship, but also broader policy choices about the nature of society and the distribution of resources. Any sophisticated study of the discipline mandates an understanding of labor law's legislative content as well as the historical, social, political, and economic context within which it has evolved, and within which its legislation plays out. Thus, labor law scholars have been receptive to socio-legal methods—going beyond doctrinal legal sources and looking to other disciplines including industrial relations, sociology, and history. Many scholars are committed to legal pluralism in recognizing the involvement of nonstate actors such as trade unions and employer associations in law creation and law enforcement.[1] Yet the decline of the old industrial order since the latter half of the twentieth century, and the transformation of work and production, have triggered a debate amongst labor law academics about the

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[1] *See generally* Ruth Dukes, *Critical Labour Law: Then and Now*, *in* RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY 345, 349 (Emilios Christodoulidis et al. eds., 2019); Karl Klare, *Horizons of Transformative Labour Law*, *in* LABOUR LAW IN AN ERA OF GLOBALISATION (Joanne Conaghan et al. eds., 2004).

future of capitalism and labor law's role within it. Scholars have struggled to define the discipline's institutional and normative weight in the face of globally integrated markets and a drastically changed regulatory environment. There is a recognition, particularly amongst British labor law scholars, that "old ways of thinking about the subject, of describing and analyzing it, [seem] increasingly inadequate, but new ways have yet to be found."[2]

Contributing to this special issue provides an opportunity to revisit the development of socio-legal labor law scholarship in Germany and the UK, to understand the different approaches within the context of two different legal and academic cultures, and to consider how a comparison can provide new insights at a time when the discipline is in a state of flux. This Article focuses in particular on how history can provide an *entrée* into different ways of comparing labor law and labor relations systems. While early labor law scholars in Germany and the UK relied on history to develop new understandings for the discipline, few contemporary academic labor lawyers would identify as labor law historians.[3] There is no institutional infrastructure or identifiable community of scholars dedicated specifically to the field—in the sense of scholars who share common understandings about the subject matter, including its methodological requirements.[4] The scope of the field itself remains unclear, both substantively and temporally. It straddles labor history and legal history, but lacks a home of its own—as scholars who research medieval laws on master and servant are more likely to attend legal history conferences than labor law conferences.[5] Since the 1960s, there has been a rise in labor history scholarship which has looked at working-class experience more broadly where topics overlap with labor law.[6] However, labor historians "have only occasionally engaged with twentieth century labor law,"[7] and their work has never become part of mainstream labor law scholarship. Indeed, it is only occasionally cited by those working on labor law history. A consequence of the blurring of boundaries and lack of a distinct community amongst labor law historians is that there have been limited reflections on the foundational question of "how to do" labor law history within a national and comparative context in both Germany and the UK. Eric Tucker aptly suggests that labor law historians "ain't got no home," and that there has been "limited development of a collective identity which in turn has failed to produce the institutional infrastructure that would support greater reflection on methodological issues in the field."[8]

This Article seeks to start a methodological debate on "how to do" labor law history within the context of the discipline's socio-legal origins. It uses insights from history and comparative law in order to develop a new methodology, a "minor comparativism,"[9] which unearths the processes and influences underpinning the historical development of labor law which have hitherto escaped the legal record. A minor comparativism enables scholars to adopt the perspective of those who were minorities—in the sense of being powerless—within their own country. In doing so, it encourages alternative ways of thinking about traditional narratives by revealing the views of minority groups whose ideas were not translated into law. Such an approach enables scholars to reassess traditional narratives—a worthwhile endeavor at a time when the future role of labor law in regulating work is under scrutiny.

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[2]Dukes, *supra* note 1, at 354 (citing THE IDEA OF LABOR LAW (Guy Davidov & Brian Langille eds., 2011)).

[3]*See generally* Eric Tucker, *On Writing Labour Law History: A Reconnaissance*, 33 INT'L J. COMP. LAB. L. & INDUS. REL. 39 (2017) (for an overview of the literature).

[4]Writing labor law history is not necessarily dependent on the establishment of such a community. However, the successful establishment of a field of study is often marked by the creation of an institutional infrastructure, including academic societies, regular conferences, and dedicated journals. *See generally id.*

[5]*Id.* at 44.

[6]*See generally* JOAN ALLEN ET AL., HISTORIES OF LABOUR. NATIONAL AND INTERNATIONAL PERSPECTIVES (2010).

[7]*Id.* at 106–07.

[8]Tucker, *supra* note 3, at 42.

[9]*See generally* Sherally Munshi, *You Will See My Family Become so American: Toward a Minor Comparativism*, 63 AM. J. COMP. L. 655 (2015).

The Article proceeds as follows. Sections B and C revisit the development of socio-legal, or historical, labor law scholarship in Germany and the UK. Section B finds that there is an openness, to varying degrees, in both systems to socio-legal approaches. Though the tradition of socio-legal labor law scholarship originated in Germany, it has embedded itself in the UK. Section C presents a short history of labor law history in both countries. Again, there is an openness to socio-legal approaches, but there has been limited engagement with methodological questions. Labor law history lacks a debate on its relationship with socio-legal studies more broadly. In Sections D and E, I begin to develop a methodology for labor law history within a socio-legal framework, based on comparative law and drawing on historical sources and methods. Section D situates the methodology within comparative law and introduces the concept of a minor comparativism. Section E illustrates the possible uses of a minor comparativism by summarizing my current research project on worker participation in workplace decision-making, followed by a conclusion.

B. The Development of the Socio-Legal Study of Labor Law

There is an established tradition of socio-legal labor law scholarship which emerged first in Germany, and later in the UK. In Germany, Hugo Sinzheimer (1875–1945) played a major role in developing a theory of German labor law during the Weimar Republic. Sinzheimer considered labor law as a tool to be manipulated to correct the injustices inherent in the capitalist mode of production.[10] He supported Rudolf Stammler's theory according to which "law" represents the "moulding force" of social life: "Society does not exist in a preconstituted form," but "is 'guaranteed' by law."[11] For Sinzheimer, this meant that the "law"—as contained in legislation and court judgments—was not just a system of norms, but also had to correspond to the social needs for which it was developed. Thus, law had to be understood within the context of "legal reality," or, the norms which govern social action. Any analysis of labor law had to adopt a socio-legal method.[12]

Sinzheimer's advocacy for the socio-legal method in labor law fed into the *Methodenstreit* of the 1930s, which pitched the socio-legal method against the "law as science" approach— the latter supported by a number of leading German labor law scholars, including Hans Carl Nipperdey and Walter Kaskel.[13] The "law as science" approach stressed objectivity in legal analysis—rejecting any "politico-legal" treatment of labor law, which it considered a "step backwards to a kind of sociological feuilleton"[14]—and instead adopted a legal dogmatic lens.[15] It systematically divided labor law "into several components (together with industrial insurance, labor contracts, labor protection, labor constitution (*Arbeitsverfassung*), the public authorities with regard to work and trade disputes, as well as the 'search' for work (*Arbeitsbeschaffung*) and help for the unemployed)."[16] Labor law was studied and taught in an aprioristic manner. Sinzheimer broke with this systematization, by interpreting labor law in a way that clarified "the processes going towards its making, starting with the structures and functioning of rival social forces."[17]

[10]*See generally* Ruth Dukes, The Labour Constitution: The Enduring Idea of Labour Law (2014).

[11]*See generally* Rudolf Stammler, Wirtschaft und Recht (1986); Luca Nogler, *In Memory of Hugo Sinzheimer (1875-1945): Remarks on the Methodenstreit in Labour Law* 2 Cardozo L. Bull. (1996), www.jus.unitn.it/cardozo/review/laborlaw/nogler-1996/nogler.htm.

[12]Nogler, *supra* note 11.

[13]*Id.* On the *Methodenstreit* in law more generally, see Michael Stolleis, Der Methodenstreit Der Werimarer Staatsrechtslehre – Ein Abgeschlossenes Kapitel Der Wissenschaftsgeschichte? (2001).

[14]*See* Walter Kaskel, Recht Und Wirtschaft 70–71 (1922).

[15]*See also* Sandro Blanko, Soziales Recht Oder Kollektive Privatautonomie: Hugo Sinzheimer Im Kontext Nach 1900 Ch. 2 (2005), 67-100.

[16]Kaskel, *supra* note 14, at 71–72.

[17]Nogler, *supra* note 11 (citing Franz Mestitz, *Alcuni ricordi di Hugo Sinzheimer*, *in* Lavoro E Diritto 1 (1989)).

As a prominent Jewish scholar, Sinzheimer was forced to leave Germany for the Netherlands in 1933 and died in exile in 1945. Following World War II, Sinzheimer's approach was not initially resurrected. Labor law lacked the foundational, legal-political debate on its role and purpose which had defined the Weimar Republic. It was characterized by a "withdrawal to general clauses" and a reliance on "judge-made laws."[18] Labor laws and the accompanying jurisprudence were based on the principles of social and mutual cooperation which tempered collective articulation and action.[19] As Ramm explains, "[a]fter 1945 labor law was deprived of its left wing politics and Jewish scholars; it was a labor law in which the force of the workers' movement was lacking, as was the social issue."[20] A change in approach only occurred in the 1970s when a group of younger scholars reignited the *Methodenstreit* of the inter-war years by calling for labor law to consider the law as it exists in society.[21] This group of scholars—the "labour law left" (*die arbeitsrechtliche Linke*), a minority in labor law scholarship—presented their arguments as a rigorous rebuttal of the majority's legal dogmatic arguments. They adopted a broad definition of labor law as including the law as contained in legislation and judicial decisions as well as its impact on the work relationship. The *arbeitsrechtliche Linke* advocated a more politicized approach to labor law, analyzing the law through recourse to socio-legal methods.[22] In doing so, they revived a foundational, and still ongoing, debate on the role and purpose of labor law scholarship. Coupled with changes in the labor market that have led to a decline in the standard employment relationship, there has been a recognition in Germany that labor law scholarship must respond "to problems of daily life and away from abstract theory or, as it is called, *Dogmatik*,"[23] thereby opening up potential avenues for future socio-legal research projects.

Although his influence has been limited in his home country, Sinzheimer's socio-legal approach had an effect beyond Germany. Otto Kahn-Freund (1900–1979), the "founding father" of British labor law and one-time student of Sinzheimer, had internalized his teacher's thinking.[24] Kahn-Freund's main contribution to the creation and development of British labor law was his articulation of the doctrine of *collective laissez-faire*, which states that the central function of British labor law is to enable, facilitate, and support the regulation of the employment relationship through voluntary collective bargaining between employers and trade unions. As Davies and Freedland explain:

> At the heart of Otto Kahn-Freund's thinking about labor law was an ideology of collective bargaining . . . . It was an ideology in the sense of being a set of ideas that assumed systematic proportions, that is to say was regarded as a basis for thinking about labor law and labor relations as a composite conception that embraced both the practice and the regulation of the employment relationship.[25]

This sociological approach to thinking about labor law *à la* Sinzheimer embraced both "the law" and the "actual state of affairs."[26] In order to determine "the actual state of affairs," Kahn-Freund collaborated with a number of industrial relations scholars, particularly the

[18]Ramm speaks of a "Flucht in die Generalklauseln" und "richterliche Rechtsfortbildung." *See* Thilo Ramm, *Die "Linke" und das Arbeitsrecht*, 33 JURISTEN ZEITUNG 184, 185 (1978).

[19]*See generally* Thilo Ramm, *Codetermination and the German Works Constitution Act of 1972*, 3 INDUS. L.J. 20 (1974).

[20]Thilo Ramm, *Pluralismus ohne Kodifikation. Die Arbeitsrechtswissenschaft nach 1945*, *in* RECHTSWISSENSCHAFT IN DER BONNER REPUBLIK 456 (Dieter Simon ed., 1994).

[21]*See generally* Wolfgang Däubler, *Arbeitsrechtliche Forschung in der Bundesrepublik*, *in* WSI MITTEILUNGEN 67 (1985).

[22]*See generally* Ramm, *supra* note 18.

[23]Rolf Birk, *Labour Law Scholarship in Germany, France and Italy*, 23 COMP. LAB. L. & POL'Y J. 679, 686 (2002).

[24]*See generally* DUKES, *supra* note 10.

[25]Paul Davies & Mark Freedland, *National Styles in Labor Law Scholarship: The United Kingdom*, 23 COMP. LAB. L. & POL'Y J. 765, 766 (2002).

[26]*See generally* DUKES, *supra* note 10.

"Oxford School" led by Allan Flanders and Hugh Clegg—scholars who had an interest in and understanding of the history of industrial relations.[27] The resulting multi-disciplinary labor law scholarship sought to analyze and explain legal rules within their social context. Although this particular type of British labor law scholarship had its heyday in the 1960s, it produced an extended generation of labor law scholars who followed in Kahn-Freund's footsteps.[28] Many of these scholars drew on the writings of labor historians and industrial relations scholars in order to explain and develop labor law. Their work placed "labor law at the cutting edge of British socio-legal scholarship."[29]

Subsequent shifts in government policy have meant that *collective laissez-faire* as a key feature of British labor law has all but disappeared, and as such, new rationales for, and ways of thinking about, labor law have emerged. Yet British labor law scholarship stands out for retaining an open, multi-disciplinary approach. There has not been the development of a single dogmatic framework which guides analyses.[30] Contemporary researchers have turned to philosophy and political theory, economics, sociology, and political economy approaches in order to explain and advance the discipline at a time when the labor market has fundamentally changed.[31] This Article proposes to use history as an *entrée* into developing different ways of understanding the origins and future trajectory labor law and labor relations systems. As a prerequisite for this approach, the next section reviews the labor law history scholarship in Germany and the UK.

C. A History of Labor Law History in Germany and the UK

I. The UK

Labor law history in the UK lives at the margins and intersections of a number of different fields—including labor history, legal history, labor law, and industrial relations. The extent to which scholars have adopted an explicitly socio-legal approach—in the sense of going beyond doctrinal sources—appears to be driven by individual project considerations—including researchers' historiographic and theoretical commitments—rather than being shaped by discipline-wide methodological debates—which have hitherto been lacking. Labor law history emerged, along with labor history, in the late nineteenth and early twentieth centuries among scholars interested in the "labor question," centered on the role of workers' collective action.[32] Early labor law histories traced the legal regulation of trade unions.[33] Labor law history has thus traditionally been situated within an industrial relations framework—although labor law and industrial relations have parted ways as the former has responded to shifts in government policy away from *collective laissez-faire* and the latter has focused increasingly on quantitative methodologies, becoming a "largely history-free field fundamentally concerned with policy in the present."[34] As a result, labor law history

[27]See Clegg's three-volume work, in particular, on the history of trade unions which combined industrial relations and labor history, I–III H.A. Clegg, A History of British Trade Unions Since 1889 (published between 1964 and 1994). Industrial relations subsequently turned away from history and developed as a specialized, largely history-free field fundamentally concerned with policy in the present. *See generally* Allen et al., *supra* note 6.

[28]These include Bill Wedderburn, Paul O'Higgins, Bob Hepple, and to some, though perhaps a lesser extent, Roger Rideout, Steve Anderman, Roy Lewis, Jon Clark, Paul Davies, and Mark Freedland. *See* Davies & Freedland, *supra* note 25, at 769.

[29]*Id.*

[30]*Id.* at 786.

[31]*See generally* The Philosophical Foundations of Labour Law (Hugh Collins et al. eds., 2018); Keith D. Ewing, *Democratic Socialism and Labour Law*, 24 Indus. L.J. 103 (1995); Georg Menz, *Employers and Migrant Legality: Liberalization of Service Provision, Transnational Posting, and the Bifurcation of the European Labour Market*, *in* Migrants at Work (Cathryn Costello & Mark Freedland eds., 2015); Ruth Dukes, *The Economic Sociology of Labour Law*, 46 J.L. & Soc'y 396 (2019).

[32]Tucker, *supra* note 3, at 42.

[33]*See generally* Sidney & Beatrice Webb, The History of Trade Unionism (1894); Robert Yorke Hedges & Allan Winterbottom, The Legal History of Trade Unionism (1930).

[34]Allen et al., *supra* note 6, at 107.

differs in its origins and approach from legal history, which has traditionally produced narrow "internal histories" of law with an emphasis on the common law.[35]

Legal history's purpose has been to recreate the particular contexts which shaped the law by, inter alia, reading marginalia, case notes, personal papers, government reports, newspaper articles, and other, often archival, materials which normally evade the attention of other legal scholars, in order to fully capture the contexts surrounding the law.[36] Labor law historians, by contrast, do not produce "internal" histories in the sense understood by the legal historian, but analyze labor law history in relation to wider social forces. Labor law historians have walked a fine line between law and politics. Often, the purpose of adopting a historical lens has been to better understand the law with a view to making reform proposals.[37] The most extensive analysis of labor law history can be found in Lord Wedderburn's *The Worker and the Law*. Published in 1965, it explained the whole legal framework governing labor in an historical and sociological context.[38] As Hepple explains, "Wedderburn came to labor law through his private reading of labor history."[39] He relied on a wide range of materials, including extracts from judicial decisions and decisions of national insurance commissioners, government ministers, the Registrar of Friendly Societies, collective agreements, union rule books, fair wages resolutions, and other documents not commonly used in traditional black-letter law books.[40] Subsequent editions of the book maintained the contextual, historical focus to explain legal developments.[41] As Hepple points out, "Wedderburn found that the history books' accounts of [labor law's development] were inadequate. His special contribution to the history of labor law and industrial relations ... was to synthesize the history of legal doctrine and social history."[42]

A handful of other scholars have also written on labor law history over the last thirty years, taking as their starting point the different historical and social forces which have shaped labor law —which is understood broadly to include legislation, case law, regulations and customs. Their methodological choices have been guided by the purpose of individual projects. In 1993, Paul Davies and Mark Freedland wrote a history of British labor legislation between 1945 and 1990.[43] They explicitly situated their legislative history within a legal framework—rather than seeking "to operate as historians or social scientists"[44]—taking into account that law is "a product of the formulation and application of governmental economic and social policies."[45] By way of contrast, Keith Ewing has made extensive use of archival materials and social and economic history literature. His book, *Trade Unions, the Labour Party and the Law*, consulted a wide range of sources to study the Trade Union Act of 1913 from historical and legal perspectives with a view to understanding the legislation's origins and effects within its broader social context.[46] In an article published in 1998, Ewing presented a reassessment of Kahn-Freund's account of *collective*

[35]*See* Sarah E. Hamill, *Review of Legal History*, 28 SOC. & LEGAL STUD. 538 (for a recent review of legal history scholarship).

[36]*See generally*, Michael Lobban, *Introduction: The Tools and Tasks of the Legal Historian*, *in* 6 ANDREW LEWIS & MICHAEL LOBBAN, LAW AND HISTORY: CURRENT LEGAL ISSUES 2003 (2004) (including recent attempts in legal history to give a voice to "the other").

[37]See, for example, HEDGES & WINTERBOTTOM, *supra* note 33, where the authors went back to the Elizabethan statutes on wages and apprenticeships and also looked at gild regulations, gild customs and the laws regulating trade unions. The book ends with legislative reform proposals.

[38]K.W. WEDDERBURN, THE WORKER AND THE LAW (3d ed. 1986).

[39]Bob Hepple, *Wedderburn's* The Worker and the Law*: An Appreciation*, 34 HIST. STUD. REL. 215, 223 (2013).

[40]*Id.* at 218.

[41]The third edition, published in 1986, included 200 pages on the history and analysis of the law on industrial conflict. See LORD WEDDERBURN, THE WORKER AND THE LAW (3rd ed. 1986).

[42]Hepple, *supra* note 39, at 223.

[43]*See generally* PAUL DAVIES & MARK FREEDLAND, LABOUR LEGISLATION AND PUBLIC POLICY (1993).

[44]*Id.* at 2.

[45]*Id.* at 7.

[46]*See generally* K.D. EWING, TRADE UNIONS, THE LABOUR PARTY, AND THE LAW (1982).

laissez-faire by looking at the relationship between the state and industrial relations.[47] He used multiple sources, including government reports, Hansard minutes, TUC documents, and Labor Party documents in order to develop a nuanced understanding of the role of the state in British labor law. Douglas Brodie's *A History of British Labor Law*, published in 2003, also combined primary and secondary sources in order to analyze the purposes underlying particular legislative developments between 1867 and to compare this with the law's subsequent shape.[48] Ruth Dukes, in *The Labor Constitution*, published in 2014, looked at the history of labor law scholarship and the enduring relevance of foundational texts to the study of labor law today rather than considering the historical development of labor laws as such.[49] Despite the rich scholarly output that exists on British labor law history, a broader debate on methodological issues in the field, including the scope of the discipline, how to approach its study, and its overlap with other subjects, has hitherto been limited.

II. Germany

In Germany, labor law history finds its roots in legal history rather than labor history.[50] As such, it sits less comfortably within a socio-legal framework, although early accounts of labor law history have been criticized for not giving due regard to social, economic and cultural factors which shaped labor law's development.[51] Since the 1950s, scholars, starting with Theo Mayer-Maly, have moved beyond "pure" legal history to take account of the social context of labor law.[52] Harald Steindl's edited collection in 1984, *Wege zur Arbeitsrechtsgeschichte*,[53] attempted to respond to repeated calls amongst German scholars in the 1970s and earlier for the development of a comprehensive, socio-legal labor law history.[54] His collection had the explicit aim of starting a dialogue between law and social and economic history.[55] It contained chapters on a broad range of individual and collective labor laws in Germany and Austria, including contributions on social insurance. Drawing lessons from legal history, the collection tried to map different histories of labor in order to illustrate breaks and transformations of the law in a historical narrative. There was a recognition within the collection itself, however, that it could do no more than indicate different paths that scholars could take—which have so far not been fully explored by subsequent projects.

Individual scholars have continued to write on a broad range of topics: These include the historical development of the contract of employment, the juridification of labor relations, the

[47]*See generally* K.D. Ewing, *The State and Industrial Relations: 'Collective Laissez-Faire' Revisited*, 5 HIST. STUD. INDUS. REL. 1 (1998).

[48]*See generally* DOUGLAS BRODIE, A HISTORY OF BRITISH LABOUR LAW (2003).

[49]DUKES, *supra* note 10.

[50]German legal history has a very different tradition compared to UK legal history. For methodological debates in German legal history see Marcel Senn, *Rechtswissenschaft und Geschichte*, *in* INTERDISZIPLINARITÄT IN DEN RECHTSWISSENSCHAFTEN – INNEN UND AUSSPERSPECTIVEN (2012); Marcel Senn, *The Methodological Debates in German-Speaking Europe (1960–1990)*, *in* MAKING LEGAL HISTORY. APPROACHES AND METHODOLOGIES (2012); Gerhard Oexle, *Rechtsgeschichte und Geschichtswissenschaft*, *in* AKTEN DES 26. DEUTSCHEN RECHTSHISTORIKERTAGES FRANKFURT A.M., 22. BIS 26. SEPTEMBER 1986 (1987); Ogorek, *Rechtsgeschichte in der Bundesrepublik (1945-1990)*, *in* RECHTSWISSENSCHAFT IN DER BONNER REPUBLIK. STUDIEN ZUR WISSENSCHAFTSGESCHICHTE DER JURISPRUDENZ (Dieter Simon ed., 1994). Early legal histories which touched upon labor matters include OTTO VON GIERKE, DIE SOZIALE AUFGABE DES PRIVATRECHTS (1894).

[51]Theo Mayer-Maly, *Aufgabe und Probleme einer Geschichte des Arbeitsrechts* Mayer-Maly, *"Aufgabe und Probleme einer Geschichte des Arbeitsrechts"*, *in* DAS RECHT DER ARBEIT 126 (1956).

[52]Harald Steindl, *Vorwort*, *in* HARALD STEINDL, WEGE ZUR ARBEITSRECHTSGESCHICHTE viii (1984).

[53]*Id.*; Wilhelm Herschel, *Arbeitsrecht in der Wohlfahrtsgesellschaft*, *in* RECHT DER ARBEIT 402, 402 (1968) ("Die Geschichte des Arbeitsrechts – sie ist leider noch nicht geschrieben.").

[54]Franz Mestitz, *Probleme der Geschichte des Arbeitsrechts. Ein Forschungsbericht für die Jahre 1974 bis 1979*, *in* ZEITSCHRIFT FUR NEUERE RECHTSGESCHITCHTE 47 (1980).

[55]*Id.* at x.

German labor constitution, the works constitution, the history of the labor courts, collective labor law, and labor law under National Socialism.[56] Although *Arbeitsrechtsgeschichte* has not been subject to a sustained methodological discussion, there have been some attempts to define the field and appropriate research methods.[57] Most works adopt a broad definition of "labor" (*Arbeit*) and "law" (*Recht*). There has been an intense debate over the "starting point" of labor law and the temporal scope of labor law history.[58] In broad terms, research questions are underpinned by a regard for the *question sociale*. Taking its cue from legal history, they often rely on hitherto ignored archival materials. Franz Mestitz suggested that labor law needs to be understood as both expressing and shaping social reality. Taking such an approach allows for a problem-oriented, historical analysis of the discipline rather than a chronological retelling of developments.[59] Joachim Rückert approached the history of labor law by looking at the legal solutions which have been found for particular problems at work over time and in different geographical locations in a holistic way.[60] In 2020, Wolfgang Däubler and Michael Kittner published a historical study of the German works constitution (*Betriebsverfassung*), relying on a wide range of legal and other historical sources. They argued that as a central tenet of German history, the works constitution can only be properly understood taking into account the economic and political power struggles, as well as the formal laws and informal norms, which have shaped, and continue to influence, its form.[61]

Despite their different starting points, there is a recognition in Germany and the UK that labor law histories, if they are to do more than provide internal histories and account for the external forces which have shaped the law's development, are difficult to write and require scholars to, at the very least, engage with other disciplines, thereby opening up to socio-legal approaches. Labor law historians must also ask theoretical and methodological questions about their ability to research economic and social history if they have not had subject-specific training.[62] Questions also arise on the scope—in terms of topic, place and time—of labor law history. Labor law's boundaries are nebulous. Harry Arthurs aptly describes labor law as emanating from "an infinity of sources, permeat[ing] all aspects of social and economic life, [it] is as much to be inferred as formally announced, and affects behavior, positively and negatively through social processes which are as varied as their context."[63] Problems of definition and scope inevitably arise in every field. However, the absence of an identifiable community of labor law historians—let alone of comparative labor law historians—has led to limited debate on "how to do" labor law history. In the next two sections, this Article seeks to kindle the debate by outlining the beginnings of a proposed socio-legal methodology for labor law history based on new approaches to comparative law, and drawing on historical sources and methods.

[56]Scholars include, amongst others, Thilo Ramm, Wolfgang Däubler, Gerd Bender, Joachim Rückert, Martin Becker, Martin Otto, Otto Kempen, Michael Kittner, and Thorsten Keiser.

[57]A particular example is the *Initiative Arbeitsrechtsgeschichte;* a cooperation between the Hugo Sinzheimer Institute and the Max Planck Institute for European Legal History. *See* Gerd Bender, *Initiative History of Labour Law*, Max Planck Institute for European Legal History, https://www.rg.mpg.de/cooperations/hugo-sinzheimer-institut.

[58]*See generally* Franz Mestitz, *Zur Mirkungsgeschichte Des Arbeitrechts* in Steindl, *supra* note 54. *See generally* Thorsten Keiser, Vertragsfreiheit Und Vertragszwang Im Recht Der Arbeit Von Der Frühen Neuzeit Bis In Die Moderne (2013).

[59]Mestitz, *supra* note 54, at 8–9.

[60]Joachim Rücker, Arbeit Und Recht 1800: Historisch Und Verleichend, Europäisch Und Global (2014).

[61]Wolfgang Däubler & Michael Kittner, Geschichte Der Btriebsverfassung (2020).

[62]Some scholars have addressed this dilemma in relation to legal history. *See* Jonathan Rose, *Studying the Past: the Nature and Development of Legal History as an Academic Discipline*, 31 J. Legal Hist. 101 (2010). On law and history, see Robert W. Gordon, Taming the Past: Essays on Law in History and History in Law (2017).

[63]Harry Arthurs, *Understanding Labour Law: The Debate over "Industrial Pluralism"*, 38 Current Legal Probs. 83, 86 (1985).

D. Comparative Labor Law: Introducing a "Minor Comparativism" of Labor Law History

Labor law is no stranger to comparative law. A large body of theoretical literature has developed on the proper application of the comparative method to labor law as well as an ever-increasing amount of literature comparing aspects of different legal systems.[64] As Kahn-Freund pointed out, the objective of comparative labor law should be to discover whether an institution, practice, doctrine, or tradition is inevitable or universal, or whether it is the outcome of specific social, historical, or geographical conditions.[65] A large portion of comparative writings seem to fall short of this objective by remaining superficial in the depth of comparison achieved. Their aim is to compare legal differences and similarities across jurisdictions. However, some works manage to conduct more thorough comparisons which convey a sense of how specific laws play out in a given society and provide an insight into how the law may be improved within that social setting.[66]

The main contribution to such "profound"[67] comparative labor law stems from Otto Kahn-Freund. His dual legal background equipped him with the requisite socio-historical understanding of more than one legal system in order to carry out effective, in-depth comparisons. For Kahn-Freund, comparative labor law should not be seen as a separate field of research but as a tool of analysis. As Kahn-Freund pointed out:

> [O]ne of the virtues of legal comparison (which it shares with legal history) is that it allows a scholar to place himself outside the labyrinth of the minutiae in which legal thinking so easily loses its way and to see the great contours of the law and its dominant characteristics.[68]

This approach was applied in the 1970s by a group of leading scholars, under Bob Hepple's editorship, who attempted to explain labor law's pluralism by undertaking a comparative historical research project, published as *The Making of Labor Law in Europe: A Comparative Study of Nine Countries up to 1945* in 1986.[69] The project explained the historical development of labor law as resulting from "a process of struggle between different social groups . . . and of competing ideologies conservatives, liberals and socialists, and of religious and secular groups."[70] Labor law "is made by men and women in a society not of their own making."[71] Its shape is dependent on the outcome of power struggles—what different social groups could "force or persuade other groups to let them have."[72]

Hepple sought to explain the comparative development of labor laws at two levels: (1) The direct historical relationship of legal transplants from one country to another, and (2) the "inner" social, economic and political relationship of parallel developments in different countries. The first level is relatively straightforward: "[M]any rules of national systems of labor law are either derived

[64]David Ziskind, *Labor Law Comparison in Perspective*, 2 Comp. Lab. L. 209 (1977) (providing a good overview of these topics)

[65]*See generally* Otto Kahn-Freund, Labour Relations: Heritage and Adjustment (1979).

[66]*See generally* Matthew Finkin, *Comparative Labour Law*, *in* Mathias Reimann & Reinhard Zimmermann, Oxford Handbook of Comparative Law (2006) (giving an overview of the different types of comparative law); Roger Blanpain, Comparative Labour Law and Industrial Relations in Industrialised Market Economies (2004); Anne Trebilcock, Handbook of Comparative Labour Law (2018).

[67]Finkin categorizes writings on comparative labor law into five genres which are often overlapping: Descriptive, purposive, predictive, theoretical, and profound. *See* Finkin, supra note 66.

[68]Otto Kahn-Freund, *Comparative Law as an Academic Subject*, 82 L.Q. Rev. 40 (1966), at 40.

[69]*See* Bob Hepple, The Making of Labour Law in Europe: A Comparative Study of Nine Countries Up to 1945 (1986) [hereinafter Hepple (1986)]; *see also* Bob Hepple, The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945–2004 (2009) (the successor to Hepple's 1986 book).

[70]Hepple (1986), *supra* note 69, at 4.

[71]*Id.* at 1.

[72]*Id.*

from or have been strongly influenced by other systems."[73] The comparative law literature has long debated the viability and shape of legal transplants.[74] Two main theoretical strands have emerged. For Watson, "a rule transplanted from one country to another ... may equally operate to different effect in the two societies, even though it is expressed in apparently similar terms in the two countries."[75] This implies that the transplantation of legal rules without adjustment of those rules is possible. Yet the success of rules borrowed from one legal system and directly imported to another system is rare. The second strand of thinking on the transplantability of legal rules stems from Otto Kahn-Freund. For Kahn-Freund, the degree to which a rule can be transplanted depends on the extent to which it conforms with the foreign political and legal structure.[76] Thus, "we cannot take for granted that rules or institutions are transplantable ...; any attempt to use a pattern of law outside the environment of its origin [entails] the wish of rejection," unless legislators have adequate "knowledge not only of the foreign law, but also of its social, and above all its political, context."[77]

On the "inner relationship" between systems, Hepple argued that the development of labor law "is the product of a variety of historical factors, which are neither 'necessary' nor 'natural' .... The choices made were not inevitable solutions to the social problems created by the workings of the market."[78] The challenge for comparative labor lawyers is to explain the specific features of historical change. In Hepple's book, the individual chapters do this by looking at how particular legislative measures were introduced in each country through the lens of "power." For Hepple, "[m]any of the demands made by labour movements and social reformers were unsuccessful because they were unacceptable to those with greater economic and political power .... [T]he powerfulness of the opponents of reform was the decisive factor in the making of labor law."[79] Adopting the lens of power in this sense allowed the contributors to portray the common tendencies and divergences of different labor law systems in nine European countries.

The question of whether and how to draw on other disciplines in order to undertake a comparison also permeates comparative law. Recent scholarship has sought to move away from what Pierre Legrand described as "positivist" comparative law, towards the contextualized analysis of legal rules, their active interpretation, and engagement with interdisciplinary study.[80] As part of this trend, scholars have adopted different methodological lenses in order to give a voice to individuals and social groups whose views are not part of mainstream narratives.[81] Their approach decenters the state and positive law as the focus of a comparison and recognizes the legitimacy of multiple traditions and social orderings.[82] In an article published in 2015, Sherally Munshi borrowed from comparative literature to propose the idea of a minor comparativism, which engages

[73] *Id.* at 2.

[74] Authors who have written on transplantation include: Roger Blanpain, Comparative Labour Law and Industrial Relations in Industrialised Market Economies (8th ed. 2004); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 Mod. L. Rev. 1 (1974); Alan Watson, Legal Transplants: An Approach to Comparative Law (1974); Pierre Legrand, *The Impossibility of Legal Transplants*, 4 Maastricht J. Eur. & Comp. L. 111 (1997).

[75] Watson, *supra* note 74, at 20.

[76] Kahn-Freund, *supra* note 74.

[77] *Id.* at 27.

[78] *Id.* at 4.

[79] *Id.* at 5.

[80] *See generally* Pierre Legrand, *Jameses at Play: A Tractation on the Comparison of Laws*, 65 Am. J. Comp. L. 1 (2017); as well as the other contributions in the 2017 special issue of the American Journal of Comparative Law.

[81] For an overview, see the *Decolonial comparative law* project led by Professor Dr. Ralf Michaels and Dr. Lena Salaymeh at the Max Planck Institute for Comparative and International Private Law (Hamburg). Ralf Michaels & Lena Salaymeh, *Decolonial Comparative Law,* Max Planck Institute (2020) https://www.mpipriv.de/decolonial.

[82] Thus, there are some similarities between the arguments made in favor of transnational history to correct the focus by comparative historians on the nation state. *See generally* Jürgen Kocka, *Comparison and Beyond* 42 Hist. & Theory 39 (2003); Ian Tyrell, *Reflections on the Transnational Turn in United States History: Theory and Practice*, 4 J. Glob. Hist. 453 (2009).

"the essential instability, incoherence, alterity, and heterogeneity that define the state."[83] A minor comparativism retains the general tenor of comparative law, which is "to reveal something about our immediate world that would not reveal itself but through the practice of adopting a foreign perspective", but it seeks that foreign perspective "within" one's own country.[84] It "sets the official image of a particular state *against* the reflections of its minority subjects."[85] A minor comparativism acknowledges that the minority—to be understood in the sense of foreign or not belonging to the majority—is not peripheral but central to the formation of laws, the state, and the nation. A minority constructs its thinking not within a national culture but apart from it—without absorbing a nation's consciousness, morality, or worldview.[86] Adopting such a minority perspective decenters the state, thereby engaging "the essential instability, incoherence, alterity, and heterogeneity that define the state."[87] It recognizes that the state incorporates diverse peoples and views, and "severs the imagined unity between the state and its subjects."[88] A consequence of this is that a minor comparativism resists regurgitating authorized representations of the law. While traditional approaches to comparative law tend to identify and isolate particular rules or institutions across legal systems, a minor comparativism focuses on discovering how the law is encountered, shaped, and perceived by the minority. It seeks to complicate received understandings of the law and its development. For labor lawyers, the use of such an approach opens up traditional narratives to reinterpretation at a time when the discipline is in flux. As Munshi explains:

> The purpose of such investigation is not merely ethnographic or to thicken our account of a culture, but liberatory. By recognizing that authoritative declarations of law do not exhaust our own understanding or experience of law, we proliferate opportunities to transform the laws that give shape and meaning to our shared circumstances.[89]

The question arises as to who is meant by "the minority" for labor law scholars. Two possibilities arise. First, Hepple, in his comparative labor law study, recognized that labor law's shape is dependent on the outcome of power struggles. The views of the individuals or groups who lost out in the power struggles—social reformers and labor movements who were unsuccessful—have been erased from the legal record and, by extension, are the subject of study of legal or labor historians, but are often neglected by comparative law and labor law scholars. Yet, their demands held sway at particular moments in history even if they were not in the end translated into law—the outcome of power struggles were neither inevitable nor predetermined. Second, there are the views of minority groups within states who observe majority culture but are not part of it. These minority groups are more frequently studied by historians than by lawyers, yet their perspectives offer valuable insights on the functioning of law in society.

A minor comparativism allows labor law scholars to rediscover both of these viewpoints, thereby disrupting and complicating received understandings of labor law's historical development. Such an exercise requires scholars to engage seriously with the discourse of foreign minorities and to set it against the traditional narrative. This, in turn, enables scholars to identify, question, and challenge conventional assumptions about the legal system by rendering those conventional assumptions foreign to themselves. Such an approach has not hitherto been applied to labor law. It allows scholars to

[83]Munshi, *supra* note 9, at 665 (citing Pierre Legrand, *Issues in Translatability of Law*, *in* NATION, LANGUAGE, AND THE ETHICS OF TRANSLATION (2005)).
[84]*Id.* at 664.
[85]*Id.* at 665.
[86]*Id.* at 667 (citing GILES DELEUZE & FELIX GUATTARI, KAFKA: TOWARD A MINOR LITERATURE (Dana Polan trans., 1986)).
[87]*Id.* at 666.
[88]*Id.*
[89]*Id.*

consider the possibilities of what could have been, to think about law in a different framework from the norm, and to develop alternative approaches to legal regulation. In a final section, I begin to develop a minor comparativism of labor law history within a socio-legal framework with a view to revealing alternative ways of thinking about worker participation in workplace decision-making in the UK and Germany.

E. Developing a Minor Comparativism of Labor Law History: "Foreign" Views on Worker Participation in Workplace Decision Making

Labor law's essential form reflects the problems occasioned by industrialization, including the separation of production from consumption and of workers from ownership and control of the means of production.[90] For much of the twentieth century, worker representation within the workplace in the UK had been assured primarily through agreement between employers and trade unions outside a formal legislative footing.[91] The dominant view in British labor law justifying the lack of workers' formal involvement in the control of industry has been intertwined with *collective laissez-faire* in that worker representation on management boards was "unacceptable" as it threatened trade-union independence.[92] For most of the twentieth century, worker participation on company boards was also anathema to corporate law's model of shareholder ownership and primacy. Since the 1990s, corporate law scholars have shown resurgent interest in protecting "stakeholder rights"—broadly defined to include workers, consumers and other interest groups—through corporate governance reforms, including providing for worker and other stakeholder representation on company boards.[93] In contrast, there has been comparatively limited engagement by labor law scholars with labor law's role in providing for worker participation in workplace decision-making. Much of the British labor law literature which discusses worker representation focuses on the Report of the Committee of Inquiry on Industrial Democracy (1977) Cmnd 6706 (the "Bullock Report"). For those arguing in favor of worker participation, the German model of parity codetermination (*paritätische Mitbestimmung*), which provides for equal worker and management representation on certain company supervisory boards, is cited as exemplary,[94] without probing the principles and historical contingencies underpinning the system.[95] British labor law is lacking a debate about what workplace participation is for and what it should look like.

[90]Simon Deakin & Frank Wilkinson, The Law of the Labour Market: Industrialization, Employment, and Legal Evolution Ch. 2 (2005).

[91]*See generally* Ruth Dukes, *Voluntarism and the Single Channel: The Development of Single-Channel Worker Representation in the UK*, 24 Int'l J. Comp. Lab. L. & Indus. Rel. 87 (2008).

[92]H.A. Clegg, A New Approach to Industrial Democracy 22 (1960). Since 1993, the adoption of several EU directives requiring information and consultation of employees has introduced, in certain circumstances, information and consultation channels for worker representatives. However, the impact of these measures has been limited. *See generally* Dukes, *supra* note 91.

[93]*See generally* Zoe Adams & Simon Deakin, *Corporate Governance and Employment Relations*, *in* The Oxford Handbook of Corporate Law and Governance (2018).

[94]In 2016, upon becoming Prime Minister, Theresa May pledged to appoint workers to company boards with a view to diversifying boardrooms, controlling executive pay, and scrutinizing management decision-making. *See* Nils Pratley, *Theresa May's plan to put workers in boardrooms is extraordinary,* The Guardian (Jul. 11, 2016, 11:47 AM), https://www.theguardian.com/politics/nils-pratley-on-finance/2016/jul/11/theresa-may-plan-workers-boardroom-reform-extraordinary-tories. In 2013, Frances O'Grady, the General Secretary of the TUC argued that worker representation through trade unions was justified on the basis that "economic strength demands economic democracy, a recalibration of the relationship between capital and labour." Frances O'Grady, *Attlee Memorial lecture,* TUC (Apr. 26, 2013), http://www.tuc.org.uk/union-issues/frances-ogradys-atlee-memorial-lecture.

[95]Codetermination ("*Mitbestimmung*") is an umbrella term which describes a body of different practices that take place under law in the individual enterprises of industry, commerce, and trade, and which require joint decision-making by labor and management representatives in the control and conduct of an enterprise either. Of these, the system of parity co-determination ("*paritätische Mitbestimmung*") stands out for providing the greatest level of involvement for workers by allowing for equal representation of employees and management on the supervisory boards of companies in certain industries

A minor comparativism within a socio-legal framework can ignite such a debate by revealing alternative ways of thinking about worker participation. The approach combines archival research with an analysis of German and British literature drawn from labor and corporate law, history, and industrial relations in order to reconstruct and reassess historical debates on worker participation through a minority lens. This enables an analysis of worker participation within a different framework from the status quo, opening it up to other possibilities. It moves away from mainstream explanations of the law's development and, instead, focuses on the law's perception at its time of coming into being by the minority—as evidenced by archival sources. A minor comparativism in this case sets the mainstream narrative that worker participation is "unacceptable" against the debates that were taking place in the UK on worker participation during and immediately after the period of the Second World War, up to 1950. Two minority perspectives are of interest. First, that of a group of exiled German trade unionists based in the UK during World War II who combined to form the Trade Union Centre for German Trade Unionists in the UK (*Landesgruppe deutscher Gewerkschafter in Grossbritannien*). A close reading of the German literature[96] suggests that the post-war German model of codetermination, initially introduced by the British military government in the iron and steel industries in 1947, is based on plans designed by the *Landesgruppe*.[97] The *Landesgruppe's* chairman, Hans Gottfurcht[98]—a German Jewish trade unionist who fled to the UK in 1938—set up a number of working groups during the war to develop plans for post-war German reconstruction. The *Landesgruppe* was the only German emigrant body that brought together and represented all leftwing exile groups.[99] One of these groups, the *Internationaler Sozialistischer Kampfbund* (ISK), had a substantial, albeit hitherto unexplored, influence on *Landesgruppe* policies—and had close links with British intellectuals, including the industrial relations scholar Allan Flanders, throughout the 1920s, 1930s, and 1940s.[100] Letters exchanged between *Landesgruppe* members and British trade unionists, including Walter Citrine, the Secretary General of the Trades Union Congress (TUC), and Ernest Bevin, the Minister for Labor (1940–1945) and Foreign Secretary (1945–1951), before, during, and after the war, are indicative of close personal relationships. Many German post-war trade union leaders were exiled in the UK during the war and had been members of the *Landesgruppe*. As such, the *Landesgruppe* is an example of a minority within, but apart from, and not of, the British labor law tradition. An exploration of their deliberations on worker participation also raises the question of whether there was any cross-fertilization of ideas between the British and exiled German trade union movements which have hitherto escaped scholars' attention.

The second minority perspective is that of a number of British trade unionists who advocated worker participation in workplace decision-making throughout the 1940s. The subject of worker representation on boards had arisen repeatedly at TUC Annual Congresses throughout the 1920s, 1930s, and early 1940s in the context of debates on the future nationalization of British industry. Nationalization of, *inter alia*, the coal, iron, and steel industries formed a major part of the election manifesto of the Labor government which came to power in July 1945. The general question that was raised for British trade unions by the nationalization program was whether unions would, or should, be prepared to take a wider role in the management of these nationalized industries.

and above specific size thresholds. It is widely regarded in German literature as a successful trade-union achievement and a vital element, and even as the most important "socio-political innovation" of German post-war industrial democracy. Horst Thum, Mitbestimmung In Der Montanindustrie (1982), 11-37; Gloria Müller, MItbestimmung In Der Nachriegszeit (1987), 113-46.

[96]*See generally* Eberhard Schmidt, Die Verhiniderte Neuordnung 1945–1952 (1977).

[97]*Id.*

[98]*See generally* Urusla Bitzegeio, Über Partei- und Landesgrenzen hinaus: Hans Gottfurcht (1896–1982) und die gewerkschaftliche Organisation der Angestellten (2009).

[99]*See generally* Ludwig Eiber, Die Sozialdemokraten in der Emigration (1998).

[100]For an overview, see Sabine Lemke-Müller, Ethischer Sozialismus Und Soziale Demokratie. Der Politische Weg Willi Eischlers Vom Isk Zur SPD (1988).

However, in practice it became clear that the TUC generally was prepared to take only the most cautious steps in this direction despite a number of affiliates advocating a different, and after 1945, increasingly vocal stance which has largely been forgotten.[101]

Viewing the dominant narrative on worker participation through these minority eyes provides new perspectives on the subject. It is liberating in the sense that it transforms the way in which worker participation can be understood within the UK labor law framework and provides different starting points to develop a contemporary model for worker participation—grounded in labor law, and appropriate for a post-industrial landscape.

The minor comparativism proposed here takes place within a socio-legal framework. It does not seek primarily to document the origins of particular laws or legal concepts, but instead seeks to rediscover the views of two minority groups who were advocating in favor of worker participation in workplace decision-making at a critical time in British labor law history, but whose views have escaped the legal record. The comparativism relies on a wide range of German and British primary and secondary sources drawn from labor law, history, and industrial relations in order to reconstruct the *Landesgruppe's* deliberations on worker participation and their interactions with British trade unionists on the subject. Archival sources, which are held in archives in Germany and the UK,[102] include documents from the British military government, correspondence between British and exiled German trade unionists, diaries of exiled trade unionists, and minutes of *Landesgruppe* meetings. Archival sources have been under-used in British labor law history, although they form the backbone of legal historical research. As Boorstin points out, "history is the data of law."[103] It allows the legal scholar to discover the "minds, intentions, problems, and limitations of those who created [it] or for whom [it was] created."[104] By using archival sources, scholars can revisit classic accounts of the development of the theories and processes underpinning the labor law system.[105] For lawyers, the opening up of their discipline to the findings of historians and to new methods of comparative law allows a more empirically refined and a theoretically sounder understanding of the socio-legal history and nature of labor law.

F. Conclusion

There is a long history of socio-legal labor law scholarship in Germany and the UK, and labor law historians have recognized that, in order to trace the influences and processes which explain labor law's development, they must be open to using a broad range of sources. Yet methodological debates on "how to do" labor law history, and the discipline's links with socio-legal studies, have been limited in Germany and the UK. This Article has considered how history, when applied within a socio-legal comparative framework, can provide an *entrée* into different ways of thinking about labor law and labor relations systems. It has proposed a minor comparativism of labor law history, based on archival materials and drawing on legal, historical, and industrial relations

[101] *See generally* Rebecca Zahn, *German Codetermination Without Nationalization, and British Nationalization Without Codetermination: Retelling the Story* 36 HIST. STUD. INDUST. REL. 1 (2015). Hugh Clegg elaborates three principles underpinning industrial democracy which, according to him, crystallized in the inter-war years, and which provide an explanation as to why codetermination never took root in the UK: First, trade unions must be independent of the state; second, trade unions can only represent the industrial interests of workers; and, third, the ownership of industries is irrelevant to good industrial relations. *See* Clegg, *supra* note 92, at 21–25. Clegg argues that workers' representation in management or their involvement in the control of industry does not therefore form a fundamental underpinning of industrial democracy and is indeed "unacceptable" as it threatens trade-union independence. *Id.* For a broader overview see HUGH CLEGG, INDUSTRIAL DEMOCRACY AND NATIONALIZATION (1951).

[102] Primarily in the Modern Records Centre (University of Warwick), the National Archives (Kew), the Bundesarchiv (Koblenz) and the Archiv der sozialen Demokratie/DGB Archiv (Friedrich-Ebert-Stiftung, Bonn).

[103] Daniel Boorstin, *Tradition and Method in Legal History*, 54 HARV. L. REV. 424, 427 (1941).

[104] ROBERT BARTLETT, HISTORY AND HISTORIANS: SELECTED PAPERS OF R.W. SOUTHERN 104–05 (2004).

[105] On the value of law and history generally, see Rose, *supra* note 62.

literature in order to shed new light on conventional assumptions about worker participation in workplace decision-making in the UK. A minor comparativism unearths hitherto neglected perspectives—those that have escaped the legal record—thereby opening up traditional narratives to new interpretations. As applied to worker participation in workplace decisionmaking, it provides the basis for a contemporary debate about what workplace participation is for and what it should look like. Finally, in proposing a socio-legal methodology for labor law history, this Article hopes to begin a debate, in the spirit of the subject of this special issue, on the theoretical and methodological contours of German and British labor law history and its possible links with socio-legal approaches.

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ARTICLE

Comparative Genealogies of "Contract and Society"

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Abstract
Since contracts form a basic institution of every legal order, the interdisciplinary orientation of concepts of contracts reveals socio-legal inclinations of a legal order more broadly. Contrasting the UK and US Common Law of contracts with developments under German law, this Article examines the relation between normative and social science approaches, notably rooted in economics, economic sociology, and social theory in the genealogy of contract law. A shared leitmotif over the 20th century has been the drive to account for the societal embeddedness of contract. However, conceptualizations of "Contract and Society" differ considerably between legal orders in their disciplinary ingredients and design. In the US, and to a lesser extent also in the UK, the rather continuous reception of legal realism has paved the way for broad interdisciplinary perspectives on contract law, ranging from classical socio-legal, empirical work (e.g., Macaulay), economics (e.g., Williamson), sociology (e.g., Powell), and critical theory (e.g., Kennedy) to today's landscape, where essentially instrumental and ideal-normative theories compete. Alternatively, in Germany, where the realist heritage was more ephemeral, the transformations of contract law were processed from within legal discourse and foremost in their effects on private autonomy as conceptualized, for example, in German idealism, discourse theory and critical theory. Similarly, the "constitutionalization" of contract law—even if championed for fostering private law's reflexivity—has, for the most part, defied a socio-legal orientation. Finally, the Article highlights the path dependencies with which these different starting points translate in current debates around the role of contract in transnational governance.

Keywords: Comparative contract law; socio-legal studies; relational contract; constitutionalization; transnational contract law; legal interdisciplinarity

A. Introduction: De-Essentializing Contract

Contract is arguably the most chatoyant legal institution—appearing in changing light when seen from a wide array of legal perspectives, but also at the center of an unmatched set of other disciplinary inroads, including political philosophy, ethics, economics, sociology, anthropology, psychology, and gender studies. This plurality of approaches reminds us of contract's inherent tension between the universality of its form and the highly diverse and specific ramifications of contractual practice. This tension translates into two antagonistic points of departure of current contract scholarship that compete for doctrinal recognition: normative, ahistorical, and ideal approaches on the one hand, and socio-legal, context-specific, and particularistic approaches on the other hand. While many quibbles in contract law seem timeless and canonical, as the

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discontinued project of a Common European Sales Law[1] reminds us, national contract laws are by no means uniform. It had created increased attention for comparative legal analysis of contract law,[2] first with the ambition to highlight family resemblances, especially in the EU, then with a closer look at divergences and pluralism. In today's comparative law landscape, contract law is often seen as a field of reference for principled qualifications of a legal order at large as being more or less liberal.

Despite a widespread acknowledgement of novel forms of contracting and a respective need for new conceptualizations, the historical and philosophical origins[3] of contract and its peculiar location between "state" and "society"[4] continue to form a prominent point of departure for contractual thinking. This entails a steady risk of essentializing contract on the basis of its most general definition—as a voluntary exchange[5]—which abstracts almost entirely from any parameter of the surrounding social context. Emanating from such a view of contract is a similarly essentializing image of "the market" as a natural order which law only regulates *a posteriori* and from the outside in order to protect its proper functioning.[6]

Yet, ever since the realist tradition of the early twentieth century with authors like Karl Llewellyn,[7] Eugen Ehrlich,[8] Felix Cohen,[9] and Robert Hale,[10] a strong strand of contract scholarship has gradually moved away from the Willistonian archetype of contract[11] to more contextualized approaches. Here, contract is acknowledged to give rise to a social relation, a shift that entails two important consequences. First, contract is deeply embedded in a set of social and cultural norms, or as

[1]The EU Draft Regulation on a Common European Sales Law, *Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final (Nov. 10, 2011), withdrawn in 2014, seems to have been the peak of such initiatives. It had been preceded by the "Principles of European Contract Law" (PECL) and the "Draft Common Frame of Reference" (DCFR) as expert-driven norms that continue to serve as benchmark in the field. For an analysis of the political stakes of this harmonization, compare Reinhard Zimmermann & Nils Jansen, *General Introduction: European Contract Laws –Foundations, Commentaries, Synthesis*, *in* Commentaries on European Contract Laws 1 (Nils Jansen & Reinhard Zimmermann eds., 2018), and Horst Eidenmüller et al., *The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems*, 28 Oxford J. Legal Stud. 659 (2008).

[2]*See* the excellent compilation Comparative Contract Law (Pier Giuseppe Monateri ed., 2017).

[3]For concise surveys, see Reinhard Zimmerman, The Law of Obligations: Roman Foundations of the Civil Tradition (1996); James Gordley, The Philosophical Origins of Modern Contract Doctrine (1999).

[4]Peer Zumbansen, Ordnungsmuster im modernen Wohlfahrtsstaat: Lernerfahrungen zwischen Staat, Gesellschaft und Vertrag 242–269 (1999).

[5]*See also* Restatement (Second) of Contracts § 1 (Am. Law Inst. 1981) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").

[6]*Cf.* Andrew Lang, *Market Anti-Naturalisms*, *in* Searching for Contemporary Legal Thought 312 (Justin Desautels-Stein & Christopher Tomlins eds., 2017); Bernard E. Harcourt, The Illusion of Free Markets: Punishment and the Myth of Natural Order 78–102 (2012); Nathan Oman, The Dignity of Commerce: Markets and the Moral Foundations of Contract Law (2017). On the role of the state, see Tsilly Dagan & Talia Fisher, *The State and the Market – a Parable: On the State's Commodifying Effects*, 3 Pub. Reason 44 (2011).

[7]Karl Llewellyn, *What Price Contract? An Essay in Perspective*, 40 Yale L.J. 704 (1931). *See also* Alan Schwartz, *Karl Llewellyn and the Origins of Contract Theory*, *in* Jurisprudence of Corporate and Commercial Law 12 (Jody Kraus & Steven Walt eds., 2000).

[8]Eugen Ehrlich, Grundlegung der Soziologie des Rechts (1913) (Manfred Rehbinder ed., 4th ed. 1989).

[9]Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 6 Colum. L. Rev. 809, 839 (1935).

[10]Robert Hale, *Bargaining, Duress and Economic Liberty*, 43 Colum. L. Rev. 603 (1943). *Cf.* Barbara Fried, The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement (1998). For more on the realist legacy, see Peer Zumbansen, *The Law of Society: Governance Through Contract*, 14 Ind. J. Global Legal Stud. 191 (2007).

[11]Samuel Williston (with George J. Thompson), A Treatise on the Law of Contracts (rev. ed. 1936–38, vol I—IV); for an insightful review compare Lon Fuller, *Williston on Contracts*, 18 N.C. L. Rev. 1 (1939). Generally, on the persistent struggle around "socializing" contract, see Luke Herrine, Socializing Contract (May 30, 2019), *available at* https://ssrn.com/abstract=2989173.

Durkheim famously phrased: "[T]out n'est pas contractuel dans le contrat."[12] Second, it becomes reductionist to assess the emerging contractual order from the perspective of the parties and the principle of privity alone, rather than with a view to society at large. A perspective of "contract and society"[13] would investigate how contract becomes fragmented across spheres of social interaction and is both shaped by and is itself shaping its environment beyond the immediate parties. Contracts between or involving states, within the family, at the workplace, among global corporations, or for a home do not solely differ by subject matter.[14] Their multiplicity results from their respective embeddedness in a social context that grants a peculiar reach to the idea of privity and that relies on contract for very different forms of social ordering. This heterogeneity poses a significant challenge to both descriptive and normative attempts to account for the entirety of contract law.[15] It may not surprise that even normatively monist or ideal theories, be they centered around efficiency,[16] autonomy,[17] fairness,[18] democracy,[19] or distributive justice[20] are increasingly incorporating pluralist elements.[21] Socio-legal explanations see the function of contract precisely in enabling cooperation despite potentially diverging, "pluralistic" normative preconceptions: The role of contract is to regulate—or make endogenous to the contractual program—certain behaviors and understandings of parties that fall within its scope, just as much as it is to explicitly make exogenous other factors.[22]

This Article is interested in the underlying (inter-)disciplinary dynamics that guide this move, or rather, that guide the reflection of contract's foundational normative and social pluralism. Contrasting the UK and US Common Law of contracts with developments under German law, this Article will examine the relation between normative and social science approaches, mostly those rooted in economics, economic sociology, and social theory, in the genealogy of contract law. It takes the perspective of asking which normative and conceptual preconditions animate the evolution of contract law, in particular, with regard to complex transactions and

[12]Émile Durkheim, De la division du travail social 189 (1893). Positioning Durkheim within early socio-legal scholarship, see Moritz Renner, *Privatrecht und Soziologie*, *in* Privatrechtstheorie 121 (Stefan Grundmann et al. eds., vol I, 2014).

[13]*C.f.* Lawrence Friedman, *The Law and Society Movement*, 38 Stan. L. Rev. 763 (1986) (deliberately alluding to the methodologically diverse movement of "law and society").

[14]For a taxonomy, see Hanoch Dagan & Michael Heller, The Choice Theory of Contracts 93–101 (2017).

[15]*C.f.* Gordley, *supra* note 3; Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 Yale L.J. 541 (2003).

[16]*E.g.*, Richard Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 Hofstra L. Rev. 487 (1980); Steven Shavell, Foundations of Economic Analysis of Law 289 et seq. (2004); Robert Cooter & Thomas Ulen, Law and Economics Ch. 8 (6th ed. 2012). *C.f.* Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure*, 112 Yale L.J. 829 (2003).

[17]Dagan & Heller, *supra* note 14; Hanoch Dagan & Michael Heller, *Autonomy for Contract, Refined*, 38 L. & Phil. (forthcoming 2020); Hanoch Dagan & Michael Heller, *Why Autonomy Must Be Contract's Ultimate Value*, 18 Jerusalem Rev. Legal Stud. 148 (2019); Hanoch Dagan & Avihay Dorfman, *Justice for Contracts* (August 11, 2019), *available at* https://ssrn.com/abstract=3435781; Thomas Gutmann, *Theories of Contract and the Concept of Autonomy*, Centre for Advanced Study in Bioethics Münster Working Paper No. 2013/55.

[18]Florian Rödl, *Contractual Freedom, Contractual Justice, and Contract Law (Theory)*, 76 L. & Contemp. Probs. 57 (2013).

[19]Martijn W. Hesselink, *Democratic Contract Law*, 11 Eur. Rev. Cont. L. 81 (2015).

[20]Lyn Tjon Soie Len, Minimum Contract Justice: A Capabilities Perspective on Sweatshops and Consumer Contracts (2017); Hugh Collins, *Distributive Justice Through Contracts*, 45 Current Legal Probs. 49 (1992). *Cf.* Aditi Bagchi, *Distributive Justice and Contract*, *in* Philosophical Foundations of Contract Law 193 (Gregory Klass et al. eds., 2014).

[21]*See* Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 Suffolk U. L. Rev. 915 (2012); Nathan Oman, *Unity and Pluralism in Contract Law*, 103 Mich. L. Rev. 1483 (2005). For a call to account for plural spheres of valuation, see also Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 Colum. L. Rev. 1409 (2012). On balancing normative goals, Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 Phil. Issues 420 (2001).

[22]*C.f.* Niklas Luhmann, Das Recht der Gesellschaft 459 (1993) (Ger) (stating that contracts "stabilize a specific difference over time, while being indifferent to anything else," "indifference for the sake of difference", translation KHE).

transnational arrangements. Contracting practice here looks very unlike the idea of a bilateral "meeting of minds," which, with some perseverance, remains the prototype of contract law debates. Consequently, the individual justification of contract rooted in autonomy and an idea of human agency needs to be complemented by a broader societal justification that is concerned with the social institutions—such as markets or chains of production—that contract gives rise to. This Article will illustrate how the disciplinary framing underlying the push towards more societally contextualized conceptions of contract differs between the jurisdictions discussed. A central explanation for this is that along the lines of legal realism, the US—and to a lesser extent also the UK—have sought to contextualize contract from the outside, that is, by a broad range of interdisciplinary perspectives. In turn, the German debate has processed transformations of contract law from within the legal discourse and through the lens of its ramifications on private autonomy.

Accordingly, despite a surprising congruence across Western legal orders in the evolution of contractual paradigms over the twentieth century,[23] this shift was ultimately animated by different normative and socio-theoretical considerations across jurisdictions. On the one hand, the gradual move from Willistonian formalism to a "material" or "social"[24]—and occasionally to a more " procedural" or "reflexive"[25]—paradigm has echoed a changing philosophical discourse around the antinomies of freedom.[26] The philosophical contribution highlighted the normative insufficiency of a formal idea of freedom in light of structural coercion or dependency—as illustrated, for example, in labor law.[27] On the other hand, a significant second stream stems from the realm of socio-legal analysis. Both Maine[28] and Weber[29] provided early accounts of how the scope of contractual ordering within a given society expanded as societies moved from traditional segmentation and hierarchical stratification to functional differentiation.

The picture hitherto allows two cautious observations regarding attempts of contextualizing and embedding contract in society. First, in a scholarly landscape dominated by deontological analysis, such projects surely form a minority current. Second, among such projects, the scope, interdisciplinary inspiration, doctrinal realization of such embedding, and the respective imaginary of "non-contractual elements of contract" vary between jurisdictions. Against this

[23]Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19 (David Trubek & Alvaro Santos eds., 2006); Duncan Kennedy, *The Globalisation of Critical Discourses on Law: Thoughts on David Trubek's Contribution*, *in* CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE: LIBER AMICORUM DAVID M. TRUBEK 3 (Gráinne de Búrca et al. eds., 2014).

[24]MARC AMSTUTZ ET AL., SOZIALES VERTRAGSRECHT: EINE RECHTSEVOLUTORISCHE STUDIE (2006); Claus-Wilhelm Canaris, *Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner "Materialisierung"*, 200 ARCHIV FÜR CIVILISTISCHE PRAXIS 273 (2000).

[25]Rudolf Wiethölter, *Proceduralization of the Category of Law*, *in* CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE 501 (Christian Joerges & David M. Trubek eds., 1989); Rudolf Wiethölter, *Materialization and Proceduralization in Modern Law*, *in* DILEMMAS OF LAW IN THE WELFARE STATE 221 (Gunther Teubner ed., 1986); Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC'Y REV. 239 (1983); GRALF-PETER CALLIESS, PROZEDURALES RECHT (1999); Dieter Hart, *Zur konzeptionellen Entwicklung des Vertragsrechts*, AG 66 (1984); Karl-Heinz Ladeur, *Prozeduralisierung zweiter Ordnung—Am Anfang war das Verfahren*, *in* PROZEDURALISIERUNG DES RECHTS 82 (Tatjana Sheplyakova ed., 2018).

[26]GONÇALO DE ALMEIDA RIBEIRO, THE DECLINE OF PRIVATE LAW: A PHILOSOPHICAL HISTORY OF LIBERAL LEGALISM (2019).

[27]John Gardner, *The Contractualisation of Labour Law*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 33 (Hugh Collins, Gillian Lester & Virginia Mantouvalou eds., 2019).

[28]HENRY SUMNER MAINE, ANCIENT LAW 174 (1861).

[29]MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT: GRUNDRISS DER VERSTEHENDEN SOZIOLOGIE 387–97, 503–13 (5th ed. 1972). Weber's historical sociology went as far as to decry non-formal elements to modern law, especially those in contract, as potentially countering the formal rationality of modern society and prone to cause social regress, partly because it would expand the discretion of bureaucracy to the detriment of its predetermination and control through parliament. *C.f.* Wolfgang Mommsen, *Max Webers Begriff der Universalgeschichte*, *in* MAX WEBER, DER HISTORIKER 51, 52–54. (Jürgen Kocka ed., 2011); Hans-Peter Müller, *Rationalität, Rationalisierung, Rationalismus. Von Weber zu Bourdieu?*, *in* DIE RATIONALITÄT DES SOZIALEN 43 (Andrea Maurer & Uwe Schimank eds., 2011); Martin Albrow, *Legal Positivism and Bourgeois Materialism: Max Weber's View of the Sociology of Law*, 2 BRITISH J.L. & SOC'Y 14 (1975).

background, this Article will first showcase the plurality of arrangements of "contract and society" in a double intention to illustrate contract's heterogeneity as a legal institution, and to use contract theory—more broadly speaking— as a test case for socio-legal inclinations of a legal order. Second, this Article will then turn to the issue of long-term, project-specific, in other words "relational," contracting as a focal point to analyze how the Common Law of contracts, especially in the UK and the German legal order, have conceptualized the challenge such contracts pose to traditional contract thinking, and what paths of adjustment they have developed. Finally, in an outlook, this Article will project these experiences from the national level towards the analysis of transnational law and discuss their respective influence—for the novel task of private governance by contract—beyond the state.

B. "Contract and Society": Situating the Impact of Socio-Legal Analysis

The birth of modern contract law as a distinct discipline is often located in the second half of the nineteenth century for US law,[30] and was brought to its pinnacle in the works of Langdell[31] and Williston.[32] For Europe, the grand treatises by Pothier,[33] Savigny,[34] and Blackstone[35] suggest a much earlier development.[36] Conceptually, contract law emerged as a set of rights and duties that stood alongside the preexisting system of ownership rights in property. It comprised rules for the entire lifecycle of a contract in the general effort of laying the foundations of a formalist, well-ordered model of contractual thinking that was induced from the sub-types of contract and adjudged cases. The implications of the formalist vision were not limited to doctrinal particulars, but rather formed a comprehensive mode of thought that extended to the whole of private law. The idealizations of a Kantian will theory resonate just as much in contract law as they do in property law and theories of legal personality. Hegel, while having a thicker idea of contractual justice than Kant's theory of contract law, likewise saw contract's essence in the recognition among property owners.[37] In other words, formal contract law was entrenched in a general private law architecture of pre-existing legal subjectivity, property rights, and a primacy of civil society over the state. Consequently, the institution of contract is inseparable from other basic institutions of private law[38] because the scope of contracting parties and objects of transaction are decided upon outside of contract law. This liberal architecture justified contract on the basis of the formal equality of the parties—overlooking how the socio-political situatedness shapes contracting opportunities and behavior in morally significant ways. Accordingly, contracting shapes contexts beyond the contracting parties. Relegated to a "private affair and not a social institution,"[39] the free bargaining process provided for the congruency of contract with the social order as a whole.

[30] Kevin Teeven, A History of the Anglo-American Common Law of Contract 217 (1990).

[31] Christopher C. Langdell, A Summary of the Law of Contracts (1880). For a contemporary analysis, c.f. Bruce Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 L. & Hist. Rev. 345 (2007).

[32] Williston, *supra* note 11.

[33] Jean-Robert Pothier, Traité des Obligations (1761).

[34] II Friedrich Carl von Savigny, Das Obligationenrecht als Theil des heutigen Römischen Rechts (1853).

[35] William Blackstone, Commentaries on the Laws of England (1765–69). For more on Blackstone's underlying conception of law and social theory, see Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buff. L. Rev. 205 (1979) with a reply by Alan Watson, *The Structure of Blackstone's Commentaries*, 97 Yale L.J. 795 (1988).

[36] Alfred Simpson, A History of the Common Law of Contract 199 (1987).

[37] *C.f.* Georg Wilhelm Friedrich Hegel, Grundlinien der Philosophie des Rechts § 63 (1820). For a synthesis, see Peter Landau, *Hegels Begründung des Vertragsrechts*, 59 Archives for Phil. L. & Soc. Phil. 117–38 (1973).

[38] *See* Thomas Vesting, *Einbau von Zeit: Rechtsnormativität im relationalen Vertrag*, 52 Kritische Justiz 626 (2019); Maria Rosaria Marella, *Who is the Contracting Party? A Trip Around the Transformation of the Legal Subject*, *in* Comparative Contract Law, *supra* note 2, at 205 .

[39] Friedrich Kessler, *The Contracts of Adhesion—Some Thoughts about Freedom of Contract Role of Compulsion in Economic Transactions*, 43 Colum. L. Rev. 629, 630 (1943).

I. Legal Realists: Combining Micro- and Macro-Sociology of Contract Law

Legal realists paved the way for a more complete picture of contract. Even though the movement was strongest in its intellectual firepower and lasting effects on legal thought in its variant of American Legal Realism,[40] Europe knew parallel streams dubbed either "realism"[41] or early "sociology of law."[42] European authors made important contributions to the US variant. This section seeks to develop how realist jurisprudence reframed the embeddedness of contract in society and reshuffled the relation between black-letter contract law and additional elements central to contract's operation. It will become clear that legal realism has opened the door to a necessarily eclectic set of social science approaches to contract law, which raises questions of disciplinary pluralism.[43] Without the realist pioneers, critical approaches to contract law[44] as well as the impactful frameworks of welfare[45] and institutional economics[46] would be largely inconceivable. Above being a political or distinctively normative project, legal realism was a jurisprudential movement that promoted a legal mode of thought. Their project was, generally speaking, to counter the distortive effects of the formal model of contract by deciphering its constructed nature and to make political and societal stakes part of the analysis. Despite being somewhat politically heterogeneous, the realists' generation would possibly regard some of their theoretical heirs of today with suspicion.

In his trailblazing contribution of 1931, Karl Llewellyn asks "what price contract?"[47]? What could, misleadingly at first sight, be understood as going into a similar direction as Coase's analysis of "social costs,"[48] takes the social anchoring of contract in society seriously by assuming it cannot be aptly expressed in economic terms alone. His interest goes into the "role of contract in the social order, the part that contract plays in the life of men."[49] Compared to the formalist mainstream of his time, Llewellyn's approach entails looking behind the edifice of doctrine and asking what type of society and market, or social and economic relations, contract gives rise to. In an inquiry that qualifies as institutionalist *avant la lettre*, albeit one inevitably pursued on the basis of an "arm-chair" economic sociology, Llewellyn connects contract to markets that emerge from aggregate and decentralized contracting. For him, individual contracts, and *a fortiori* the market, are animated to a large extent by norms that are operational irrespective of court intervention and a lawyer's lens—an idea he attributes to Eugen Ehrlich's "living law."[50] Rather, contract is tasked with developing the constitutional side of the self-government of society,[51] not in a *laissez faire* sense, but with the idea to incorporate non-economic effects, which, for Llewellyn, seem more

[40]For concise overviews, see Hanoch Dagan, *The Realist Conception of Law*, 57 U. Toronto L.J. 607 (2007); Brian Leiter, Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy (2007).

[41]On the Scandinavian realist movement, see Jes Bjarup, *The Philosophy of Scandinavian Legal Realism*, 18 Ratio Juris 1 (2005); Gregory S. Alexander, *Comparing the Two Legal Realisms—American and Scandinavian*, 50 Am. J. Comp. L. 131 (2002).

[42]On the trajectory of German sociology of law, compare Stefan Machura, *Law in Other Contracts German Sociology of Law: A Case of Path Dependency*, 8 Int'l J.L. Context 506 (2012).

[43]For a normative perspective on disciplinary pluralism in private law, compare Stefan Grundmann, *Pluralistic Private Law Theory* (2020) (unpublished manuscript) (on file with author); Stefan Grundmann, *Methodenpluralismus als Aufgabe—zur Legalität von ökonomischen und rechtsethischen Argumenten in Auslegung und Rechtsanwendung*, 66 RabelsZ 423 (1997); Marietta Auer, Zum Erkenntnisziel der Rechtstheorie 35 (2018) (drawing on Duncan Kennedy to advocate for "fancy theory," in other words, an experimental patchwork of approaches to overcome disciplinary silos).

[44]*C.f.* Duncan Kennedy, *The Political Stakes in 'Merely Technical' Issues of Contract Law*, 1 Eur. Rev. Priv. L. 7 (2001).

[45]*See* Schwartz, *supra* note 7; Horst Eidenmüller, *Rechtswissenschaft als Realwissenschaft*, 54 Juristenzeitung 53 (1999).

[46]For an explicit reverence to realist pedigree, see Oliver E. Williamson, *Revisiting Legal Realism: The Law, Economics and Organization Perspective*, 5 Indus. & Corp. Change 383 (1996).

[47]Llewellyn, *supra* note 7.

[48]Ronald Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).

[49]Llewellyn, *supra* note 7, at 705.

[50]*Id.* at 706 n.6 ("This whole paper builds at every point on Ehrlich, as any such paper must.").

[51]*Id.* at 727–31.

sophisticated to capture.[52] Such "constitutions" can only exist in plural, carefully attuned to the living institutional setting of corporations, factories, trade-unions, churches, and households. Contract law's principal role here is to provide an adjustable, indicative framework that parties can turn to in case of unexpected disagreement, or when the cooperative spirit ceases. Does the relative insignificance of contract law for most transactions imply it could simply be abrogated? Llewellyn hastens to specify that growingly complex markets—and therefore expanding reliance on impersonal trust—become easier with a credible threat of enforcement through state law.[53] As much as state power is not the ultimate and only "basis of contract,"[54] Llewellyn does not go as far as to dismiss the state legal system and the judiciary as its incarnation. The "rule of law," in other words, remains an unshattered reference for him, unlike the critical tradition and later empirical works. One resulting limitation—perhaps less significant in his time than nowadays—is that Llewellyn concentrates on "legal" markets and on contracts in their "legal" enforceability, as opposed to "illegal" or "black" markets on which contracts exist as social artefacts without aspirations of enforceability.[55]

The realist movement did not lobby for a holistic project of legal reform that would implement their analysis broadly speaking, even though many of its protagonists identified as social reformers.[56] To be sure, sectoral reforms like the social current in labor and rental law were unmistakably fueled by realist inspiration. Similarly, the rise of contracts of adhesion corroborates the realists' observations on contract law, because boilerplate transcends the usual framework by overshadowing the individuality of parties and reflecting the impersonality of the market within the institution of contract.[57] Next to such specific fields of application, the deeper shortcomings of formal contract law that realism as a jurisprudential movement laid bare are too heterogeneous to be mitigated by a single legislative act, specifically because a central tenet of the realist project was precisely to highlight the decay of unity in contract law. More specifically, only rather small parts of realist scholarship even aimed at the legislator, while others were directed at courts or—in the most frequent scenario—gathering information on the legal process irrespective of a peculiar addressee and oftentimes even highlighting the relative insignificance of formal legal actors in parliaments and court chambers.[58]

II. The Realist Heritage: Diverging Trajectories

Despite the transnational character of the realist movement, the mark left by the realist tradition on contract law paradigms varies considerably between and within Europe and the US. This becomes clear in a comparative socio-legal analysis of the changing paradigms of contract over the twentieth century until today.[59] In UK and US Common Law, realism has facilitated and

[52] *Id.*

[53] *Id.* at 720–21. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

[54] Morris R. Cohen, *The Basis of Contract*, 56 HARV. L. REV. 553 (1933).

[55] The ongoing role of law on "illegal" markets is similarly unaddressed in moral debates around the limits of marketization of certain commodities. *See, e.g.*, DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS (2012). Empirical studies suggest that "illegal" markets operate on the basis of replicated forms of normativity and enforcement that realists should study. *C.f.* THE ARCHITECTURE OF ILLEGAL MARKETS: TOWARDS AN ECONOMIC SOCIOLOGY OF ILLEGALITY IN THE ECONOMY (Jens Beckert & Matías Dewey eds., 2017).

[56] Katharina I. Schmidt, *Law, Modernity, Crisis: German Free Lawyers, American Legal Realists and the Transatlantic Turn to "Life," 1903-1933*, 39 GERMAN STUD. REV. 121 (2016).

[57] Kessler, *supra* note 39, at 633 (referring to the "high price" paid by society "for the luxury of an apparent homogeneity in the law of contracts").

[58] Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 13 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1981).

[59] On such a methodology, see Annelise Riles, *Comparative Law and Socio-legal Studies*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 772 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed., 2019); David Nelken, *Comparative*

encouraged socio-legal perspectives on contract law with varying leading disciplinary references over time. The most salient contestation comes from a recent surge in moral contract theories,[60] not from mere doctrinalism. Turning to the UK context more specifically, it is remarkable that both pioneers of a regulatory approach to contract[61] and of a more recent "legal institutionalism"[62] develop their views with regard to UK examples.

In his influential monograph of 1999, Hugh Collins formulates avenues for an understanding of contract that does justice to forty years of empirical studies since Macaulay, and thus moves beyond a "closed" legal doctrinal perspective. He discusses contract as a legal institution in a state of flux, undergoing a metamorphosis from the formalism of UK orthodox doctrine[63] to a contextual support of parties' manifold projects in business and beyond. Collins develops a theory that collapses the distinction between private law and regulation as contract itself becomes a realm of regulation, both used for regulatory purposes and endowed with regulatory effects. He locates contract as a "hybrid" between discourses of law, economics, and sociology of business, and decidedly links Macaulay's and Macneil's contribution to a systems theory conceptualization of law as a communicative system. Consequently, economic, social, and legal inroads to contract are closely entangled, and it becomes the office of the judge to prove awareness of the multi-sidedness of a case. Unlike some of his critics,[64] Collins does not stop at the point of acknowledging the practical difficulties that such ambitions for judicial reasoning pose. The reconstruction of those principles and reasonable expectations that nurture parties' cooperation can be inferred from a theory-based understanding of parties' intentions, notably, with recourse to models of complex transactions in economic sociology.[65] Here, Collins distinguishes himself from scholarship on "relational" contracting.[66] Unlike Macneil, who interprets contractual behavior in light of a predetermined set of "types of transactions," Collins seeks to identify the "normative points of reference that guide behavior," hence the specific contractual project undertaken by the parties. The more robust judicial entitlement to considerations of distributive justice[67] is thus grounded in a "sociological jurisprudence"[68] that uses both substantive and procedural mechanisms of contract doctrine to mitigate the "alienation" of the facts of a case and the subversion of extra-contractual norm systems between the parties when being translated into legal categories. Overall, Collins' concern with jeopardizing social bonds and atypical cooperative projects translates the realist project to contemporary business reality, although the exclusivity of business as a field governed by contract seems reductive.

"Legal institutionalism" may serve as a second example of a mode of legal thought developed with a view to UK Common Law that has strong allegiance to a realist pedigree. It uses an

Sociology of Law, *in* An Introduction to Law and Social Theory 329 (Reza Banakar & Max Travers eds., 2002); Naomi Creutzfeldt et al., *Introduction: Exploring the Comparative in Socio-legal Studies*, 12 Int'l J.L. Context 377 (2016). For a synthesis, see David Campbell, Linda Mulcahy & Sally Wheeler, Changing Concepts of Contract (David Campbell, Linda Mulcahy & Sally Wheeler eds., 2013).

[60]In the aftermath of Charles Fried, see Charles Fried, Contract as a Promise: A Theory of Contractual Obligation (1981).

[61]Hugh Collins, Regulating Contracts (1999).

[62]Notably, see Simon Deakin et al., *Legal Institutionalism: Capitalism and the Constitutive Role of Law*, 45 J. Comp. L. & Econ. 188 (2017); Katharina Pistor, The Code of Capital: How the Law Creates Wealth and Inequality (2019).

[63]Collins states that the US Uniform Commercial Code and the Restatement (Second) of Contracts have allowed legal formalism to disintegrate much faster than in the UK. *See* collins, *supra* note 61, at 199.

[64]John Gava & Janey Greene, *Do We Need a Hybrid Law of Contract? Why Hugh Collins is Wrong and Why it Matters*, 63 Camridge. L.J. 605, 616–19 (2004).

[65]Hugh Collins, *The Research Agenda for Implicit Dimensions of Contract*, *in* Implicit Dimensions of Contract 1 (David Campbell et al. eds., 2003).

[66]*See infra* Section C.

[67]For a recent reconceptualization of distributive justice with regard to private law, see Hanoch Dagan & Avihay Dorfman, *Poverty and Private Law: Beyond Distributive Justice* (June 27, 2020), *available at* https://ssrn.com/abstract=3637034.

[68]*See* Die Fälle der Gesellschaft: Eine neue Praxis soziologischer Jurisprudenz (Bertram Lomfeld ed., 2017).

interwoven framework from economic sociology, institutional economics, and political economy to identify certain institutions as a backbone and central characteristic of capitalism and highlights the role of law in establishing and maintaining them.[69] Institutions mark the settings of human interaction which are governed by respective operating rules. Institutions, here, appear as "part and parcel of any mode of production"[70]; they shape, rather than merely follow, modes of production. For instance, legal institutionalism points out that technology can only become a central driving force of economic innovation when coupled with a supportive set of property rights, finance, and other legal parameters. In this, "legal institutionalism" builds on previous institutional accounts of law, and both transposes and profoundly sharpens the institutional economics' insights into law.[71] Unlike Williamson,[72] who, drawing on Coase,[73] established the role of law in building economic institutions but saw law—particularly private ordering—as essentially serving efficiency between firms and markets, "legal institutionalists" claim a more holistic understanding of the law and its basic concepts as social and economic institutions. While taking private ordering in its current pervasiveness and practical appeal seriously, "legal institutionalists" likewise reflect on the power structure implicated in private ordering and see the state as contested, yet still an irreducible element to the very concept of law. Legal rules are evaluated not solely in their influence on rational acting individuals, but in their institutional effects, namely those effects that, under realistic assumptions arise from the aggregate use of the particular rights and entitlements that a legal rule confers. In this light, for instance, the circulation of knowledge in society crucially depends on the design of institutions, among them legal institutions such as intellectual property and competition law.[74]

In contrast, in Germany, it was the realist tradition that introduced a thicker concept of "contract" compared to the rather marginal idea embodied in the German Civil Code of 1900. Not only was the codification under the influence of German idealism with its three freedoms of contract, property, and the freedom to make a will, but legal sociology was also still in its infancy and unable to call for a more contextualized assessment of contract. In fact, in the eyes of contemporary critics like Otto von Gierke,[75] the codification paid insufficient reverence to the Germanicist tradition, which had developed independently of a nation state for more than a century and thus incorporated collective effects of individual rights into the idea of freedom of contract. Still, the realist heritage was particularly ephemeral in Germany because communitarian thinking was discredited and again fell into oblivion in the post-war period. Consequently, unlike in the Common Law trajectory, contract law's evolution in the second half of the twentieth century did not follow a sequence of changing interdisciplinary references. Rather, it was structured around the analytical legal typology of a "material" and "reflexive" law coupled with a pivotal role given to the "constitutionalization" of contract law. Franz Wieacker's eminent study on the "social model" of the

[69]Deakin et al., *supra* note 62.

[70]Geoffrey M. Hodgson, *Conceptualizing Capitalism: A Summary*, 20 Competition & Change 37 (2015).

[71]Dick Ruiter, *Economic and Legal Institutionalism: What can They Learn From Each Other*, 5 Const. Pol. Econ. 99 (1994).

[72]Oliver E. Williamson, The Economic Institutions of Capitalism 68 (1985); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & Econ. 233 (1979).

[73]Ronald Coase, *The Nature of the Firm*, 4 Economica 386 (1937); Ronald Coase, The Firm, the Market, and the Law (1988).

[74]*C.f.* Dan Wielsch, *Private Governance of Knowledge: Societally-Crafted Intellectual Properties Regimes*, 20 Ind. J. Global Legal Stud. 907 (2013).

[75]Otto von Gierke, Die soziale Aufgabe des Privatrechts 12 (1889). *See also* Olivier Jouanjan, *Le souci du social: Le "moment 1900" de la doctrine et de la pratique juridiques*, *in* Le "moment 1900". Critique sociale et critique sociologique du droit en Europe et aux États-Unis 13 (Olivier Jouanjan & E. Zoller eds., 2015); Tilman Repgen, Die soziale Aufgabe des Privatrechts: Eine Grundfrage in Wissenschaft und Kodifikation am Ende des 19 Jahrhunderts (2001).

grand codifications[76] is firmly rooted within legal analysis. A "social model" for Wieacker crystallizes typically implicit assumptions about society, markets, and the realization of freedom that underlies legal thinking and court practice. Despite its double nature as normative and descriptive, "social models" are not understood as inroads for interdisciplinary, socio-legal work, but serve as a basis for a historical and philosophical reconstruction of legal developments since the entry into force of the German Civil Code.[77] This orientation shines through in the structure of leading discussions of German contract law calibrated around the extent and justification of private autonomy[78] as a vantage point, while socio-legal perspectives on that same topic remained of rather marginal standing.[79] Even the extensive discussion of shortcomings of the regulatory or welfare state—a prime domain, in principle, for socio-legal analysis—was conducted through the legal lens of private autonomy and the related risks of normalizing effects and petrification of social roles.[80]

Interestingly, the innovation[81] provided for by the growing influence of fundamental rights on contract law[82] seems to have further solidified a reasoning that is at least not outspokenly interdisciplinary. Even if not positivist in a strict sense, and vested with the potential to foster self-reflection within contract law,[83] the "constitutionalization" of contract law has barely opened up a new disciplinary repertory. Instead, recurring *topoi* pertain to the alleged risk of a levelling down of an existing hierarchy of norms and a venturesome turn in the theory of fundamental rights.[84] This partly stems from the fact that private autonomy as guaranteed under Art. 2(1) of the Grundgesetz is conceived predominantly in individualistic terms and not socially situated and mediated through the power of social institutions. The liberal epistemology of fundamental rights that is common for their role in curtailing state power complicates the accommodation of sociological theories of fundamental rights[85] that are based on non-ideal and situated theories of society.

[76]Franz Wieacker, Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft (1953).

[77]*See also* Marietta Auer, Materialisierung, Flexibilisierung, Richterfreiheit 27 (2005).

[78]Notably, see Ludwig Raiser, *Vertragsfunktion und Vertragsfreiheit*, *in* 1 FS zum hundertjährigen Bestehen des deutschen Juristentages 1860–1960 101 (1960); Ludwig Raiser, *Vertragsfreiheit heute*, *in* Juristenzeitung 1 (1958); I Werner Flume, Allgemeiner Teil des Bürgerlichen Rechts, Das Rechtsgeschäft 1 (4th ed. 1992).

[79]*But see* Walter Schmid, Zur sozialen Wirklichkeit des Vertrags (1983).

[80]*See, e.g.*, Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 413 (William Rehg trans., 1996). Similarly, the disciplinary pluralism in the work of Rudolf Wiethölter, informed through the triad of critical theory, systems theory, and political economy, while decidedly inviting social science models in private and business law, does so with cautious concern for the legitimating patterns of dominant legal thought. *C.f.* Ruldolf Wiethölter, *Sozialwissenschaftliche Modelle im Wirtschaftsrecht*, 18 Kritische Justiz 126 (1985).

[81]On such effects of fundamental rights, see Gerrit Hornung, Grundrechtsinnovationen (2015).

[82]For leading cases, see BVerfG, 1 BVR 26/84, Feb. 7, 1990, https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BVerfG&Datum=07.02.1990&Aktenzeichen=1%20BvR%2026%2F84; BVerfG, 1 BVR 567/89, 1044/89, Oct. 19, 1993, https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BVerfG&Datum=19.10.1993&Aktenzeichen=1%20BvR%20567%2F89; BVerfG, 1 BVR 3080/09, Apr. 11, 2018, https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BVerfG&Datum=11.04.2018&Aktenzeichen=1%20BvR%203. Among the abundant literature, see also Claus-Wilhelm Canaris, *Verfassungs-und europarechtliche Aspekte der Vertragsfreiheit*, *in* Wege und Verfahren des Verfassungslebens: Festschrift für Peter Lerche zum 65 Geburtstag 873 (Peter Badura & Rupert Scholz eds. 1993); Stefan Grundmann, *Constitutional Values and European Contract Law—an Overview*, *in* Constitutional Values and European Contract Law 3 (Stefan Grundmann ed., 2008); Felix Maultzsch, *Die Konstitutionalisierung des Privatrechts als Entwicklungsprozess*, Juristenzeitung 1040 (2012).

[83]Dan Wielsch, *Grundrechte als Rechtfertigungsgebote im Privatrecht*, 213 Archiv für die civilistische Praxis 718 (2013).

[84]Matthias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights and Principles and the Constitutionalization of Private Law*, 7 German L.J. 341 (2006).

[85]*See* Niklas Luhmann, Grundrechte als Institution (6th. ed. 2019). *C.f.* Gunther Teubner, *Ein Fall von struktureller Korruption? Die Familienbürgschaft in der Kollision unverträglicher Handlungslogiken (BVerfGE 89, 214 ff.)*, 83 KritV 338 (2000); Gert Verschraegen, *Human Rights and Modern Society: A Sociological Analysis From the Perspective of Systems Theory*, 29 J.L. & Soc'y 258 (2002).

C. The Interdisciplinary Matrix of Legal Analysis and the Conceptualization of "Relational" Contracting

One of contract theory's recurring threads is to conceptualize new modes of economic organization and the related contractual devices. Contractual practice often seems to be the first mover, yet ultimately legal practice can only express itself within the available legal imaginaries of contract, including those originating in practice. As a result, the most adequate depiction seems to be that of a co-evolution between contract law and economic organization based on division of labor, specialization, and cooperation.[86] Arguably, the most significant evolutionary step of the second half of the twentieth century in the field, and an ongoing domain of scholarly innovation, is the discovery of "relational" contracting, that is, the specificity of contracts related to long-term and/or multi-party projects that often use network-types of organization.[87] Fittingly for a mode of contracting that lies at the heart of a global trend towards accelerated and fluid modes of production,[88] the conceptualization of "relational" contracts has been a truly interdisciplinary and cross-jurisdictional endeavor.[89] Indeed, critical contributions stem from lawyers, institutional economists, and economic sociologists, to name just the central proponents. Today, "relational" contract theory finds at least as much resonance outside of law, notably in management,[90] as it does within the legal academy.

I. The Discovery of "Relational" Contracting: From Socio-Legal Studies to Institutional Economics

As a legal concept,[91] "relational" contracts have been developed in a critical dialogue between the lawyers Stewart Macaulay and Ian Macneil. Both works—while not identical in their interdisciplinary orientation—have become the new "orthodoxy" within socio-legal scholarship on contracts[92] and took inspiration from legal realism.[93] Stewart Macaulay's empirical study of the manufacturing business in Wisconsin in the 1960s[94]—conducted during a time of flourishing socio-legal research—marked a primer for the study of relational contracting. It challenged two important standing assumptions of lawyers at the time, namely that legal design is crucial

[86]Gunther Teubner, Idiosyncratic Production Regimes: Co-Evolution of Economic and Legal Institutions in the Varieties of Capitalism, in THE EVOLUTION OF CULTURAL ENTITIES: PROCEEDINGS OF THE BRITISH ACADEMY 161 (Michael Wheeler et al. eds., 2002); IGLP Law and Global Production Working Group, The Role of Law in Global Value Chains: A Research Manifesto, 4 LONDON REV. INT. L. 57 (2016); Klaas Hendrik Eller, Is 'Global Value Chain' a Legal Concept? Situating Contract Law in Discourses around Global Production, 16 EUR. REV. CONT. L. (2020).

[87]Another paradigm case, yet from a totally different field of private law, is marriage. *C.f.* Elizabeth S. Scott & Robert E. *Scott, Marriage as Relational Contract*, 84 VAND. L. REV. 1225 (1998).

[88]*See, e.g.*, Stefano Ponte & Timothy Sturgeon, *Explaining Governance in Global Value Chains: A Modular Theory-Building Effort*, 21 REV. INT. POL. ECON. 195 (2014); Joonkoo Lee & Gary Gereffi, *Global Value Chains, Rising Power Firms and Economic and Social Upgrading*, 11 CRITICAL PERSP. INT. BUS. 319 (2015).

[89]Stefan Grundmann, *Towards' a Private Law Embedded in Social Theory: Eine Skizze*, 24 EUR. REV. PRIV. L. 409 (2016).

[90]*See, e.g.*, Donald J. Schepker et al., *The Many Futures of Contracts: Moving Beyond Structure and Safeguarding to Coordination and Adaptation*, 40 J. MGMT. 193 (2014); Bjoern Ivens & Keith Blois, *Relational Exchange Norms in Marketing: A Critical Review Macneil's Contribution*, 4 MARKETING THEORY 239 (2004).

[91]Hugh Collins, *Is a Relational Contract a Legal Concept?*, *in* CONTRACT IN COMMERCIAL LAW 37 (James Edelman et al. eds., 2016).

[92]Sally Wheeler, *Visions of Contract*, 44 J.L. & SOC'Y 74 (2017).

[93]*But see*, Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847 (2000).

[94]Stewart Macaulay, *Non-Contractual Relations in Business—a Preliminary Study*, 28 AM. SOC. REV. 55 (1963). For later discussions of his own work, see Steward Macaulay, *Long-Term Continuing Relations: The American Experience Regulating Dealerships and Franchises*, *in* FRANCHISING AND THE LAW—DAS RECHT DES FRANCHISING: THEORETICAL AND COMPARATIVE APPROACHES IN EUROPE AND THE UNITED STATES 179 (Christian Joerges ed., 1991); Steward Macaulay, *Relational Contracts: Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775 (2000); David Campbell, *What Do We Mean by the Non-Use of Contract*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY 159 (Jean Braucher et al. eds., 2003).

in a transaction, and that thinking about economic organization could be aligned with the Coasian[95] dichotomy of market and firm correlating with contract and organization. Macaulay's series of interviews and reviews of contract terms led him to conclude that the degree of meticulous planning and recourse to legal sanctions in business relations is surprisingly low. Contracts—and contract lawyers—oftentimes seem to hinder rather than enable transactions by being at odds with the logic of the social relation that surrounds them. The underestimated non-contractual elements include business customs, good faith relationships, past transactions, personal and professional relations between actors across businesses, as well as mechanisms of trust, reciprocity, and reputation. One company even estimated that the majority of its contracts might be unenforceable and yet would not hinder its business.[96] Macaulay concludes that the scope and type of planning is unlike the one found in classical and neo-classical theory. A more thorough planning manifests itself with regard to the core obligations of the contract and existential risks.[97] Yet, instead of substantive solutions, legal rules will often be limited to deciding on internal procedures and decision-making authority. Furthermore, within a company, management will be leaning less towards legal planning than accountants and legal departments, whose very role is a formal legal assessment and who will often be unaware of or skeptical towards inter-party dynamics at the management level. The picture shifts after termination of a contract, in other words when the continuation of a business relation is no longer a promising trajectory.

Macneil, in a seminal article and subsequent work,[98] has further developed the study of relational contracts, sharpened its definition, and expanded its scope, conceptualization, and disciplinary portfolio. First, Macneil went beyond Macaulay by introducing network-patterned multi-party settings that later became a primary case of application of relational contracts, especially spurred by the economic sociology of networks represented, for example, by Powell.[99] Second, he integrated "relational" contracts into an abstract typology of phases of contract law's development, ranging from classical via neo-classical to relational contract law.[100] The features Macneil understands as distinctive for relational contracting become clear in this confrontation: Classical contract law governs discrete "spot" transactions and focuses on locking parties' consensus at a given time into a perpetual state ("presentiation"), abstracting from surrounding factors, uncertainties, and externalities. Neo-classical contract law overcomes some of the rigors of its predecessor by situating contract formation in time, including provisions that govern adjustments, through indexes as external references, good faith or renegotiation, or disputes clauses. Ultimately, however, neo-classical contract law continues to see the formalized consensus as the anchoring point of a transaction. The third "system" is what Macneil refers to as "relational contract law." Such contracts feature an organizational dimension that distinguishes it from an exchange relation.[101] They are constitutive of a "minisociety"[102] and thus require rules to

[95]Coase, *supra* note 73.

[96]Macaulay, *supra* note 94.

[97]*Id.*

[98]Ian Macneil, *The Many Futures of Contracts*, 47 S. Cal. L. Rev. 691 (1974). As scholarship under the label of "relational" contracting grew, Macneil himself grouped his work under the headings of a "new social contract" and later "essential contract theory." *See* Ian Macneil, The New Social Contract: An Inquiry into Modern Contractual Relations (1980); Ian Macneil, *Values in Contract: Internal and External*, 78 Nw. U. L. Rev. 340 (1983); Ian Macneil, *Contracting Worlds and Essential Contract Theory*, 9 Soc. & Legal Stud. 431 (2000).

[99]Walter W. Powell, *Neither Market nor Hierarchy—Network Forms of Organization*, 12 Res. Organizational Behav. 295 (1990).

[100]For a discussion, compare Jaakko Salminen, *Towards a Genealogy and Typology of Governance Through Contract Beyond Privity*, 16 Eur. Rev. Cont. L. 25 (2020) (comparing Macneil, Williamson, and conceptualizations around global value chains [GVCs]).

[101]Drawing on these characteristics, see The Organizational Contract: From Exchange to Long-Term Network Cooperation in European Contract Law (Stefan Grundmann et al. eds., 2013).

[102]Ian Macneil, *Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law*, 72 Nw. U. L. Rev. 854, 901 (1978).

harmonize conflict between the more discrete and long-term behavior in order to preserve the relation against threats of opportunism. Accordingly, without vanishing altogether, the "original consent" cannot stand unquestioned as the ultimate reference, but will need to be balanced with competing goals of safeguarding, coordination, and adaptation. In short, "relational" contracts pursue no single purpose, but become flexible multi-purpose vehicles.[103]

Methodologically, Macneil broadened the interdisciplinary scope of the study of "relational" contracts by including economic, behavioral, and historical elements, thereby allowing for an easier reception within nascent institutional economic literature, especially in the work of Oliver E. Williamson. Williamson,[104] along the lines of Coase's introduction of transaction costs, drew on Macneil's typology to identify the most suitable governance structure. In this, his analysis aims at curbing the specific vulnerability of long-term relations by addressing three causes. The stability of a long-term, relational contract hinges on the degree of asset specificity or relation-specific investment—forming part of "sunk costs"—, the degree of uncertainty between parties, and the frequency of individual interaction and transaction within the broader frame that is the relational contract.

II. Developing "Relational" Contract Law and the Politics of Method: The Case of UK and US Common Law

Relational contracting has inspired a broad interdisciplinary legal literature on specific contractual arrangements, normative regimes, and industry studies. While the scholarly debate outside of law —for example in management, sociology of networks, institutional economics, critical theory, and anthropology—is genuinely global, the legal debate is mostly global in its analytical streams—such as on concepts of "contract governance"[105]—yet fragmented along boundaries between jurisdictions or at least legal systems in its doctrinal processing. Because models and knowledge from other disciplines cannot simply be "applied" doctrinally, but necessarily undergo a process of translation,[106] patterns of reception of "relational" contracting allow some cautious remarks on the inclination of a legal order towards interdisciplinary legal work generally speaking, and on the disciplines that find most voice within doctrinal scholarship. Even if it is intuitive and widely accepted that—unlike in the formal, classical model of contract—"non-contractual" elements play an important part of the story, it remains to be seen how they should be identified for the purpose of legal analysis, and even more so, how law might contribute to strengthen those complementary elements. These questions cannot be solved doctrinally by means of legal systematization alone, but are a genuine field of interdisciplinary inquiry. Though for long, the discussion centered around the question of the influence of "economics" versus "sociology," the latter finding support and being promulgated in socio-legal studies, today's analysis needs to be attentive to inner disciplinary debates. For legal reception, some of the most salient recent debates in economics—neoclassical versus behavioral,[107] or in sociology— constructivist versus positivist—suggest very different understandings of law and its regulatory function.

"Relational contracting" naturally presents itself as a focal point of research for numerous disciplines. It shifts the vantage point of analysis from contracting parties with a preconfigured set of preferences to the emerging social relation. Cautious to avoid a simplifying understanding of an "efficient" design of complex relations, it highlights the social mechanisms that reinforce or jeopardize cooperation in long-term interactions. Just like the *Böckenförde dilemma* has observed with

[103]Mika Viljanen, *Actor-Network Theory Contract Theory*, 16 Eur. Rev. Cont. L. 74 (2020).

[104]Williamson, *supra* note 72.

[105]Contract Governance: Dimensions in Law and Interdisciplinary Research (Stefan Grundmann et al. eds., 2015).

[106]*See* Gunther Teubner, *Rechtswissenschaft und-praxis im Kontext der Sozialtheorie*, *in* Recht und Sozialtheorie: Interdisziplinäres Denken in Rechtswissenschaft und—praxis 145 (Stefan Grundmann & Jan Thiessen eds., 2014).

[107]*See, e.g.*, Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 93 Minn. L. Rev. 749 (2007); Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 Minn. L. Rev. 803 (2007).

regard to the liberal secularized state, contract also—and most specifically complex contracts and private ordering—"lives by prerequisites which it cannot guarantee itself."[108]

Because both US and UK Common Law adhere to an ideal of "completeness" of contracts, treating a social relation, not individual parties' will, as a unit of analysis was a far-reaching step to make. [109] The doctrinal reaction to the discovery of "relational" contracts was to equate relational contracts with "incomplete" contracts that suggest a role of the state in regulating or "completing" such contracts.[110] This task strongly alludes to one's normative presuppositions and thus takes different directions depending on whether, for example, "efficiency," "autonomy," or "distributive justice" form the goal of regulation, and depending on the status of bottom-up norm creation, for example, through social groups,[111] business communities, or trading partners.[112] Macaulay, for instance, holds that private parties develop fully-fledged, complex normative regimes that make use of the parties' proximity and expertise to guarantee for a constant adjustability. For him, such "private government"[113] neither can nor should be easily influenced, let alone replaced, by state intervention—an idea that has lost much of its innocence in later years.[114]

Having debuted in socio-legal "law in action" from Wisconsin, "relational contracting" has made its way through social norms theory and institutional and behavioral economics to the present day where three diverging impulses seem to reign. One is an empirical micro-modelling approach that tests the hypothesis of behavioral and institutional economic models on the basis of simplified concepts of contract.[115] Main fields of application are to date specialized fields, such as consumer, contract, and credit law. The second is more closely linked to sociological theories of networks and social systems, and takes a critical distance towards an agency-driven legal model.[116] Finally, a third model is barely a model of "relational" contracting properly speaking, but rather a movement that counters the very project of embedding contract and commenced with Charles Fried's "Contract as Promise."[117]

III. From "Relational Contracts" to "Networks": German Contract Law and the Criticality of Sociological Jurisprudence

German contract law has never developed a thick notion of a "relational contract" and has maintained reservations against the concept, both among doctrinal[118] and socio-legal scholars.[119] These

[108]Ernst-Wolfgang Böckenförde, *Die Entstehung des Staates als Vorgang der Säkularisation*, *in* Staat, Gesellschaft, Freiheit: Studien zur Staatstheorie und zum Verfassungsrecht 41–64 (1976).

[109]*See* Jay M. Feinman, *The Reception of Ian Macneil's Work on Contract in the USA*, *in* The Relational Theory of Contract: Selected Works of Ian Macneil 59 (David Campbell & Ian Macneil eds., 2001); Peter Vincent-Jones, *The Reception of Ian Macneil's Work on Contract in the UK*, *in* The Relational Theory of Contract: Selected Works of Ian Macneil 67 (David Campbell & Ian Macneil eds., 2001); David Campbell & Hugh Collins, *Discovering the Implicit Dimensions of Contracts*, *in* Implicit Dimensions of Contract 25 (David Campbell et al. eds., 2003).

[110]*C.f.* Scott, *supra* note 93.

[111]*See* Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601 (1986).

[112]*See, e.g.*, Matthew Jennejohn, *The Private Order of Innovation Networks*, 68 Stan. L. Rev. 281 (2016); Ronald J. Gilson et al., *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice and Doctrine*, 110 Colum. L. Rev. 1377 (2010).

[113]Stewart Macaulay, *Private Government*, *in* Law and Social Science 445 (Leon Lipson & Stanton Wheeler eds., 1986).

[114]Elizabeth Anderson, Private Government: How Employers Rule Our Lives (and Why We Don't Talk about it) (2017).

[115]For an overview, see Zev Eigen, *Empirical Studies of Contract*, 8 Ann. Rev. L. & Soc. Sci. 291 (2012); Russell Korobkin, *Empirical Scholarship in Contract Law: Possibilities and Pitfalls*, U. Ill. L. Rev. 1033 (2002).

[116]Hugh Collins, *Networks and Comparative Sociological Jurisprudence*, *in* Soziologische Jurisprudenz. Festschrift f. Gunther Teubner zum 65. Geburtstag 249 (Gralf-Peter Calliess et al. eds., 2009).

[117]Fried, *supra* note 60. For an overview of recent US scholarship in the field, see Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. Chi. L. Rev. 2077 (2014); Herrine, *supra* note 11.

[118]For an overview, compare II Michael Martinek, Staudinger Commentary § 662, ¶¶ 68–88 (14th ed. 2006); Walter Doralt, Langzeitverträge (2018).

[119]Gunther Teubner, *Contracting Worlds: The Many Autonomies of Private Law*, 9 Soc. & Legal Stud. 399 (2006).

reservations had two main origins. In part, they were linked to peculiar features of German contract law, which, going back to organicist Germanic theories such as those of Otto von Gierke,[120] echoes a "relational" dimension already in its key concept of *Schuldverhältnis* (obligation).[121] Interestingly, reference to Gierke was made in the US specifically by realists going back to Roscoe Pound[122] in order to oppose the then-flourishing reception of the Continental European will theory, and as part of a broader movement of restoration of US contract law.[123] It has therefore been argued that "relational" contract law conceptualizes adjustments that are necessary predominantly under the Common Law.[124] It contributed to this impression that the German reception focused on the potential need for a new "contract type" of *Dauerschuldverhältnis* (long-term contractual relation) instead of fleshing out relational elements in existing "contract types."[125] Put this way, existing leverage through general clauses, third party beneficiaries, or "piercing the veil" was overlooked in its potential to accommodate complex networked patterns.[126] The second reason for skepticism in the German debate arose from a critique of an all-too-easy construction of social embeddedness as stable and holistic that was suggested by the social theory underlying "relational" contracting and its interdisciplinary inspirations.[127] The underlying, and at times outspoken, debate[128] centers around methodologies of delimitating the social context to a contract and is accordingly particularly illustrative for the present context. The conceptual move of "embedding" contract in society will differ in scale and manner depending on which social science discipline prevails in informing legal analysis. Both welfare and institutional economics emphasize an efficient design between parties, while effects on third parties that result from the non-irritability and closure of multilayered networks are investigated by social theories that take complexity as a starting point. Systems Theory[129] in particular here offers its critical gist by shedding light on the relation between business networks and their social environment.[130] Unlike in an organization, networks lack centralized institutions and procedures of observing and reflecting their environmental effects. Law's ability to perceive and effectively curtail such effects therefore hinges upon selecting interdisciplinary references beyond the micro-level.[131]

[120] *See* GIERKE, *supra* note 75.

[121] Jürgen Oechsler, *Wille und Vertrauen im privaten Austauschvertrag*, 60 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 91, 93 (1996).

[122] Roscoe Pound, *The End of Law as Developed in Juristic Thought*, 30 HARV. L. REV. 201 (1917); ROSCOE POUND, THE SPIRIT OF THE COMMON LAW (1921).

[123] POUND, *supra* note 122, at 114–17.

[124] Oechsler, *supra* note 121, at 93 ("late reimport" into German law). For a synoptical comparison of Common and Civil Law systems, compare THOMAS LUNDMARK, CHARTING THE DIVIDE BETWEEN COMMON AND CIVIL LAW (2012).

[125] DER KOMPLEXE LANGZEITVERTRAG: STRUKTUREN UND INTERNATIONAL SCHIEDSGERICHTSBARKEIT (Fritz Niklisch ed., 1986).

[126] *See* GUNTHER TEUBNER, NETZWERK ALS VERTRAGSVERBUND: VIRTUELLE UNTERNEHMEN, FRANCHISING, JUST-IN-TIME, IN SOZIALWISSENSCHAFTLICHER UND JURISTISCHER SICHT (2004).

[127] *See* Teubner, *supra* note 119.

[128] *Id.*; Oliver Gerstenberg, *Justification (and Justifiability) of Private Law in a Polycontextural World*, 9 SOC. & LEGAL STUD. 419 (2000); Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877 (2000); David Campbell, *The Limits of Concept Formation in Legal Science*, 9 SOC. & LEGAL STUD. 439 (2000).

[129] Niklas Luhmann, *Temporalization of Complexity*, *in* SOCIOCYBERNETICS 95 (Johannes van der Zouwen & R. Felix Geyer eds., 1978).

[130] *See* Gunther Teubner, *From "Economic Constitution I, II" to the "Self-justifying Law of Constitutional Law": On the criticality of Rudolf Wiethölter's Critical Systems Theory*, ANCILLIA IURIS 1 (2020); Andreas Fischer-Lescano, *Ironie der Autonomie: Die Rechtswissenschaft im Pakt mit der ökonomischen Macht*, 47 KRITISCHE JUSTIZ 414 (2014).

[131] KLAAS HENDRIK ELLER, RECHTSVERFASSUNG GLOBALER PRODUKTION (forthcoming, 2020).

D. Outlook: Path Dependencies of "Contract and Society" in Transnational Contract Governance

The methodological stakes are even higher when shifting to the transnational level. Contract is a pivotal trope of transnational ordering across various fields of social interaction.[132] Contract here becomes immersed in the fault lines of globalization, that is, of enhanced self-referentiality of social systems unfolding against the backdrop of a hierarchical global political economy.[133] Because recourse to domestic democratic legitimation is cut off for the most part, contract theories need to come to grips with the role of the political. The very question of seeing the transnational realm and its power imbalances and more remote interconnectedness as a novel challenge to contract law depends on theoretical presuppositions that create path dependencies for debates within national jurisdictions. The phenomena of interest here cover the emergence of a fully-fledged anational law of commercial contracts—"new *lex mercatoria*"—as well as, more generally, contracts as a governance mechanism and backbone of transnational social institutions of various types, enabled through the transnational reach of private autonomy.[134] The latter is exemplified, for example, by cross-boundary commercial and investment contracts, but also by the role of contract in transnational "private" ordering in fields as diversified as financial markets, sports, digital communication, or copyright. Here, contracting realities become disembedded from background justice provided for by nation states—irrespective of the claim that "private autonomy" might conceptually be granted only within a given legal order.[135] As soon as private law can no longer rely on a well-curated division of labor with a public regulatory framework to bridge it with concerns of common interest, a crucial element in formalist and neo-formalist contract theories falls apart and thereby shifts attention to the inner-contractual mechanisms of justice. While in the EU, political pluralism can still—hypothetically—be processed by a democratically enacted contract law,[136] such stable political references become ultimately fictitious in the transnational realm. In other words, contracts form miniature transnational legal orders; they build communities and ultimately society at large—a task that is not mastered *en passant* by enabling and restricting individual transactions—but requires an attention to broader societal effects. The role of contract in animating global value chains,[137] for instance, illustrates how contract becomes an arena for matters of distribution, participation, and equality in the global realm[138]—a role that reaches far beyond providing for an efficient design of buyer-seller relationships. This has deep methodological implications for contract law theories.

Scholarship on "relational" contracting has introduced a thinking about contracts as a tool for social, not merely interpersonal, ordering. Even though much more anonymous than in Macaulay's local study of Wisconsin businesses, global trade relations rely on a comparable multi-layered web of norms encompassing custom, social norms—such as reputation and trust—and law.[139] However, the dominant approaches in the Common Law debate, rooted in welfare and institutional economics, appear increasingly problematic when transposed to the transnational level. In essence, they seek to guide legislators in the regulation of business contracts by

[132] *See* ZUMBANSEN, *supra* note 4.

[133] Klaas Hendrik Eller, *Transnational Contract Law*, *in* OXFORD HANDBOOK OF TRANSNATIONAL LAW (Peer Zumbansen ed., forthcoming 2020). For conceptualizations of "transnational law," see generally GRALF-PETER CALLIESS & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW 27–152 (2010); Roger Cotterell, *What is Transnational Law?*, 37 L. & SOC. INQUIRY 500 (2012).

[134] Horatia Muir Watt, *Party Autonomy in Global Context: An International Lawyer's Take on the Political Economy of a Self-Constituting Regime*, *in* COMPARATIVE CONTRACT LAW, *supra* note 2, at 512.

[135] HEIN KÖTZ, VERTRAGSRECHT ¶ 22 (2d ed. 2012) ("Vertragsfreiheit gilt freilich nur im Rahmen der Rechtsordnung. ").

[136] For such a call, compare Martijn W. Hesselink, *Democratic Contract Law*, 11 EUR. REV. CONT. L. 81 (2015).

[137] *See* Ponte & Sturgeon, *supra* note 88; Lee & Gereffi, *supra* note 88.

[138] *See* Eller, *supra* note 86; Ioannis Kampourakis, *Empiricism, Constructivism, and Grand Theory in Sociological Approaches to Law: The Case of Transnational Private Regulation*, in this issue.

[139] THOMAS DIETZ, INSTITUTIONEN UND GLOBALISIERUNG (2010).

curtailing contract law to the maximization of parties' contractual surplus from transactions, while refraining from any other goal.[140] Besides the absence of a central legislator beyond the state, what is more problematic is the resulting lack of any embedding institution geared towards mediating a business rationale with public interests. The transnational character forms a blind spot in theories of "relational" contracting, appearing as a proxy for the general complexity of such contract regimes. This can be read as a direct outgrowth of the conceptual architecture of relational contract theory and has widely inhibited its influence in the field of transnational contract law. The more broadly received projects in transnational law perform an inward turn to contract law by fusing it with social theory to reflect upon its broader and conflicted social function. Especially promising is the theme of an inner "constitutionalization" of private law regimes, which was probed distinctively in Germany at the national level, in the interplay between private law and fundamental rights. From this perspective, theories of "societal constitutionalism"[141] stand in direct lineage to a specific configuration of socio-legal research at the domestic level.

E. Conclusions

Across jurisdictions, the drive to account for the non-contractual elements and extra-contractual effects of contract law has been a leitmotif of contract law's development since at least the beginning of the twentieth century. This Article has examined the relation between normative and social science approaches, notably rooted in economics, economic sociology, and social theory in the genealogy of contract law. Contrasting the UK and US Common Law of contracts with developments under German law, it has been shown that the disciplinary framing underlying the push towards more societally contextualized conceptions of contract differs considerably. One explanation can be seen in the rather continuous reception of legal realism, certainly in the US, and to a lesser extent also in the UK. This has paved the way for broad interdisciplinary perspectives on contract law, ranging from classical socio-legal, empirical work, via economics, sociology, and critical theory, to today's landscape, where essentially instrumental and ideal-normative theories compete. In Germany, however, the realist heritage was less powerful, partly because of a widespread reluctance to blur a rule-based model of law in the post-war era. By consequence, the transformations of contract law were processed from within legal discourse and foremost in their effects on private autonomy as conceptualized, for example, in German idealism, discourse theory, and critical theory. Similarly, the "constitutionalization" of contract law—even though championed as fostering private law's reflexivity of its social effects—has not in its core promoted a socio-legal or interdisciplinary legal discourse.

These findings can be backed by a case study on the discovery and conceptualization of "relational," in other words long-term and often multi-party, contracting. A veritable product of interdisciplinary contributions,[142] "relational" contract has become a prominent concept in US and UK Common Law and inspired a contract law taxonomy going from classical, via neo-classical, to relational contract law.[143] The German legal order, in turn, had an easier task in conceptualizing such contractual regimes, partly on the basis of doctrines originating in the Germanicist tradition and echoing the values of trust and expectation. Still, the German debate was also divided about which disciplines—and more importantly— which underlying theories of society to turn to in order to inform law about the "reality" of complex business transactions. The resulting picture of comparative socio-legal analysis of the changing paradigms of contract is not limited to retracing past legal developments. It also proves profitable when turning to the role of

[140] *C.f.* Schwartz & Scott, *supra* note 15, at 544.

[141] Gunther Teubner, Constitutional Fragments: Societal Constitutionalism and Globalization (2012); Marc Amstutz et al., *Civil Society Constitutionalism: The Power of Contract Law*, 14 Ind. J. Global Legal Stud. 235 (2007).

[142] Grundmann, *supra* note 89.

[143] Macneil, *supra* note 102.

contract in transnational governance. Contract is the central building-block for many developments in the transnational legal realm, and our ability to conceptualize it hinges strongly upon our preconceptions rooted in domestic theories of contract law. The transnational, however, does mark a different terrain in its political, economic, and social structure, and thus for most contract theories, requires conceptual adjustment. In critically following such attempts, being able to identify path dependencies to domestic discourses seems particularly valuable.

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ARTICLE

Empiricism, Constructivism, and Grand Theory in Sociological Approaches to Law: The Case of Transnational Private Regulation

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Abstract
Sociological approaches to law in both Germany and the UK have been characterized by internal divisions and divergent methodologies and aspirations. While, in the UK, empirical socio-legal studies have been a prominent way of studying how law shapes and is shaped by social institutions, in Germany, the "grand theory" of system-theoretical approaches to law has had a lasting impact. In this Article, I discuss the epistemological contrast between these two sociological approaches to law by focusing on how they address transnational private regulation. Empirical socio-legal studies share an epistemic commitment to an objective and knowable social reality, and they tend to see human actors as the motors of history. Thus they focus on the inter-relational dynamics within Global Value Chains (GVCs), searching for "what works" in transnational private regulation. On the contrary, systems-theory oriented sociological jurisprudence views social reality as constructed and fragmented into the epistemes of different social systems. GVCs are understood as self-referential normative orders, in which the question of agency and human actors is secondary—the emphasis is on communications and anonymous forces of ordering. Attempting to inspect the possibilities for synthesis, I ask how "big" we can and should think in law and society. I thus attempt to outline an approach that starts from the materiality of social structures to investigate processes beyond individual agency and to uncover elements of normative reconstruction of the particular area of social activity.

Keywords: Empirical socio-legal studies; constructivism; systems theory; private regulation; transnational law

A. Introduction

The workshop that inspired this Article set out to trace the convergences and divergences between socio-legal studies in Germany and the UK. My contribution relates to internal debates on the nature and purpose of socio-legal studies broadly understood—or, differently—of "sociological approaches to law."[1] Such debates have taken place with different intensity and different

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[1]For the purposes of this contribution, I follow the functional definition provided by Hendry et al., in *Socio-Legal Studies in Germany and the UK: Theory and Methods* in this issue, according to which socio-legal studies are best defined as "oppositional" to doctrinal legal approaches. In that sense, socio-legal studies become synonymous with—the elsewhere broader—"sociological approaches to law."

protagonists in both countries.[2] Indeed, in both Germany and the UK, approaches that claim to study law in light of how it intervenes in social reality have diverged over their prioritized methodologies—that of "empirical research" or that of "grand theory." As empirical research, I understand the research that collects data for the investigation of a particular problem.[3] Empirical socio-legal research then uses such data to study "the intersections of law and society and the ways in which law and society are co-constitutive and co-existent."[4] As grand theory, I understand the attempt to construct a systematic and encompassing theory of the studied relationship or phenomenon, in this case, how law and society interact and shape each other. For the purposes of this Article, I consider both directions to make part of the socio-legal field, broadly understood. A third direction that shares an affinity with the field of "law and society" but which I will not discuss here is that of critical legal studies and theory.[5]

As I will show, the difference between empirical socio-legal research and grand theory-oriented sociological jurisprudence is primarily a difference of epistemology, reflecting the divide between empiricist and positivist aspirations in social sciences on the one hand, and postmodern constructivism on the other hand. In Germany, system-theoretical approaches to law have been an influential current of sociological jurisprudence. I will, therefore, discuss the attempt of legal autopoiesis and of its progeny, societal constitutionalism, to present a unifying theory of law and society without relying on the provision of raw data from field research.[6] Societal constitutionalism builds on the epistemological and analytical premises of systems theory and legal autopoiesis. However, contrary to the latter, it also suggests a normative framework as an answer to the question of how to constrain the expansionary and potentially destructive dynamics of social systems. The reliance on the same constructivist assumptions as systems theory and the engagement with normative thinking makes societal constitutionalism a particularly strong representation of grand theory in contemporary sociological jurisprudence and, thus, a good instance for the comparative work I want to undertake. In the UK, empirical socio-legal research has arguably been a more prominent way to study the law and society nexus. In line with the comparative aspirations of this Special Issue, I will then discuss the underlying methodological and epistemological assumptions of empirical approaches to law. I will draw the comparison between these two different sociological approaches to law by focusing on how they address one increasingly important aspect of legal and social ordering under conditions of globalization, that of transnational private regulation. Unavoidably, the conclusions I draw from this comparative endeavor cannot do absolute justice to the richness of nuances that exist within the paradigms of empirical socio-legal studies or system-theoretical approaches to law. Yet, the discussion of their underlying epistemologies and how these epistemologies inevitably

[2]*See* Stefan Machura, *Milestones and Directions: Socio-Legal Studies in Germany and the United Kingdom*, in this issue; Alfons Bora, *Sociology of Law in Germany: Reflection and Practice*, 43 J.L. & Soc'y 619 (2016); Max Travers, *Sociology of Law in Britain*, Am. Sociologist 26 (2001).

[3] Lee Epstein & Andrew D. Martin, An Introduction to Empirical Legal Research 3–4 (2014).

[4]Margaret Davies, Doing Critical Socio-Legal Studies 88 (Naomi Creutzfeldt et al. eds., 2020).

[5]Critical legal approaches occasionally share the sociological, non-doctrinal viewpoint of socio-legal studies. Without the holistic aspirations of "grand theory," critical legal studies approach the law-society nexus through an abstract inquiry into the significance of legal structures or through a critical rationalization and explication of doctrinal choices. *See* Costas Douzinas & Adam Gearey, Critical jurisprudence: The Political Philosophy of Justice (2005). For the critique that recent critical legal theory has tended to be ethical, rather than socio-historical in its form, see Alan Norrie, *From Critical to Socio-Legal Studies: Three Dialectics in Search of a Subject*, 9 Soc. & Legal Stud. 85 (2000). "Law and Economics" also shares the external perspective to the study of the law. *See* Richard A. Posner, Frontiers of Legal Theory 3 (2001). However, Law and Economics' distinct ambitions and historical development justify not considering it part of the "law and society" movement. As such, I do not discuss it here. *See also* John J. Donohue, III, *Law and Economics: The Road Not Taken*, 22 L. & Soc. Rev. 903 (1988).

[6]For an introduction to systems theory, see Niklas Luhmann, Introduction to Systems Theory (2012) [hereinafter Luhmann, Introduction to Systems]. For legal autopoiesis, see Niklas Luhmann, Law as a Social System (2004) [hereinafter Luhmann, Law]. For societal constitutionalism, see generally Gunther Teubner, Constitutional Fragments: Societal Constitutionalism and Globalization (2012).

structure distinct projects captures an essential aspect of the debates about the nature and purpose of sociological approaches to law. It also provides an insight into the divergent development of law and society in the UK and Germany.

The case study that I use to uncover the different starting points, aspirations, and results of empirical socio-legal research and system-theoretical analysis is that of transnational private regulation. Private regulation I understand as the "voluntary, private, non-state industry and cross-industry codes that address labor practices, environmental performance, and human rights policies."[7] As a form of legal pluralism, private regulation poses a challenge to legal centralism and state sovereignty, making doctrinal approaches to law ill-suited to capture its significance. Considering that private regulation does not depend on the coercive power of the state apparatus and, in that sense, is not a product of a national legal order, it could be readily dismissed as a non-legal phenomenon.[8] Yet, private regulation produces binding and otherwise normative effects on the ground for a plurality of actors in global supply chains. The non-doctrinal, "beyond the books" perspective of sociological approaches to law is sensitive to this normativity that is not linked to state law.

Empirical socio-legal studies approach transnational private regulation through the specificities of each particular context: Which actors are involved; how it is applied in practice; whether it has an impact, and, if so, what the reasons behind its success are. Although a general conclusion about all empirical socio-legal work in the field of transnational private regulation is beyond the aspirations of this Article, the four research works that I analyze point to the conclusion that an emphasis on "context" and, eventually, a level of particularism, is a shared and unifying theme of this strand of research. Underlying this type of sociological approach is an epistemic commitment to an objective and knowable social reality and, to a certain extent, a methodological individualism,[9] which seeks to explain social phenomena in terms of facts about individuals.

In line with systems theory, societal constitutionalism approaches transnational private regulation the opposite way: Fitting concrete instances into its bigger theoretical framework. Systems theory posits that society is fragmented into multiple systems of communication that do not interact directly with one another. Instead, each system translates "irritations"[10] from its environment into its own code communication. As a result, change cannot be imposed upon systems but rather stems from "within" each social system.[11] Societal constitutionalism adds a normative dimension to this descriptive framework by suggesting that social systems need to develop forms of self-limitation and internal democratization.[12] This "constitutionalization" of social systems is necessary in a world where dangers for the social fabric do not emanate solely from political power but

[7]David Vogel, *The Private Regulation of Global Corporate Conduct*, 49 BUS.& SOC'Y 68, 68 (2010).

[8]On the debate on voluntary/binding character of instances of transnational private regulation, see Florence Palpacuer, *Voluntary Versus Binding Forms of Regulation in Global Production Networks: Exploring the "Paradoxes of Partnership," in* THE EUROPEAN ANTI-SWEATSHOP MOVEMENT (Geert de Neve & Rebecca Prentice eds., 2017); Radu Mares, *Global Corporate Social Responsibility, Human Rights and Law: An Interactive Regulatory Perspective on the Voluntary-Mandatory Dichotomy*, 1 TRANSNAT. LEGAL THEORY 221 (2010); John Gerard Ruggie, *Multinationals as Global Institution: Power, Authority and Relative Autonomy*, 12 REG. & GOVERNANCE 317 (2018). According to Gunther Teubner, *Global Bukowina: Legal Pluralism in the World-Society*, *in* Global LAW WITHOUT A STATE 7 (Gunther Teubner ed., 1996):

> [O]n this [legal centralist, doctrinal] viewpoint, any legal phenomenon in the world necessarily has to be "rooted" in a national legal order; it needs at least a "minimal link" to national law. *Lex mercatoria* will never develop into an authentic legal order because it does not regulate an exclusive territory with coercive power.

[9]On the historical waves of methodological individualism, see JOSEPH HEATH, METHODOLOGICAL INDIVIDUALISM (Edward N. Zalta ed., 2020). For a defense, see Steven Lukes, *Methodological Individualism Reconsidered*, 19 THE BRITISH J. SOC. 119 (1968). For a critique, see Roy Bhaskar, *On the Possibility of Social Scientific Knowledge and the Limits of Naturalism*, 8 J. THEORY SOC. BEHAV. 1 (1978).

[10]LUHMANN, LAW *supra* note 6, at 258-259.

[11]GUNTHER TEUBNER, INTRODUCTION TO AUTOPOIETIC LAW 7–8 (Gunther Teubner ed., 1987).

[12]TEUBNER, *supra* note 6, at 83-86, 88-89. *See also* Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC'Y REV. 239, 266-270. (1983).

also from other systems, most prominently the economy.[13] Transnational private regulation appears as a fitting instantiation of this theoretical framework, as it represents attempts of economic actors to self-limit, often in response to social pressures – to irritations from their environment. Underlying this approach to understanding private regulation is, first, a constructivist epistemology that views social reality as constructed and fragmented into the epistemes of different social systems. Second is an anti-individualism that refuses to see human actors as the agents of social action and points instead to constructs, the communications of which human actors express in their social interactions.[14]

While these approaches initially appear irreconcilable and each has its own value as a distinct project, I believe that there is also a margin for a middle ground, or, more ambitiously, for synthesis. This emerges when considering whether there is a spectrum between an encompassing theory of society and sectoral approaches into the specificities of particular social problems. In other words, what are the degradations of thinking "big" in law and society? In that direction, this Article attempts to draw the contours of an approach that focuses on the materiality of social structures. This materiality can be empirically examined not only to provide context-specific insights, but also to uncover elements of normative reconstruction of the particular area of social activity. If frameworks that present themselves as merely "descriptive" do in fact convey implicit normative presuppositions, then empirical research has an inherent potential for normative thinking that extends beyond institutional reforms. A synergetic approach would start inductively from the empirical examination of the materiality of social structures to investigate and possibly to challenge processes that take place beyond individual agency.

In Section B, I show how empirical socio-legal studies and also legal autopoiesis and societal constitutionalism share an external—as opposed to internal, in other words, doctrinal—perspective to law, but differ in their epistemological bases. In Section C, I discuss in detail the response of socio-legal studies and societal constitutionalism to the conundrum of transnational private regulation. In particular, I focus on the role each approach attributes to agents and structures in Global Value Chains (GVCs). In Section D, I attempt to outline a role for "thinking big" in sociological approaches to law and to trace elements of possible convergence between the different approaches. I conclude the Article with a brief summary of the main points discussed and with a note on how thinking on synergies might develop further.

B. Empirical Socio-Legal Studies and Legal Autopoiesis: Converging Perspectives, Diverging Epistemologies

Legal autopoiesis, the conceptual foundation of societal constitutionalism, and empirical socio-legal studies both follow the "sociology of law" tradition of thinking about the law from an "external," observer's perspective.[15] Where "restricted legal theory"[16] adopts a standpoint that is internal to state-based law, aspiring to work out how law is or is meant to be interpreted by legal practitioners, sociological theories of law deliberately distance themselves from the professional viewpoint of the legal practitioner. The limitations of the internal perspective are captured by David Schiff, according to whom "jurisprudence writers in general, have tended to show a lack of concern for an analysis of the structure of society which accounts for the workings of the legal

[13]Science and technology or the media—including social media—are further social systems, the unfettered expansion of which might be detrimental to the social fabric. *See* Teubner, *supra* note 6, at 1.

[14]For this core notion of systems theory, see NIKLAS LUHMANN, THEORY OF SOCIETY 6-13. (2012).

[15]Roger Cotterrell, *The Sociological Concept of Law*, 10 J.L. & SOC'Y 241, 242–43 (1983).

[16]According to DOUZINAS & GEAREY, *supra* note 5, at 10–11, by focusing on the question "what is law ", "restricted legal theory" is bound to seek the characteristics that define the "essence" of the law, limiting the legal phenomenon to particular institutions, practices, and actors.

systems."[17] To address this shortcoming, sociological theories have attempted to answer broader questions about the role of law in society, its relation to political and economic structures, or its role in historical change and social transformation.[18] In that direction, legal autopoiesis is not interested in questions of jurisprudence for their interpretative value for doctrine or case law. Rather, it uses them to distill a broader principle of social theory—the self-referentiality of the law. This becomes instrumental in conceptualizing law as a social system wherein the "paradox" of self-referentiality is not something to be resolved but is rather constitutive of the system and structural in making it operational.[19] Similarly, empirical socio-legal studies are not employing empirical designs to evaluate the internal coherence of the legal doctrine. Instead, they seek to test assumptions about the operations of the legal system and to study how the law affects or is affected by various social institutions.[20]

Starting from such an external perspective and a sociological concept of law, empirical legal research, for many a core element of socio-legal studies, attempts to use the methods of social sciences and study law and legal practices in an objective light, as a set of observable facts. According to Simon Deakin, this type of approach is based on the premise that data gathered through empirical research is "capable of representing features of the social world which exist independently of the process of inquiry which is being used to study them."[21] In other words, empirical legal research is underpinned by the idea that, within a particular social context, there can be objective knowledge that is not merely interpretative or hermeneutics.[22] Such "truth" can be attained, or at least approached, through the rules of good scientific practice. Admitting the possibility of objective empirical knowledge, even with a role for intellectual construction, follows the currents of logical empiricism and positivism in social sciences.[23] Historically, the aspiration behind the use of empirical methods has been to transform society through the use of knowledge: Even in the absence of concrete predictions, the data gathered by social sciences provides a framework of argumentation, dispelling speculative metaphysical doctrines.[24]

[17]David N. Schiff, *Socio-Legal Theory: Social Structure and Law*, 39 MOD. L. REV. 287, 289 (1976).

[18]DAVIES, *supra* note 4, at 88.

[19]Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 L. & SOC'Y REV. 727, 736 (1989).

[20]*See* David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 581 (1984) ("[L]aw cannot be defined other than by the difference it makes in society, and empirical inquiry is necessary to determine what that is."); Carrie Menkel-Meadow, *Uses and Abuses of Socio-Legal Studies*, *in* ROUTLEDGE HANDBOOK ON SOCIO-LEGAL THEORY AND METHODS 43 (Naomi Creutzfeldt et al. eds., 2020):

> [W]here legal scholars have focused on doctrinal developments and often argue for law reform, often without any reference to empirical data . . . socio-legal scholars have been especially good at focusing on non-uniform impacts of law (various forms of patterning by race, class, gender, and other characteristics), the contextual conditions that may be necessary for legal policies to be effective.

[21]Simon Deakin, *The Use of Quantitative Methods in Labour Law Research*, 27 SOC. & LEGAL STUD. 456, 458 (2018).

[22]Geoffrey Samuel, *Does One Need an Understanding of Methodology in Law Before One Can Understand Methodology in Comparative Law?*, *in* METHODOLOGIES OF LEGAL RESEARCH 189 (Mark van Hoecke ed., 2011).

[23]*See* Filipe J. Souza, *Meta-Theories in Research: Positivism, Postmodernism, and Critical Realism*, *in* 16 ORGANIZATIONAL CULTURE, BUSINESS-TO-BUSINESS RELATIONSHIPS, AND INTERFIRM NETWORKS (ADVANCES IN BUSINESS MARKETING AND PURCHASING (Arch G. Woodside ed., 2010) (describing the explicit case for the "Empirical Legal Studies" movement in the U.S., and citing Elizabeth Chambliss, *When Do Facts Persuade - Some Thoughts on the Market for Empirical Legal Studies*, 71 L. & CONTEMP. PROBS. 17, 32 (2008)).

[24]*See* OTTO NEURATH ET AL. eds., INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE 46 (1944). The role of scientific progress and expertise was also an important aspect of legal realism, see Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 1001 (1997 [1897]), according to whom "the man of the future is the man of statistics and the master of economics. " Legal realism has been invested in highlighting the distance between "law in the books" and "law in action," an effort that can only be achieved through empirical study of social facts pertaining to legal endeavors; *see also* Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607 (2007). For a reappreciation of positivism's progressive and even socialist angle before its fall into dismay amongst critical thinkers, see John O'Neill, *In Partial Praise of a Positivist: The Work of Otto Neurath*, 074 RADICAL PHIL. (1995). Similarly, yet denouncing the label of "positivism," Trubek, *supra* note

On the contrary, legal autopoiesis, and by extension, societal constitutionalism, relies on a postmodern, constructivist social epistemology, according to which there is no "reality" to be discovered. Instead, "reality" is constructed. In the case of law, it is law itself as an epistemic subject that constructs its own reality.[25] Systems theory posits that society is differentiated into distinct social systems, each with its own code of communication and, inevitably, its own episteme. In fact, the loss of a "unifying mode of cognition"[26] is a fundamental attribute of modern society. As each social system constructs its own reality, law becomes a "self-validating discourse ... largely impervious to serious challenge from other knowledge fields."[27] This perspective leads to a foundational clash with the positivist ontological underpinnings of empirical socio-legal studies and their invocation of the authority of controlled scientific observation as a privileged access to reality. As Gunther Teubner emphasizes, following Niklas Luhmann, "science does not discover any outside facts; it produces facts."[28] Similarly, law is self-referential and produces its own distinctions and categories. Most characteristically, law should not be understood as a product of particular individuals' actions—including, legislators and judges. Instead, it is law itself as a communicative process that "produces" human actors as its semantic artifacts.[29]

The epistemological divide between socio-legal studies and societal constitutionalism corresponds to the epistemological and ontological divide between positivism, empiricism, and rationalism on the one hand, and constructivism on the other hand.[30] As I will show in the following section, the empirical dimension and largely positivist ontology of empirical socio-legal studies result in a study of the inter-relational dynamics of the actors within GVCs, constituting an effort to uncover "what works" in transnational labor law. On the contrary, societal constitutionalism starts from an understanding of GVCs as self-referential normative orders in which the question of agency and particular actors is secondary. Instead, the normative dimension of societal constitutionalism places the emphasis on the structures and mechanisms that may generate self-regulatory dynamics within social systems, such as human rights or the corporate codes of lead firms.[31]

C. Case Study: Agency and Structure in Global Value Chains

The fact that multiple systems of ordering, not necessarily linked to the legitimate state legal order, might co-exist in the same place at any one time has since long been recognized and theorized by

20, at 580, according to whom those that use empirical methods in legal scholarship are driven by practical concerns, as opposed to an epistemological commitment to positivism or a belief in determinism—this is a commitment to "pragmatism." At the same time, empiricism has also roots in Karl Popper's "rationalism" and the idea that beliefs are rationally grounded only if they can pass a "crucial experiment test"—an approach that led to the dismissal of Utopian social philosophy. *See* KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES (2013).

[25]Teubner, *supra* note 19 at 730.

[26]*Id.* at 738.

[27]Roger B.M. Cotterrell, *Law and Sociology: Notes on the Constitution and Confrontations of Disciplines*, 13 J.L. & SOC'Y 9, 15 (1986).

[28]*See* Teubner, *supra* note 19, at 743 (attacking "law and society" approaches—meaning, here, empirical socio-legal approaches—as "the celebrated controlled experiment is not what it pretends to be, a test of an internal theory against external reality, but is a mere internal coherence test comparing two constructs that are produced according to different procedural requirements: The logic of theoretical reasoning and the logic of the laboratory"). According to NIKLAS LUHMANN, WISSENSCHAFT 2, 9 (1988), "science produces a construction of the world which is validated by its distinctions and not by the world as such. Thus, science cannot claim the authority to discover the only and the correct access to the real world and to communicate this to others." According to LUHMANN, *supra* note 14, at 16, "the coincidence of empirical knowledge and reality cannot be empirically determined, and from an epistemological point of view must accordingly be treated as accidental."

[29]Teubner, *supra* note 19, at 741.

[30]For a brief impression of this recurrent debate, see how Max Horkheimer of the Frankfurt School, in his 1937 article *The Latest Attack on Metaphysics*, attacks Vienna Circle's neo-positivism for political quietism and for furnishing unwitting assistance to fascism, MAX HORKHEIMER, CRITICAL THEORY: SELECTED ESSAYS (1972).

[31]*See generally* TEUBNER, *supra* note 6.

socio-legal research.[32] Private regulation is one instance of this type of legal pluralism. The different ways it has been probed and studied within the socio-legal field flesh out how the different epistemological and methodological assumptions of empirical socio-legal studies and grand-theory sociological jurisprudence lead to divergent ways of conceptualizing the phenomenon and to distinct normative projects.

In a global economy characterized by an organizational system of vertical disintegration, fragmented ownership, and dispersed production, lead firms have managed to keep manufacturing-related concerns outside the legal boundaries of the firm.[33] However, as an appeal to consumers or as a result of social pressures often following a moment of crisis,[34] lead firms have, in many cases, instituted private regulatory regimes that aspire to improve working conditions within supply chains. Currently, the labor aspect of transnational private regulation and the question of lead firm accountability for human rights violations in global supply chains is becoming a growing concern in both studied countries. In Germany, the *Jabir v KIK* case of 2019 highlighted that it might be possible to establish lead firm liability based on obligations assumed by the firm and incorporated in corporate codes that make part of supply chain agreements.[35] Similarly, in the UK, the 2019 *Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines Plc* case underscored that a UK parent company could arguably owe a duty of care to the people affected by its subsidiary's operations.[36]

Yet, the normativity and the social reality of transnational private regulation pose a challenge to traditional conceptions of law that have as their starting point legal centralism and state sovereignty.[37] This makes the external perspective of sociological approaches to law uniquely suited to examine this phenomenon. Empirical socio-legal studies are often concerned with "what works" in transnational private regulation—in other words, what can be evidenced as having an effect. Drawing from the positivist ontology of social sciences and from a methodological individualism that unpacks collective phenomena through the agency of individual actors operating in particular contexts, empirical work concentrates on context, specific case studies, and actors in the value chain. The caveats of inductive reasoning notwithstanding, the researched case studies help to draw lessons of broader theoretical significance. For the purposes of this Article, I summarize four such attempts to delve into the specificities of GVCs, to trace the impact of corporate codes of conduct, and to discern how they interact with public regulation, or what meaning they may acquire when used by local actors as leverage. In these cases, the authors generally refrain from postulating a grand theoretical framework. Any attempts to understand the structure of GVCs and the role of private regulation therein are deduced from the data acquired through the research, the subjects of which are specific actors within the value chain—for example, workers and unions.

[32]*See* Sally Engle Merry, *Legal Pluralism*, 22 L. & Soc'y Rev. 869 (1988).

[33]Gary Gereffi et al., *The Governance of Global Value Chains*, 12 Rev. Int'l Pol. Econ. 78 (2005).

[34]For example, the hybrid regulatory regime of the Bangladesh Accord on Fire and Building Safety in Bangladesh was established following the collapse of the Rana Plaza in 2013 and the death of 1,134 people, most of them garment workers.

[35]*See* Landgericht Dortmund [LG] [Dortmund Regional Court], 7 O 95/15 (filed Mar. 13, 2015) (Ger.) (eventually rejected on the basis that the statute of limitations had expired).

[36]*See* Lungowe and Ors. v. Vedanta Resources Plc and Konkola Copper Mines Plc [2017] [EWCA] (Civ) 1528 (holding that a UK parent company could arguably owe a duty of care to the people affected by its subsidiaries' operations, on the grounds of the "high level of control and direction" that the parent company exercised over the subsidiary); Even though this case concerns individuals affected by the operations of a subsidiary who are not employees of the subsidiary, it eventually follows Chandler v. Cape Plc [2012] [EWCA] (Civ) 525, where the parent company was found to have assumed a duty of care towards the employees of its subsidiary, who had been exposed to asbestos. This was a result of the parent company's "state of knowledge" about the factory in which these employees worked and "its superior knowledge about the nature and management of asbestos risks" in relation to the operations of the subsidiary [78].

[37]Teubner, *supra* note 8, at 6–7.

I. Empirical Studies

One example in this direction is the work of Tim Bartley and Niklas Egels-Zanden, who employ qualitative research methods to interrogate the common hypothesis of the "decoupling" between the symbolic CSR commitments of lead firms and concrete work practices.[38] In particular, they are interested in how local actors within the value chain use the leverage provided by CSR codes to achieve improvements in working conditions. NGOs and especially trade unions use these largely symbolic structures as resources and an opportunity to enroll other actors in order to achieve local goals.[39] One prominent example of such CSR leveraging is "brand boomerang" campaigns, in which union activists facing repression from factory managers cooperate with international allies to pressure lead buyer firms.[40] Yet, the authors point out further avenues taken by Indonesian unions in using CSR commitments to advance their causes. Unions appeal to brands' compliance staff to resolve grievances with factory managers or use the possibility to do so as a form of pressure during negotiations. They also occasionally attempt to engage in capacity-building and participate in standard-setting together with lead firms. In all these instances, the addressee of the demand to promote workers' rights is the lead firm of the value chain, as opposed to the government.[41] Considering the occasional and limited success of such strategies, Bartley and Egels-Zanden suggest that, instead of complete decoupling, it is more suitable to think of CSR and actual labor practices in terms of "contingent coupling." The coupling is contingent because it emerges out of highly contextual contention beyond universalizable recipes for success, and it only temporarily addresses structural, underlying problems, with transformative gains being rare.[42]

Another example of empirical research in transnational private regulation that highlights the importance of context is that of Greg Distelhorst and others in the electronics industry.[43] Using quantitative analysis of factory audits and qualitative fieldwork to identify the institutional

[38]Tim Bartley & Niklas Egels-Zandén, *Beyond Decoupling: Unions and the Leveraging of Corporate Social Responsibility in Indonesia*, 14 Socio-Econ. Rev. 231, 233 (2016). For the hypothesis of decoupling, see John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 Am. J. Soc. 340 (1977); Luc Fransen, *Multi-Stakeholder Governance and Voluntary Programme Interactions: Legitimation Politics in the Institutional Design of Corporate Social Responsibility*, 10 Socio-Econ. Rev. 163 (2012); Dima Jamali, *MNCs and International Accountability Standards Through an Institutional Lens: Evidence of Symbolic Conformity or Decoupling*, 95 J. Bus. Ethics 617 (2010).

[39]*See* the notion of "principled opportunism" in Marxist theory, Robert Knox, *Marxism, International Law, and Political Strategy*, 22 Leiden J. Int'l L. 413, 433 (2009). *See also* Evan Schofer & Ann Hironaka, *The Effects of World Society on Environmental Protection Outcomes*, 84 Soc. Forces 25 (2005) (demonstrating how this dynamic is also examined in world society theory).

[40]In a well-known case, independent unions at the Kukdong factory in Mexico and BJ&B factory in the Dominican Republic successfully gained collective bargaining rights after international campaigns pressured Nike to support freedom of association, Bartley & Egels-Zandén, *supra* note 38, at 236. *See also* César A. Rodríguez-Garavito, Nike's Law: The Anti-Sweatshop Movement, Transnational Corporations, and the Struggle over International Labor Rights in the Americas (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2009).

[41]On how this strategy increases "the very power of corporations that the campaigns aimed to denounce and circumscribe, vesting lead firms with a new form of political authority based on private regulation schemes in global production networks," see Palpacuer, *supra* note 8, at 80.

[42]Empirical research has already shown that corporate codes can lead to improvements in outcome standards, while they change little in process rights for workers and cannot comprehensively challenge existing commercial practices of exploitation, see Stephanie Barrientos & Sally Smith, *Do Workers Benefit From Ethical Trade? Assessing Codes of Labour Practice in Global Production Systems*, 28 Third World Q. 713 (2007). *See also* Richard M. Locke et al., *Does Monitoring Improve Labor Standards? Lessons from Nike*, 61 Indus. & Lab. Rel. Rev. 3 (2007) (reviewing factory audits of working conditions in over 800 of Nike's suppliers and found that monitoring had only limited results); Dara O'Rourke, Monitoring the Monitors: A Critique of PricewaterhouseCoopers' Labor Monitoring (2000) (employing ethnographic research, which included observing monitors at work, to reveal the weaknesses of the monitoring system).

[43]Greg Distelhorst et al., *Production Goes Global, Compliance Stays Local: Private Regulation in the Global Electronics Industry*, 9 Reg. & Gov. 224.

dimensions that complement private regulation, the authors suggest that the local institutional context is the most significant predictor of private regulation being effective at improving labor standards. Strong state regulatory institutions and a strong local civil society are crucial for meaningful compliance, while they also enable synergies with private regulation that lead to higher standards of labor rights protection.[44] Specifically, the authors examined how Hewlett-Packard (HP) monitors and facilitates the compliance of its suppliers with the voluntary Electronics Industry Citizenship Coalition (EICC) code that HP helped establish in 2004. While factory audits reveal that suppliers are far from fully compliant,[45] working conditions appear to have improved as a result of HP's engagement with suppliers.[46] Yet, the rate of improvement and compliance with social standards is best explained not by factory-level predictors, but rather by examining the local institutional environment. In countries with weaker regulatory institutions, including developing countries, the strength of civil society becomes a differentiating factor for the effectiveness of compliance. For example, in Mexico, the mediation of a local NGO led to the creation of a relatively successful collaborative dispute resolution institution that subsidized inefficient state institutions. By contrast, in China, such civil society partners were not easily available, and unionization did not sufficiently advance worker interests.[47] As a result, compliance with the EICC was lower and private regulation could not sufficiently complement lax state enforcement of labor laws. Overall, Greg Distelhorst and others underscore that the local institutional context is vital for the success of transnational private regulation, while private and public regulatory regimes should be thought of as complements rather than rivals.

The study conducted by Andrew Crane and others on forced labor in domestic supply chains in the UK offers another example of focusing on the institutional context to untangle the particular workings of GVCs.[48] Shifting the spotlight from the developing world to forced labor in developed countries, they draw attention to the role of labor market intermediaries. For example, the construction and food industries make significant use of "temporary, casual, and other forms of contingent labor, the supply of which is often outsourced to third-party labor providers."[49] While a key factor for the emergence of forced labor in GVCs is the price pressure exerted by buyers from the Global North on manufacturers in the developing world, in supply chains of the Global North the division of legal status and protections offered to workers depending on their country of origin is critical. The contrast between domestic and global supply chains becomes even more prominent in the discussion of remedies and solutions to such governance gaps. While GVC scholarship emphasizes the potential of private regulation and explores the possibilities for reconfiguring private law instruments along the value chain,[50] domestic supply chains bring to the foreground the state, regulatory enforcement, licensing, and policing. In a sense, this is a response to another difference between global and domestic supply chains—their level of complexity. As Crane and others point out, the "cult of complexity" that surrounds global supply chains overlooks important aspects of simplicity within domestic supply chains.[51]

[44]On how private compliance efforts are layered upon traditional forms of regulation, see D.M. Trubek & L.G. Trubek, *New Governance and Legal Regulation: Complementarity, Rivalry or Transformation*, 13 COLUM. J. EUR. L. 539 (2007). On the question of designing CSR and governance mechanisms that effectively engage with local variations, see Luc Fransen, *The Embeddedness of Responsible Business Practice: Exploring the Interaction Between National-Institutional Environments and Corporate Social Responsibility*, 115 J. BUS. ETHICS 213 (2013).

[45]Distelhorst et al., supra note 43, 228 ("42 percent of audited facilities were non-compliant in wages and benefits.").

[46]*Id.* at 228.

[47]*Id.* at 236 (explaining that low percentages of participation and underfunding are pointed out as reasons for this failure).

[48]Andrew Crane et al., *Governance Gaps in Eradicating Forced Labor: From Global to Domestic Supply Chains*, 13 REG. & GOV. 86, 93 (2019).

[49]*Id.* at 93.

[50]*See* The IGLP Law and Global Production Working Group, *The Role of Law in Global Value Chains: A Research Manifesto*, 4 LONDON REV. INT'L L. 57 (2016).

[51]Crane et al., *supra* note 48, at 101.

Critical in the suppression of forced labor in domestic supply chains then becomes the coordination of already-existing hierarchy- and market-based initiatives designed to address labor abuses, as well as regulation around immigration and other structural conditions that promote vulnerability to exploitation.[52] Eventually, this accentuates the importance of politics, as opposed to capacity deficits.

Anthropological and ethnographic work within GVCs reinforces the idea that structures of exploitation are contextual. This also supports the conclusion that the normativity of private regulation needs to be addressed in its particular instantiations. Anna Tsing, in her study of supply chain capitalism, draws attention to the fact that the cultural diversity of GVCs is a structural element of the processes of exploitation that develop within the chain.[53] In other words, according to Tsing, supply chains vitalize performances of non-economic features of identity and neutralize worker negotiation leverage to maximize exploitation beyond what would be expected from general economic principles—for example, Christian service work at Wal-Mart, women from the Global South with sewing skills learned at home, coding work as entrepreneurship for white men holding on to independence, etc. As diversity becomes ingrained in the processes that make GVCs operational, any comprehensive legal and political theory of supply chain capitalism would have to take into account the "full tapestry" of gender, race, and national status through which exploitation becomes possible.[54] A theory of transnational labor rights and "decent work" can only aspire to be normative through context, through the lived reality of intersecting structures of exploitation. There can be no unifying theory of emancipation designed on paper; instead, theory-building must start from the ground up.

II. Societal Constitutionalism

Does then this emphasis on context and particularity preclude the possibility of a grand theory of supply chain capitalism? Societal constitutionalism shifts the focus from agents to structure, conceptualizing context as an integral feature of its grand theory. The move to structure and the core methodological challenge societal constitutionalism poses to empirical socio-legal approaches does not consist of simply taking into consideration the aggregate dynamics arising from the decentered use of private autonomy. That is something empirical approaches are attentive to, as manifested in the examples above, such as the cumulative and strategic use of codes of conduct in Bartley and Egels-Zanden. Rather, it consists of undermining the fundamental assumption that individuals are the agents of social action and, eventually, the makers of history. The system-theoretical underpinnings of societal constitutionalism draw attention to constructs, primarily to self-organized systems of communication. In system-theoretical terms, humans cannot be thought of as independent agents, beyond the confines of social systems; instead, they partake in multiple and overlapping systems of communication, the codes and functions of which they express through their actions. As a result, the individual is not the basic unit of analysis. She is a medium through which the workings of broader social systems become manifest.

This defines both how to understand society and how to envision social transformation. As society is imagined, divided into multiple self-referential social systems, which remain functional only by translating external complexity to their own code of communication, change and evolution can only happen in one way: System-internally.[55] Social transformation is only possible

[52] *Id.* at 102.

[53] Anna Tsing, *Supply Chains and the Human Condition*, 21 RETHINKING MARXISM 148 (2009). *See also* Hannah Appel, *Race Makes Markets: Subcontracting in the Transnational Oil Industry*, SOC. SCI. RES. COUNCIL (2018), https://items.ssrc.org/race-capitalism/race-makes-markets-subcontracting-in-the-transnational-oil-industry/.

[54] Tsing, *supra* note 53, at 172.

[55] TEUBNER, *supra* note 11, at 1, 7–8.

through the internal workings of social systems, as opposed to superimposition by external agents, such as the state. Effective limitations on the destructive expansion of social systems, like the economy, can only be the result of system-specific logic.[56] In the context of the economy, this is because of two main reasons. The first is that the necessary knowledge for inhibiting a catastrophic expansion of economic rationalities cannot be built from external observation points, such as that of the state. There is no comprehensive, centralized knowledge that can capture, let alone regulate, the hyper-complex processes of the global economy.[57] A mundane manifestation of this lack of epistemic and enforcement capacity is the way transnational corporations manage to circumvent and avoid *ex-ante* regulations, such as taxation. The second reason is that if politics is left to define the fundamental principles of other social systems, such as that of the economy, there is a risk of de-differentiation of society and of slippage to totalitarianism in which politics aspires to represent the whole of society.[58]

Therefore, the solutions to the conundrums of decent work, sustainable development, and even social justice and equality, lie within the transnational economy itself. GVCs must be understood as normative orders in need of constitutionalization.[59] However, the constitutionalization process must not replicate that of the political system.[60] Different, non-state, social structures develop their own forms of self-limitation that amount to constitutionalization through their autonomous processes. This often happens ad hoc at the emergence of a particular social problem.[61] There is no single, all-encompassing social constitution—only "islands of the constitutional in the sea of globality."[62]

One way of envisioning such transnational constitutionalization of the economy is through corporate codes of conduct.[63] By applying to contractors and subcontractors, the codes of transnational corporations constitute regimes of corporate self-governance that coordinate and homogenize outsourced production. While originally designed for guaranteeing product and service standards, such codes have the potential to—and often, indeed, do—expand into areas traditionally understood as "externalities" of the supply chain: The safeguarding of labor rights among suppliers or the impact of the outsourced production on the environment.[64] The genesis of these codes may be traced to the susceptibility of lead firms to "learning pressures," that is, to external pressures, such as reputational sanctions, that lead to internal self-limitation. Such pressures may result from court cases of supply chain liability, soft international legal norms, or civil society pressures and political consumerism. Contrary to state-initiated soft law on the social

[56]Gunther Teubner, *A Constitutional Moment? The Logics of 'Hitting the Bottom,' in* THE FINANCIAL CRISIS IN CONSTITUTIONAL PERSPECTIVE 5 (Poul F. Kjaer et al. eds., 2011). As mentioned above, *supra* note 14, the same logic applies with regards to the expansion of other social systems. For example, with regards to the legal system, human rights serve as a counterinstitution wherein the self-limitations to the expansion of the system are congealed.

[57]On the convergence between systems theory and the Hayekian insistence on "constitutional ignorance" and the "unknowability" of the global economy, see QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM, 224-235. (2018). In parallel with systems theory, F.A. Hayek also opposed ideas of planning and saw the market as a "spontaneous order" and a "system of communication, "in which only "pattern prediction" is possible.

[58]This is a recurrent concern in Teubner's work. See, for example, his exchange with Antonio Negri in Gunther Teubner, Societal Constitutionalism and the Politics of the Common, 21 FINNISH Y.B. INT'L L. 2 (2010). For a critical engagement with this view, see Ioannis Kampourakis, CSR and Social Rights: Juxtaposing Societal Constitutionalism and Rights-Based Approaches Imposing Human Rights Obligations on Corporations, 9 GOETTINGEN J. INT'L L. 537, 566 (2019).

[59]On law's endogeneity in GVCs, see Dan Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 HARV. INT'L L.J.411 (2005).

[60]Teubner, *supra* note 58, at 13.

[61]One such example could be considered the emergence of the Accord on Fire and Building Safety in Bangladesh.

[62]TEUBNER, *supra* note 6, at 52. *See also* Neil Walker, *Beyond the Holistic Constitution?*, *in* THE TWILIGHT OF CONSTITUTIONALISM (Petra Dobner & Martin Loughlin eds., 2012).

[63]Gunther Teubner, *Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, 18 IND. J. GLOBAL LEGAL STUD. 617 (2011).

[64]Jaakko Salminen, *Contract-Boundary-Spanning Governance Mechanisms: Conceptualizing Fragmented and Globalized Production as Collectively Governed Entities*, 23 IND. J. GLOBAL LEGAL STUD. 709, 713–14 (2016).

responsibility of transnational corporations,[65] the resulting corporate codes of conduct are considered an effective and binding form of private ordering.[66]

A second lens through which to understand the normative direction of constitutionalizing GVCs is that of human rights. Human rights make up an integral aspect of the decentered conceptualization of society that informs societal constitutionalism. However, in a clear shift from agents to structure, the crucial feature of human rights is not their role as guarantors of affected legal interests of individuals, but rather their function "as social and legal counter-institutions to the expansionist tendencies of social systems."[67] The question behind the "horizontal effect" of human rights is not a question of balancing the rights of concrete actors—instead, it is an "ecological" question of the weight of the injury caused by the expansion of a social system to other functional systems.[68] The case of labor and human rights violations in sweatshops is elucidating. In this case, it would be a mistake to consider factory managers as the only ones responsible, especially considering the price pressure imposed on them by lead firms. Yet, focusing only on lead firms is equally misleading. Often, arguments of lack of knowledge or control over suppliers' management of production have a basis as monitoring and auditing processes might be circumvented. It is, instead, "anonymous market forces" that are eventually responsible for the structural violence that characterizes sweatshops.[69] Therefore, human rights need to be conceived as a defense against precisely such anonymous forces, rather than against specific actors.

Despite the normative direction of societal constitutionalism toward the democratization of the economy from within, there is no room for optimism for an overarching resolution to issues of justice and genuine fulfillment of human rights. The project of a utopian justice remains a conceptual impossibility. Humans are, by definition, neither the subjects nor the objects of communications—these are the social systems in which humans take part. As a result, society can never aspire to fully do justice to humans, who stand outside communication. At best, it can create the kind of irritations or "learning pressures" to social systems so that they remove unjust situations. But then, it can be asked, how do we know which situations are unjust? The way out for societal constitutionalism is to draw attention to spontaneous indignation, protest, and unrest. This is a move that reconnects a grand theory project with empirical reality and, in a way, it prepares the ground for the argument I will present on the possibilities for synthesis. While the claim that justice can only be construed in negative terms may be seen as anti-utopian, it shares the characteristic grand theory-like attribute of making broad claims about the nature of social order. The "negativity" of this overarching perspective captures the postmodern incredulity to narratives of incremental reform, a tendency present in the empirical analyses of GVCs discussed above. Drawing from the comparison between empirical socio-legal studies and societal constitutionalism I outlined in this section, I will now attempt to further elucidate the role of "grand theorizing" in the socio-legal field.

[65] *E.g.*, the UN Guiding Principles on Business and Human Rights of 2011. For quasi-soft law legislative initiatives focusing on transparency, see also the EU Directive 2014/95 or the UK Modern Slavery Act of 2015.

[66] Teubner, *supra* note 6, at 48. Corporate codes are particularly promising as "civil constitutions" because they introduce not only primary rules for the protection of labor rights or the environment but also secondary rules that juridify reflexive processes that link the corporation with its environment. *See* Teubner, *supra* note 63, at 624. On the potential of corporate codes, see also, Anna Beckers, Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law (2015).

[67] Gunther Teubner, *Transnational Fundamental Rights: Horizontal Effect?*, 40 Neth. J.L. Phil. 191, 210 (2011).

[68] Gunther Teubner, *The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors*, 69 Mod. L. Rev. 327, 330 (2006).

[69] *Id.* at 335.; Mark Anner et al., *Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 Comp. Lab. L. & Pol'y J. 1, 3 (2013) ("[L]abor violations are not simply a factory-level problem that can be corrected by improved compliance monitoring; they are a pervasive and predictable outcome in an industry dominated by lead firms whose business model is predicated on outsourcing apparel production via highly flexible, volatile, and cost-sensitive subcontracting networks.").

D. How "Big" Should We Think in Law and Society?

The discussion of the empirical research in GVCs indicated that the authors did not—with the exception of Anna Tsing—attempt to link their findings to an overarching theory of society or of the role of law and private regulation in conditions of globalization. Is there a value in extrapolating from empirical findings to more systematic theory-building? What is the place of social and legal theory—and especially of grand theory—in the socio-legal field and in connection to empirical scholarship?

Underlying empirical socio-legal work is the assumption, first, that objective social reality exists, and second, that it is, in some way, observable, intelligible, and even measurable. The existence of a material, social reality implies that phenomena occur within a specific socio-historical context. It is by gathering data within that context that researchers may find regularities and patterns behind social phenomena. By definition, then, all knowledge is partial and contextual. Any unitary account of the social order is at best reductive and at worst obfuscating, possibly manipulating data to advance transhistorical claims.[70]

On the one hand, relying on empirical data to address specific social problems has had a distinctly "progressive" and "reformist" character. Indeed, a cardinal aspect of legal realism was the urge to study the social facts behind legal endeavors, to demystify metaphysical legal doctrines through the knowledge of their social impact, and to shape a better, more moral law based on the teachings of sociology, economics, or anthropology.[71] For example, in the U.S., this realist recruitment of empiricism and the sciences was the intellectual spearhead behind the New Deal policies in the 1930s.[72] At the same time, however, the reliance on facts and data fueled the "rationalist" turn in social disciplines, namely the Popperian dictum that beliefs are rationally grounded only if they can pass an experimental test of falsifiability.[73] This test was meant to distinguish between factual and normative claims, placing the social disciplines on the path to become "real" sciences.[74] By separating the normative from the descriptive, while attributing scientific credence only to the latter, the rationalist stance was decisively anti-utopian. Thinking "big" in social philosophy was tantamount to "mystifying nonsense."[75]

But can we so neatly distinguish between the factual and the normative? Or does the discernment of the factual already smuggle in normative preconceptions? According to Thomas Kuhn, our access to facts, in the light of which we are supposed to test our beliefs, is always filtered by existing "paradigms" of understanding.[76] If our access to reality is dependent on contingent beliefs and paradigms of understanding, then the rationalist project begins to lose ground and the boundary between the factual and the normative becomes more porous. Knowledge is not partial and contextual; it is socially constructed. Postmodern constructivist positions that start from this premise would not normally dovetail with singular, overarching schemes of explanation.[77] However, the constructivist position is *in itself* an overarching, singular explanatory scheme about society. Theoretical endeavors that start from such an epistemology cannot but morph into some form of grand theory.[78] They are bound to prioritize concepts as opposed to

[70] C. Wright Mills, The Sociological Imagination 22 (2000).

[71] Morton J. Horwitz, Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy 189 (1992) (summarizing the reformist impetus of legal realism in which "detailed knowledge of social fact [provides] a necessary demystifying first step toward the goal of social reform").

[72] *See* Marcus J. Curtis, *Realism Revisited: Reaffirming the Centrality of the New Deal in Realist Jurisprudence*, 27 Yale J.L. & Human. 157 (2015).

[73] *See* Popper, *supra* note 24.

[74] Quentin Skinner, The Return of Grand Theory in the Human Sciences 5 (Quentin Skinner ed., 2000).

[75] Popper, *supra* note 24, at 247 (citing Schopenhauer's critique to Hegel).

[76] *See* Thomas S. Kuhn, The Structure of Scientific Revolutions (2009).

[77] Skinner, *supra* note 74, at 12.

[78] *Id.* at 12–13:

> There is no denying that Foucault has articulated a general view about the nature of knowledge, that Wittgenstein presents us with an abstract account of meaning and understanding, that Feyerabend has a preferred and almost

concrete social reality because they see concepts at the roots of all understanding. At the same time, the recognition that the factual cannot exist irrespective of some normative preconceptions implies that even an explicitly self-declared empirical approach, like that of Empirical Legal Studies, cannot help but convey—at least implicitly—a theory about the role of law in society and the way it mediates between power and reason.[79] Even an instrumental approach to legal reform entails the commitment to a background prescriptive theory of the relevant area of social practice, as manifested at least in selecting the cases to be examined.

Fleshing out such normative commitments may lead to delimiting the role law can play in social transformation, acknowledging that it is only one among interrelated social frameworks where social hierarchies might be instantiated.[80] For example, in that direction, societal constitutionalism delimits what law can achieve by daring a big claim about justice: That it is unattainable—at least through law. The determinism of this claim is only nuanced by its attachment to the contingency of the meaning of justice.[81] For law to approach justice, it is neither enough to refer to its own internal principles (positivism) as justice searches for an extra-legal orientation, nor to appeal to metaphysical authorities beyond law that supposedly possess substantive criteria of justice (natural law). Instead, law is dependent on its "ecologies": Its social, human, and natural environment and the varying understandings of justice therein.[82] Regardless of where one stands on this pluralist utopianism, it constitutes a type of normative thinking that goes beyond legal reform. Societal constitutionalism engulfs contingency, context, and local variation as parts of a singular explanatory and normative framework. Paradoxically, *difference* becomes the unifying theme of a constructivist, postmodern grand theory.

Is the dichotomy between empirical socio-legal approaches and constructivist grand theory approaches unbridgeable? Critical realism offers a way to imagine a possible middle ground or even a synthesis between empirical socio-legal studies and grand theory. Critical realism rejects the methodological individualism of explaining social phenomena via an ultimate recourse to the individual in a way that is reminiscent of systems theory: A study of society is not a study of the behavior of large groups but rather a study of the persistent relations between individuals or groups.[83] However, critical realism also acknowledges that society consists of real people and that "the material presence of social effects consists only in changes in people and changes brought about by people on other material things."[84] While people unconsciously reproduce the structures that govern their lives, they retain agency in the process. The hegemony of particular social structures is ensured through the repetition of their performance. In turn, this repetition constitutes a particular social order and the individuals therein, defining the contours of their agency.[85]

Popperian method of judging scientific hypotheses, and even that Derrida presupposes the possibility of constructing interpretations when he tells us that our next task should be that of deconstructing them .... There is no paradox, in short, in giving pride of place to the iconoclasts: Almost in spite of themselves, they have proved to be among the grandest theorists of current practice throughout a wide range of the social disciplines.

[79]Hanoch Dagan et al., *Legal Theory for Legal Empiricists*, 43 L. & Soc. Inquiry 292 (2018).

[80]Nicola Lacey, *Normative Reconstruction in Socio-Legal Theory*, 5 Soc. & Legal Stud. 131, 140, 146 (1996).

[81]It is interesting to note that this determinist anti-individualism that leaves little room for human agency is common with that of structuralism. *See, e.g.*, Louis Althusser, *Louis Althusser Replies to John Lewis*, 1 Austl. Left Rev. 23, 29 (1972) ("[H]istory is a process without subject."). The contingent meaning of the discussed categories is the differentiating, post-structuralist factor. *See* Bernard E. Harcourt, *An Answer to the Question: 'What is Poststructuralism?'*, (University of Chicago Public Law & Legal Theory Working Paper No. 156, 2007).

[82]Gunther Teubner, *Self-Subversive Justice: Contingency or Transcendence Formula of Law?*, 72 Mod. L. Rev. 1, 9 (2009).

[83]Bhaskar, *supra* note 9, at 6 (explaining it would be impossible to give a non-social, for example, strictly individualistic explanation of an individual—"explanation ... always seems to involve irreducibly social practices").

[84]*Id.* at 8. Materiality is different from "observability" but is rather defined through the function structures perform in the social world. For example, structures may not be observable but still perform a function such as the concept of a deity. *See also* Souza, *supra* note 23, at 24; Roy Bhaskar, A Realist Theory of Science (2008).

[85]Luis Eslava, *The Teaching of (Another) International Law: Critical Realism and the Question of Agency and Structure*, L. Teacher 1, 4 (2019).

Therefore, social structures, if only by reason of them constituting subjectivities, have a material, palpable manifestation in the real world. While this does not exclude that some aspects of the world are socially constructed, it allows a wide margin for empirical research to work with and elucidate this materiality.

Grand theories in sociological approaches to law base their normative output on presuppositions that are inevitably axiomatic. For example, societal constitutionalism's normative agenda of "democratizing the economy from within" follows from the presuppositions, first, that society is fragmented in different systems of communication and, second, that these systems cannot communicate directly. The impossibility of direct communication implies that top-down state intervention in the economy cannot be efficient, redirecting the focus of social transformation in system-internal processes.[86] Yet, how do we know that these presuppositions are "true"?

Admitting that social structures possess materiality means that some type of empirical examination of them must be possible and that they are not accessible only through reason. Yet, at the same time, admitting the existence of structures that go beyond the individual use of private autonomy invites a level of abstraction capable of capturing processes that take place "beyond individual agency," such as the anonymous market forces defining sweatshops. Empirical socio-legal research has the capacity to uncover how social structures are shaped and negotiated in specific social practices, localities, and contexts. In Anna Tsing's words, "it is time to reimbue our understanding of the economy with the art of noticing."[87] A similar undertone echoes in Boaventura De Sousa Santos' argumentation for an "emancipatory common sense."[88] In that sense, empirical socio-legal studies can be most promising when they are not merely attuned to possible institutional reforms, but when they discover, inductively, elements of normative reconstruction of the particular area of social activity. What meaning do concepts like justice acquire in the human "ecologies" of the law? By turning the attention to "subaltern counterpublics"[89] and giving them a voice, counter-hegemonic values that were so far unexplored may gain prominence, disrupting currently dominant ways of social ordering. In that direction, the fieldwork of De Sousa Santos on the parallel legality of the favelas in Rio de Janeiro provides a basis for theoretical insights on law, postmodernism, and social struggles.[90] Similarly, Tsing's ethnographic research on supply chain capitalism shows how diversity is both the condition that makes value extraction from supply chains possible and a challenge to GVCs, that is, a possible opening to non-capitalist spaces.[91] An inductive approach of descriptive and normative inquiry may never meet the requirements of the rationalist, "scientific" objectivity. Yet, it could be the underpinning of utopianism and normative legal thinking that imagines new institutional and social arrangements.

E. Conclusions

Both in Germany and the UK, sociological approaches to law have had internal divisions, methodological rifts, and divergent aspirations, while still sharing an external perspective to the study of law. While empirical socio-legal studies have strong institutional presence and influence in legal research and education in the UK, the same cannot be said about Germany.[92] At the

[86] Gunther Teubner, After Legal Instrumentalism? Strategic Models of Post-Regulatory Law 310–12 (Gunther Teubner ed., 1986) (considering direct, top-down regulation faces a "regulatory trilemma" of under-effectiveness, over-effectiveness, or regulatory capture).

[87] Anna Tsing, The Mushroom at the End of the World: On the possibility of Life in Capitalist Ruins 132 (2017).

[88] Boaventura de Sousa Santos, Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition 46-50 (1995).

[89] *See* Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, Soc. Text 56 (1990).

[90] de Sousa Santos, *supra* note 88. *See also* Peter Fitzpatrick, Law and State in Papua New Guinea (1980).

[91] Tsing, *supra* note 53, at 171–72.

same time, Luhmann, Teubner, and others in sociological jurisprudence from a systems-theory perspective have had a lasting influence in German legal academia.[93] In this Article, I have tried to show that these projects do not differ only in their methodologies or their style but also in their epistemologies and ontological perspectives on social reality. Where empirical socio-legal studies tend to see an objectively existing social reality that can be probed and studied through the collection of data, societal constitutionalism – and legal autopoiesis more broadly – see a constructed and fragmented reality in which there is no "unifying mode of cognition."[94] This structures different ways to approach societal problems and different ambitions in suggesting explanatory and normative frameworks. Indicatively, the tendency of societal constitutionalism to decipher social reality through structures, such as the communications of social systems, rather than through human agency, leads to holistic explanatory and normative frameworks despite taking into consideration context and difference. On the contrary, the focus of empirical socio-legal studies on observable social reality and concrete individuals renders such approaches self-aware of the partiality of their contribution.

The discussion of transnational private regulation revealed these rifts. Empirical socio-legal studies tend to focus on the dynamics between agents in GVCs and on the concrete impact of transnational private regulation, often attempting to uncover what could make this form of legal pluralism more effective in protecting labor rights or the environment. Societal constitutionalism emphasizes the need for structures and mechanisms that may generate self-regulatory dynamics within social systems, such as, for example, human rights or the corporate codes of lead firms. While the content of these mechanisms may be context-specific, the idea of self-limitation—as opposed to, for example, external limitation—is a necessary and unavoidable result of the theoretical premises of societal constitutionalism.

The quest to imagine possible synergies between the discussed ways of thinking about the law sociologically extends beyond the ambitions of this Article. Indeed, the quest to adequately capture the materiality and meaning of "context" is ever-present in socio-legal studies.[95] Synthesis of the empirical and the grand theory perspective is premised on the idea that social structures, such as the "anonymous market forces", do, in fact, have material existence, at least because they shape and condition individuals. Yet, while the "individual" is conditioned through its contact with social structures, empirical research targets subjectivities under continuous forces of transformation. Even if a certain outline of social structures is postulated, such as the asymmetry of power relations in value chains, the outcome of the produced subjectivities remains uncertain. For instance, workers could endorse corporate codes and aspire to be part of a broader corporate culture, they could reject them as paternalizing, or they could only use them strategically. Starting inductively from the materiality of social structures and the conditioned subjectivities to eventually uncover and normatively evaluate processes beyond individual agency may be a key in thinking "big" in law and society.

[92]Bora, *supra* note 2, at 640.

[93]That does not mean that in each examined country the different approach is absent. For example, systems theory has influenced scholars working in the UK, like Emilios Christodoulidis, Jen Hendry, Andreas Philippopoulos-Mihalopoulos, Christopher Thornhill and others. Similarly, empirical socio-legal research is of course also present in Germany, often under the title "interdisciplinary legal research" ("*Interdisziplindre Rechtsforschung*"). *See* Susanne Baer, Rechtssoziologie: Eine Einführung in die Interdisziplinäre Rechtsforschung (3d ed. 2017).

[94]Teubner, *supra* note 19, at 738.

[95]Peer Zumbansen, *Transnational Law as Socio-Legal Theory: The Challenges for "Law in Context" in a Divided World*, 67 Buff. L. Rev. 909, 911 (2019).

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ARTICLE

Making socio-legal Research More Social by Design: Anglo-German Roots, Rewards, and Risks

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Abstract
This Article looks for signs of Anglo-German life in the literature and practice under-pinning the current move to use "designerly ways" in socio-legal research; and asks whether design has a role to play in nurturing a sense of Anglo-German socio-legal community. It argues that a "sociological imagination" is essential if we are to fully understand possible synergies between design and socio-legal research, and the risks and rewards of activating them; and that while we cannot know what socio-legal research will or ought to look like in the coming months and years we must pay more attention to designing those moments that we are lucky enough to share in person.

Keywords: Legal design; socio-legal research methods; Anglo-German scholarship

A. Introduction

A central theme motivating the 2019 workshop on "Socio-Legal Studies in Germany and the UK: Theory and Methods"—from which this Special Issue emerged—was "how academic traditions and institutional contexts have influenced the development of socio-legal research in Germany and the UK," and whether there exists a "typical pathway into and through law and society research" in each jurisdiction. During discussion, repeated note was made of a tendency among German academic institutions to be relatively structured or rigid—both in their definitions and assessments of legal research, and in their expectations around publishing and career pathways—and it was argued that this influences the inclination and ability of researchers to follow where their intellectual curiosity might lead. By contrast, it was observed, researchers in the UK benefit from a greater freedom to pursue the topics and methods of their choosing. As Stefan Machura details elsewhere in this Special Issue, this divergence manifests in the fact that, although German *Rechtssoziologie* began earlier, the UK variant, socio-legal studies, is stronger—a difference he attributes to the fact that socio-legal studies is defined more broadly, and there is a "greater openness" to "ideas from other disciplines in the UK."[1] As a UK-based academic, I can confirm that my

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[1]Stefan Machura, *Milestones and Directions: Socio-Legal Studies in Germany and the United Kingdom*, in this issue.

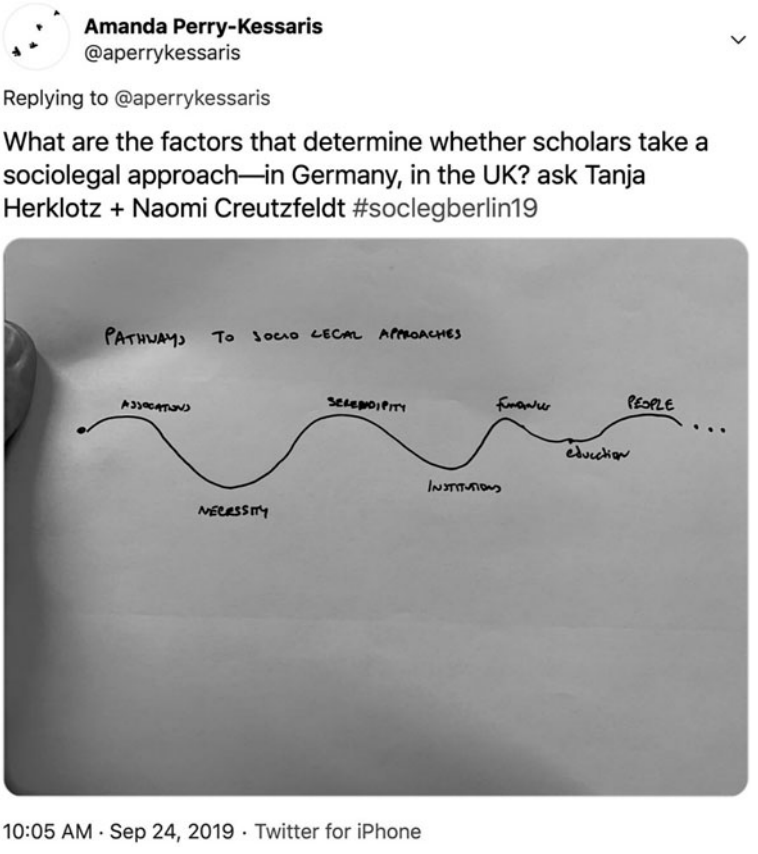

Figure 1. Visual summary of discussion on pathways to socio-legal scholarship in the UK and Germany at "socio-legal Studies in Germany and the UK: Theory and Methods"[2].

personal experience—shaped, of course, by a particular constellation of factors such as time, place, economics, and identity—has been one of freedom, and especially recently, of support to go my own way. Most notably, I have been able to devote substantial time and research funds over the last twenty-five years to train in other disciplines; and my attempts to draw insights from those disciplines have generally been received as legitimate by the UK socio-legal research community. That curiosity-driven, somewhat "serendipitous"[3] journey has led me to an ongoing project, *Doing Socio-Legal Research in Design Mode*, which explores the potential of design to help us to understand and enhance socio-legal research methods.

My interest in the intersections between law and design was triggered by frustration at the lack of communication among law, economics, sociology, and development studies.[4] Between 2012–2017, I became a part-time student of visual communication and then graphic design at the University of the Arts, London. A key insight I took from those years spent as a student of design is that "designerly ways"—that is, the mindsets, tools, and processes that are

[2]Amanda Perry-Kessaris, Screenshot of a Tweet During a Discussion on Pathways to socio-legal Scholarship, Twitter (Sept. 24, 2019, 10:05 AM), https://twitter.com/aperrykessaris/status/1176422363510059009?s=20.

[3]*See infra* Figure 1.

[4]Amanda Perry-Kessaris, The Case for a Visualized Economic Sociology of Legal Development, 67 CURRENT LEGAL PROBS. 169 (2014).

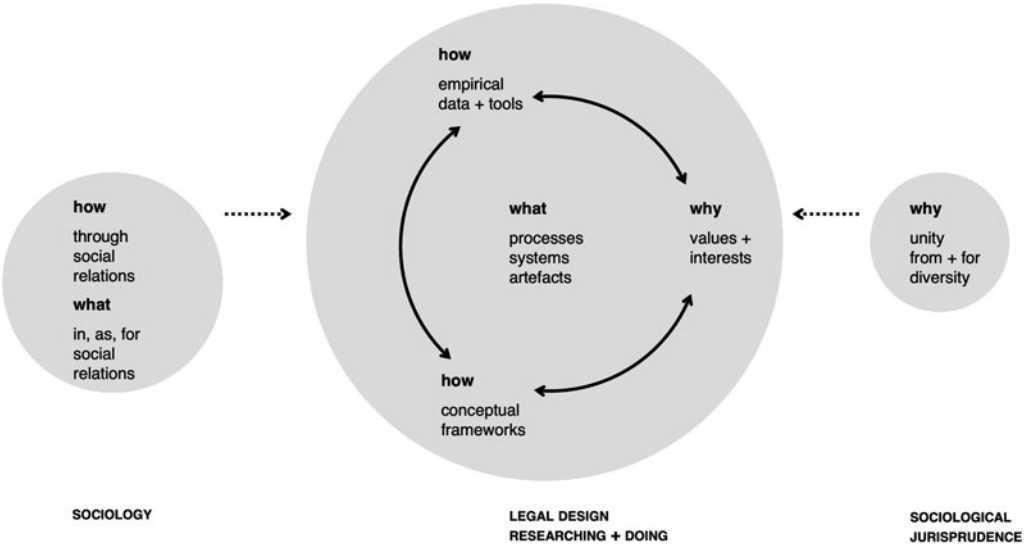

Figure 2. Excavating the Anglo-German roots of *Doing socio-legal Research in Design Mode*[5].

characteristic of design—are more inherently "social" than legal ways. I began to investigate the potential of designerly ways to make socio-legal research more "social."[6]

Reflecting back on the workshop discussion, two questions arise for me—one retrospective and inward-looking, one prospective and outward-looking—around which I will structure this Article. First, what signs of Anglo-German life can I find in the literature and practice underpinning my current research into socio-legal research and design? Second, might design have a role to play in nurturing a sense of Anglo-German socio-legal community?

B. Anglo-German Concepts and Norms

Any approach to law can be categorized in terms of what, substantively, is approached—for example, legal text, context, and/or subtext; how it is approached, both empirically and conceptually; and why it is approached—that is, motivated by what values and interests (Figure 2).[7] My wider project on "doing socio-legal research in design mode" focuses primarily on how designerly ways (mindsets, tools, processes) might enhance how (empirically, conceptually) we do socio-legal research; and in so doing, to better promote whichever values and interests we may seek to promote through our research. Here, I emphasize the Anglo-German influences on the conceptual (not empirical) dimensions of my work (how); and on my normative agenda (why).

[5]Amanda Perry-Kessaris, Image of the Anglo-German Roots of Doing socio-legal Research in Design Mode (2020).

[6]For a discussion of how, using designerly ways to make research more "social," we can improve its meaningfulness to the public or stakeholders, see Amanda Perry-Kessaris & Joanna Perry, *Enhancing Participatory Strategies with Designerly Ways for socio-legal Impact: Lessons from Research Aimed at Making Hate Crime Visible in Europe*, Soc. & Legal Stud. (forthcoming 2020); for a more detailed exploration of the risks and rewards of "doing socio-legal research in design mode," see Amanda Perry-Kessaris, Doing socio-legal Research in Design Mode (forthcoming 2020).

[7]Perry-Kessaris 2015 Perry-Kessaris, A (2015) 'Approaching the econo-socio-legal' 11:16 *Annual Review of Law & Social Science* 1-18. *See infra* Figure 2.

I. Concepts

socio-legal researchers conceptualize the world, including law, in terms of social relations and the values and interests that underpin or motivate them. Like many in the UK and beyond, I tend to think in terms of the typology proposed by German sociologist and jurist, Max Weber, to distinguish between values and interests that are "instrumental" (for example, motivated by a purpose or task), "belief-based" (for example, motivated by religion), "affective" (for example, motivated by love) or "traditional" (for example, motivated by custom).[8] As populations have diversified and the complexities inherent in notions of national identity have been exposed, so it has become necessary to identify more flexible units of social analysis. Here, I draw on UK sociologist and legal philosopher Roger Cotterrell, who has long argued that we ought to look less for "society" and more for "communal networks"—that is, for those patterns of relatively sustained and trusting interactions, centering on any of the values and interests identified by Weber, in which each of us is (typically multiply) engaged.[9] This is the lens through which I think about both the social life of law, especially law as a communal resource; and the socio-legal research process, especially socio-legal researchers as forming an (instrumental, but also potentially affective) communal network.

II. Values and Interests

Why do we (or ought we to) do socio-legal research—what values and interests does it (ought it to) serve? What is its function? For me, the most useful and meaningful answers to this question—at least in the English language—are to be found in Cotterrell's recent work on sociological jurisprudence, which—like his earlier work on law's role as a communal resource—is built on German foundations.[10]

In *Sociological Jurisprudence*, Roger Cotterrell celebrates the role of "jurists"—that is, those[11] who, first, approach law as a "practical" as opposed to purely abstract or technical, "idea"; and, second, seek to protect and "promote" its "well-being," rather than to merely exploit, "unmask or debunk it." He argues that this juristic "promotion of a value-oriented idea of law," which is "adapted to the specific, varying conditions of law's sociohistorical existence is the most distinctive, perhaps ultimately the most difficult, form of legal expertise,"; and that it requires a distinctly sociological—as opposed to a black-letter law, or law and social theory—orientation.[12] For me, the unavoidable implication of Cotterell's argument is that all socio-legal scholarship ought to be juristic. So how does such a juristic orientation translate into socio-legal practice?

First, a juristic orientation implies a focus on law as an empirical, real world, phenomenon. This aligns very easily with standard socio-legal practice which has for many decades, and thanks in large part to Max Weber, centered on systematic sociologically-informed studies of what I will call legal action—for example, of how police, judges, bureaucrats, activists, and/or litigants use, abuse, and avoid law. Second, a juristic orientation encourages the systematic, sociologically-informed study of "legal ideas"—for example, what are the core "values" present in law and

[8]Max Rheinstein, *Introduction* to Max Weber, On Law in Economy and Society i (Max Rheinstein ed. & trans., E.A. Shills trans., Harvard Univ. Press 2d ed. 1954).

[9]Roger Cotterrell, *A Legal Concept of Community*, 12 Canadian J.L. & Soc'y 75, 80–82 (1997).

[10]Cotterrell.

Cotterrell 1997.

Cotterrell, R. (2006) *Law, culture and society: legal ideas in the mirror of social theory*. Aldershot: Ashgate.

Cotterrell, R. (2018) *Sociological Jurisprudence: Juristic thought and social inquiry* Routledge.

[11]Although anyone who engages with law—journalists, private practitioners, or policy makers—might take a juristic approach to the field, this Article focuses on socio-legal researchers.

[12]Roger Cotterrell, socio-legal Jurisprudence: Juristic Thought and Social Inquiry 31–33 (2018).

society, where do they come from, and what are their effects? Again, this aligns with standard socio-legal practice, which in turn owes much to the work of Max Weber.

What makes a juristic orientation distinctive is that it can shed light on what legal values *ought* to be. This is controversial because sociology and, therefore, socio-legal scholarship, is traditionally directed to "understanding facts" rather than "applying values."[13] Specifically, Cotterrell argues, a juristic orientation gives an overarching, normative purpose for socio-legal scholarship—namely, unity. Drawing on the work of German legal philosopher Gustav Radbruch (1878-1949), Cotterrell proposes that we conceptualize law as a "triangle" composed of "three central values." Of these, two are basic technical values that fall within even the thinnest of conceptions of law: Namely order ("or security or certainty") and justice (or "equal treatment"). But the third value, law's "(fitness for) purpose," is dynamic and contingent. Its "content"—including "who and what are to be considered equal ... and how justice is to be measured and realised" is derived from, and so changes with, "sociohistorical place and time."[14] The distinctive duty of the jurist who, by Cotterrell's definition, seeks to promote the well-being of law as a practical idea, is to actively work to "hold" that "justice-order-purpose triangle of law together." They must do this by conceptualizing law in ways that accommodate and promote diversity, specifically by "integrating as equally valuable subjects of law ... *all* those living within the jurisdiction of a legal system."[15] More specifically, the social function of law is to express the values and interests that hold us together, coordinate the differences that keep us apart, and encourage participation in social life.[16]

The upshot for socio-legal researchers is that we have a juristic duty to promote social and legal unity from and for social and legal diversity. In my view, that duty applies to us both in our capacities as members of socio-legal research communities, and in relation to the impact that our research might have on communal networks beyond academia. At the heart of this duty is, I argue, a tension between unity/structure and diversity/freedom on the other:

> On the one hand, a commitment to the well-being of law requires a commitment to "law's unity" as a coherent "structure of values." On the other hand, a commitment to law as a practical idea, one that is socially meaningful, requires a commitment to ensuring that it accommodates, and actively nurtures, diversity. Law achieves this objective, which Cotterrell terms "social unity," by "facilitat[ing] communication" about the "need" for "respect" for "all"; as well as by enforcing that need by challenging inequality and bias.[17]

This need to navigate the tension between structure and freedom, and this emphasis on law as a communicator, are clear points of contact between law and design. Furthermore, a juristic commitment to the well-being of law as a practical idea calls for skills, knowledge, and attitudes that are at once practical, critical, and imaginative; and, as will be seen below, this constitutes the third point of contact between law and design. What I did not fully appreciate before the opportunity presented by the workshop is that these points of contact exist in large part thanks to 19th and 20th Century Anglo-German efforts to organize design into a socially-attuned practice.

C. Design as Socially-Attuned Field of Practice

Generations of sociological thinking render it commonsensical for a socio-legal researcher to see law and design—and therefore, legal design—as fundamentally social phenomena—that is,

[13] *Id.* at xiii, 1.

[14] *Id.* at 38.

[15] *Id.* at 31, 38.

[16] Cotterrell, *supra* note 9, at 80–82; *see also* Amanda Perry-Kessaris, Global Business, Local Law: The Indian Legal System as a Communal Resource in Foreign Investment Relations (2008).

[17] Perry-Kessaris, A (2019) 'Legal design for practice, activism, policy and research' 46:2 *Journal of Law and Society* 185-210 quoting Cotterrell 2018 pp. 31, 33 and 170.

"concerned with the mutual relations of human beings or classes of human beings," especially with "society" and "its organization,"; and shaping and shaped by human "interdependence," including the "need for companionship" and cooperation.[18] Perhaps more surprising to the socio-legal researcher, and indeed for some contemporary design enthusiasts, is that the discipline of design was, at its Anglo-German origins, remarkably socially-attuned. By this I mean that design was seen *as* a form of social relations, as playing a role *in* social relations, and as having a role to play in working *for* certain forms of social relations.

The story begins with the Arts and Crafts movement and its leading light, English designer and social activist William Morris (1834-1896). "Born of thinkers and practitioners in Victorian England who despaired of the ornate clutter which seemed to be pervading architecture and design," this was a "movement about integrity. It was about respecting your materials, and the way you used them," about "the maker and the process of making as much as the object made." In so doing, it "produced works of extraordinary vibrancy and intellectual rigor." Although the Arts and Crafts movement "came to an end shortly after the First World War," its already global influence endured.[19] Crucial to that endurance was the fact that architect Walter Gropius was directly influenced by Morris in writing the Manifesto and Program for Germany's famous Bauhaus school of art and design in 1919.[20]

Although the Bauhaus itself was short-lived, its practices were secured in its curriculum and carried by its members as they scattered across the globe in the wake of its 1933 closure by the Gestapo. Much of the Bauhaus agenda was later picked up and extended at the Ulm School of Design (*Hochschule für Gestaltung*). From Ulm, "research into design methods crossed the channel and found its advocates in Britain" in "the 'design methods movement' of the 1960s,"[21] most visibly in the 1962 Conference on Design Methods in London. Designers have since periodically pushed back against the normative agenda of "design methodology."[22] But the Bauhaus approach continues to exert global influence right through to the contemporary teaching and practice of design.

I. Design as Social Relations

The Arts and Crafts movement and the Bauhaus school both demonstrated a keen awareness of, and willingness to exploit, the relational dimensions of design. The Bauhaus Preliminary Course (*Vorkurs*) was the first, at least in the global North, to systematize the teaching—and therefore practice—of design, and remains perhaps its most influential legacy.[23] The course "emulated Arts and Crafts practices," not only in its "promotion of the applied arts and integrated design" but also in its communal "workshop-based system."[24] Although "its character changed significantly" with each lead instructor—Johannes Itten, László Moholy-Nagy, and Josef Albers—it nevertheless "served as a unifying experience for students and a common ground from which all began their studies," because all "students, be they joiner, bookbinder, potter, weaver or stage designer received the same instruction."[25]

[18] Oxford English Dictionary (2d ed. 1989).

[19] Rosalind P. Blakesley, The Arts and Crafts Movement 1, 9 (2006).

[20] Lauren S. Weingarden, *Aesthetics Politicized: William Morris to the Bauhaus*, 38 J. Architectural Educ. 8, 12 (1985).

[21] Helen Charman, *Designerly Learning: Workshops for Schools at the Design Museum*, 15 Design & Tech. Educ.: An Int'l J. 28, 29 (2010).

[22] Nigel Cross, *Designerly Ways of Knowing: Design Discipline Versus Design Science*, 17 Design Issues 49, 49–50 (2001).

[23] *Id.* at 49.

[24] Blakesley, *supra* note 19, at 135.

[25] Jeffrey Saletnik, *Josef Albers, Eva Hesse, and the Imperative of Teaching*, 7 Tate Papers (Spring 2007), https://www.tate.org.uk/research/publications/tate-papers/07/josef-albers-eva-hesse-and-the-imperative-of-teaching.

Figure 3. Assessment of work from Albers's Preliminary Course, 1928-1929[26].

More specifically, and in today's terminology, we can say that they understood design *as* a form of *sociomaterial* relations. Course leaders at the Bauhaus echoed the Arts and Crafts movement's determination that designers and users alike should fulfill their "psychological and sensory needs" by "the acts of creating, using, touching, and perceiving."[27] For example, Johannes Itten saw experimentation as a way to "unlock students' creative potential," which he sought to do using "several unorthodox techniques, including rhythmic and improvisatory drawing," "gymnastics," and "other body-based, meditative" practices which were conducted communally. Under course leader Josef Albers, students were asked to complete a series of experiments—"practical, concrete exercises"—that emphasized "process" and "learning through doing".[28]

The outcomes of these regular experiments were brought together into a shared space and assessed. Although they were intended to function as mere drafts or prototypes, such examples still exist—even the names and specifications of the experiments—and are today, 100 years later, treated as artistic works and are exhibited in major art galleries around the world—either in their original state or reproduced in larger form. But it is rare to see them as they were intended—as a collection of experiments on a common theme that generated a sense of community.[29] Figure 4).

[26]Otto Umbehr (Umbo), *Photograph of Students from Albers's Preliminary Course*, The Joseph and Anni Albers Foundation/VG Bild-Kunst, Bonn and DACS, London (2007). Image reproduced with permission.

[27]Weingarden, *supra* note 20, at 12.

[28]Saletnik, *supra* note 25. *See infra* Figure 3.

[29]Exhibition notes. Original Bauhaus exhibition. BERLINISCHEN GALERIE. 6 July 2019 – 27 January

(a)

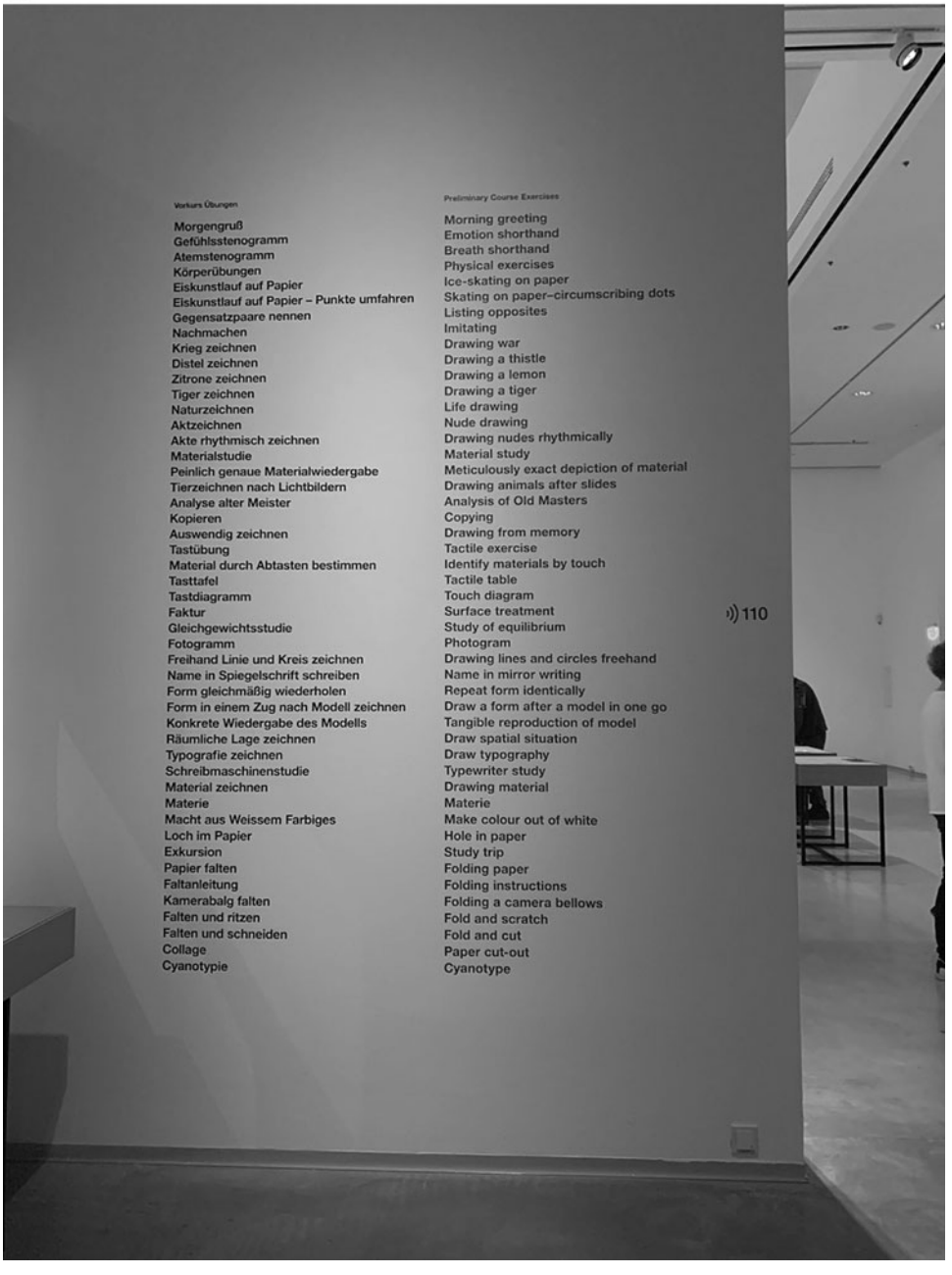

Figure 4. *Vorkurs* exercises celebrated (a) as a list and (b) in large scale, high quality reproduction[30].

II. Design in and for Social Relations

Members of the Arts and Crafts movement and the Bauhaus understood design(s) normatively, as tools for shaping social relations. They pursued a—then radical—agenda of making design

[30]Amanda Perry-Kessaris, Photographs of Original Bauhaus Exhibition from July 6, 2019 to January 27, 2020, Berlinischen Galerie (July 6, 2019–Jan. 27, 2020).

(b)

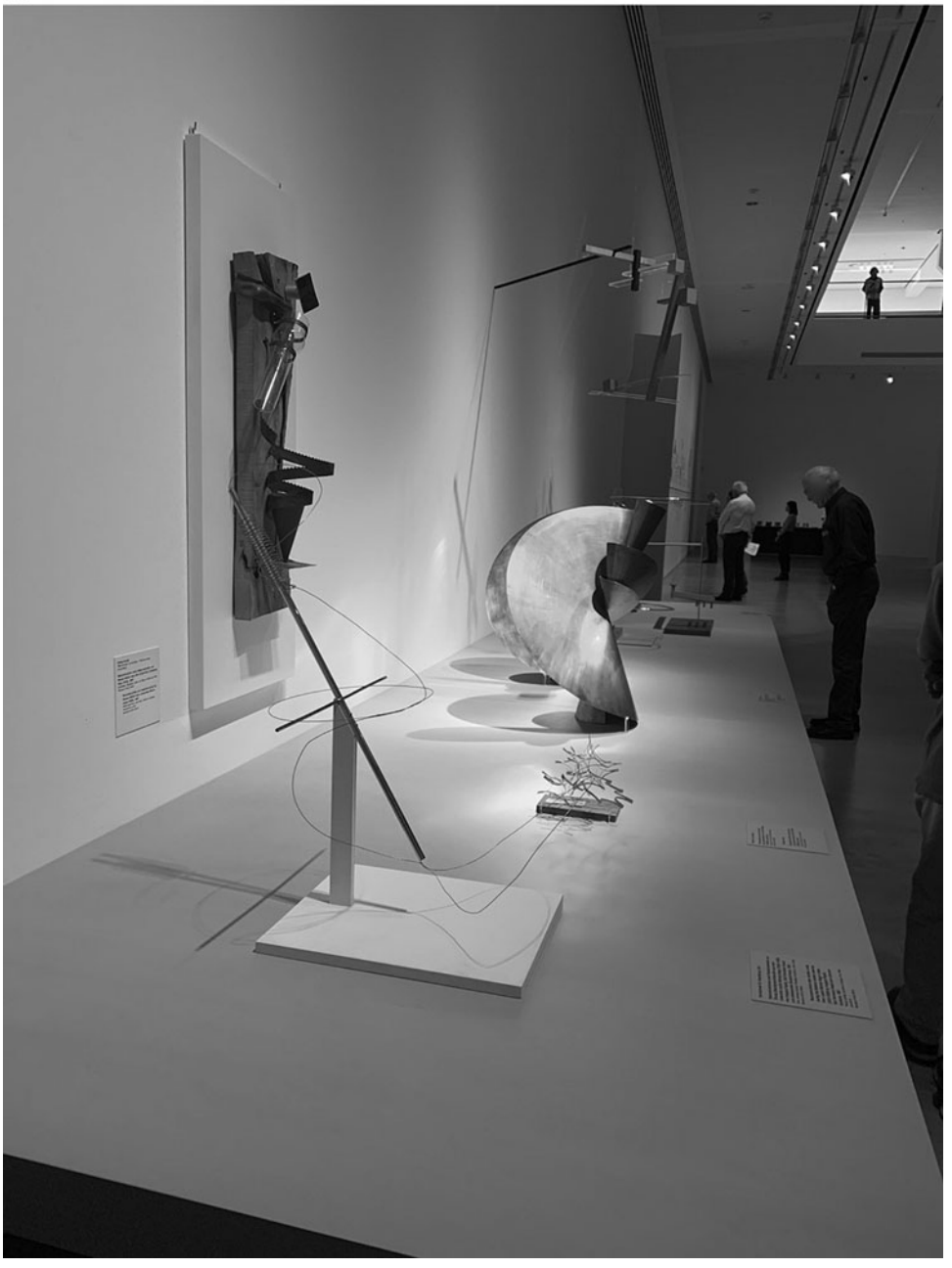

Figure 4. *Continue*.

relevant, appealing, affordable, and even transformative to all, including the relatively poor. For example, Morris asked in 1883, "[w]hat business have we with art at all unless all can share it?"[31] Likewise, "[u]niting all of [the Bauhaus'] multiple tendencies and impulses was an attempt to put

[31]Letter from William Morris to The Manchester Examiner (1883) [hereinafter Morris Letter].

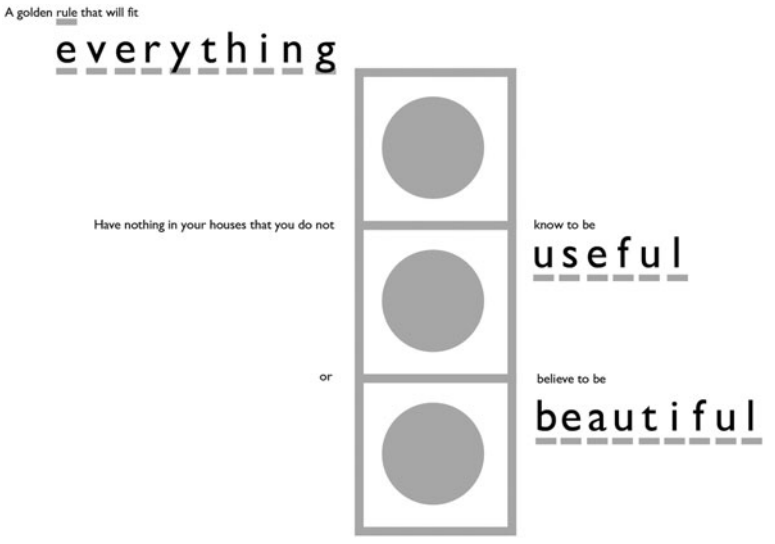

Figure 5. William Morris' 1880 exhortation for useful, beautiful design[32].

art and architecture to use as social regeneration for the world's working classes." But it took some time to get there: Gropius originally wrote in his 1919 manifesto that "[t]he ultimate aim of all artistic activity is building!" and "[t]he ultimate, if distant, aim of the Bauhaus is the unified work of art." But in 1929 then-director of the Bauhaus, Hannes Meyer, "consciously revised the statement, in poetic form, no less: 'thus the ultimate aim of all Bauhaus work / the summation of all life-forming forces / to the harmonious arrangement of our society.'"[33] Relatedly, both the Arts and Crafts movement and the Bauhaus were committed to the practical idea that, above all, designs must function. For example, Morris exhorted his followers to "have nothing in your houses that you do not know to be useful or believe to be beautiful"[34] (See Figure 5)— a sentiment since summarized in the maxim "form follows function," which is widely associated with the Bauhaus.[35]

Over time it became clear that this socially-attuned quest for user-centered functionality ought to begin further upstream, with design theory and pedagogy. So, at the Ulm school of design, Bauhaus graduate Max Bill sought "to make the design process more readily accessible and easy to understand," and thereby "to facilitate cross-disciplinary work, for example with anthropology and psychology."[36]

[32]Amanda Perry-Kessaris, Image of William Morris' 1880 Exhortation (2015).

[33]Nikil Saval, *How Bauhaus Redefined What Design Could Do for Society*, N.Y. Times Style Mag. (Feb. 4, 2019), https://www.nytimes.com/2019/02/04/t-magazine/bauhaus-school-architecture-history.html.

[34]Morris Letter, *supra* note 31. *See infra* Figure 5.

[35]The maxim originates with American modernist architect, Louis Sullivan, who wrote:

> It is the pervading law of all things organic and inorganic, of all things physical and metaphysical, of all things human and all things superhuman, of all true manifestations of the head, of the heart, of the soul, that the life is recognizable in its expression, that form ever follows function.

Louis H. Sullivan, *The Tall Office Building Artistically Considered*, Lippincott's Mag., Mar. 1896, at 403–09. *See also* Jonathan Baldwin & Lucienne Roberts, Visual Communication: From Theory to Practice 49 (2006) (interviewing Neville Brody).

[36]During the planning phase, "Bill succeeded in transforming the concept from a political school with integrated art, to a design school that integrated some political education." David Oswald, *The Information Department at the Ulm School of*

Thereafter, as design was evermore associated with consumerism, designers across the world have pushed back with regular attempts to highlight its ever-present political dimensions. Perhaps most famously, in 1964, UK-based designer Ken Garland launched First Things First, a rather Arts and Craft-y/Bauhaus-y "manifesto," calling on designers to take more responsibility for their practice. It was restated in broader terms in 2000 and 2014, and now calls to address "environmental, social and cultural crises."[37]

In recent years, design has come to be applied—across a wide range of private, public, and civil society contexts—to create or enhance not only "physical products" but also "services, strategies and policies."[38] This movement towards what is often referred to by the—misleadingly partial—moniker of "design thinking"[39] has been especially pronounced in countries such as the UK and Germany that are home to well-developed design sectors. For example, globally, Germany and the UK ranked 4th and 5th respectively for their per capita design-related exports in 2015. While the UK "has the largest design sector" in Europe and its government was "one of the first to recognise the power of design" in the private and public policy sectors,[40] the Policy Lab of the German Federal Ministry of Labour and Social Affairs uses "design thinking labs" to promote "cooperative thinking."[41] Anglo-German influence over design thinking discourse is to be found in an ever-growing collection of frameworks[42]—variously described as systems, toolkits, guides, and so on. For example, the Design Council—which is an independent charity and adviser to the UK Government on design—produced in 2004 a globally influential Double Diamond, visualizing four phases in design processes: Discover, define, develop, and deliver.[43] Likewise, a largely German team of independent designers was behind the globally influential *This is Service Design Thinking* project, which centers on three designerly tools: Personas, maps, and prototypes.[44]

Proponents of "design thinking" see it as "a cognitive style" that can serve as a "resource for organizations."[45] However, as the pioneers of the Arts and Crafts movement and the Bauhaus always already knew, design is much more than a way of thinking. It is a sociomaterial practice—that is, a "routinized . . . behavior" including bodily and mental activities, "'things' and their use," "background knowledge," know-how, emotion, and motivation. Seen as a practice, "design thinking" comprises not merely the thoughts and actions of individuals, but rather "dynamic

Design, *in* Design Frontiers: Territories, Concepts, Technologies 68 (Priscilla Lena Farias, Anna Calvera, Marcos da Costa Braga & Zuleica Schincariol eds., 2012).

[37]Ken Garland, First Things First Manifesto, Address at the Institute of Contemporary Arts (Dec. 1963), *in First Things First*, Ken Garland, http://kengarland.co.uk/KG-published-writing/first-things-first (last visited Aug. 16, 2020); *First Things First Manifesto 2000*, Eye Mag., http://www.eyemagazine.com/feature/article/first-things-first-manifesto-2000 (last visited Aug. 16, 2020); First Things First 2014 initiated by Cole Peters Available at http://firstthingsfirst2014.org (Accessed Dec. 4, 2018). *See* Ruben Pater, The Politics of Design: A (Not So) Global Manual for Visual Communication (BIS 2016).

[38]Lucy Kimbell, Applying Design Approaches to Policy Making: Discovering PolicyLab (2015); Christian Bason, Design for Policy (2014).

[39]Lucy Kimbell, *Rethinking Design Thinking: Part I*, 3 Design & Culture 285 (2011).

[40]Design Council, The Design Economy 34–36 (Oct. 20, 2015), https://www.designcouncil.org.uk/resources/report/design-economy-2015-report.

[41]*The Policy Lab*, German Fed. Ministry Lab. & Soc. Affs., https://www.denkfabrik-bmas.de/en/ (last visited Aug. 16, 2020).

[42]*See* Toolbox, https://www.toolboxtoolbox.com (last visited Aug. 16, 2020) (displaying the collection of toolkits curated on Toolbox).

[43]Design Council, The Design Process: What is the Double Diamond?, http://www.designcouncil.org.uk/news-opinion/design-process-what-double-diamond (last visited Aug 16, 2020).

[44]Marc Stickdorn, Adam Lawrence, Markus Edgar Hormness & Jakob Schenider, This is Service Design Doing Sebastopol (2018).

[45]Lucy Kimbell, *Rethinking Design Thinking: Part II*, 4 Design & Culture: J. Design Stud. F. 129, 142 (2012).

configurations of minds, bodies, objects, discourses, knowledge, structures/processes and agency."[46] So it makes more sense to think in terms of sociomaterial "designerly ways."[47]

Since at least 2001, there has been an increasingly concerted and global effort to apply design—more often "design thinking" than "designerly ways"—in the legal sphere.[48] Initially, the focus was on visualizing legal instruments such as contracts,[49] while recent efforts have addressed more strategic and systemic concerns.[50] As I have argued elsewhere, the rise of what we now call "legal design"[51] can be both explained and justified by the existence of important "points of contact" between "lawyerly concerns" and "designerly ways." On the one hand, drawing on Roger Cotterrell, I argue that lawyers need to communicate; they need to balance structure/unity and freedom/diversity; and they need to be at once practical, critical, and imaginative. On the other hand, drawing on social designer Ezio Manzini, I argue that designerly ways—especially the emphasis on communication, experimentation, and making things visible and tangible—can improve communication and generate new spaces of "structured freedom," in which lawyers can be simultaneously practical, critical, and imaginative.[52] Given these synergies, I have argued that attention ought also to be paid to the potential of design to enhance legal, especially socio-legal, research.

D. Designerly Ways for socio-legal Community?

A key insight emerging from my research into the potential of design to help us understand and enhance socio-legal research methodology is that designerly ways can help us more productively to navigate the tension between structure and freedom that is inherent in socio-legal research. That tension manifests not only in law's (in)ability to promote social unity from and for diversity, but also in scholarly (in)ability to promote conceptual unity from and for diversity and, relatedly, the (in)ability of academic communities to promote social unity from and for diversity among their members. For example, in his presentation at the Berlin workshop underpinning this Special Issue, Timur Bocharov explored one specific difference between the two jurisdictions (Figure 6)—namely, a lack of conceptual agreement around "legal culture" in socio-legal scholarship coming from the UK; and, in stark contrast, a clear consensus among German scholars around the concept of "*Recht als Kultur*"—that is, founded in the home-grown classical sociology of Max Weber and Georg Simmel.[53] And this divergence may be symptomatic of the fact, as noted

[46] *Id.* at 134–36, 142.

[47] Cross, *supra* note 22, at 49.

[48] Here, I have borrowed "mindsets," "processes," and "tools" from IDEO—which itself uses other terms in the same report. IDEO, Field Guide to Human-Centered Design (2019). In the past, I have referred to designerly ways in terms of "skills, knowledge and attitudes." Amanda Perry-Kessaris, *Legal Design for Practice, Activism, Policy and Research*, 46 J.L. & Soc'y 185 (2019).

[49] *See* Colette R. Brunschwig, *Contract Comics and the Visualization, Audio-Visualization and Multisensorialization of Law*, 46 U.W. Austl. L. Rev. 191 (2019); Colette R. Brunschwig, *Visualisierung von rechtsnormen: Legal Design* ("Visualization of Legal Norms: Legal Design"), 45 Schulthess Juristische Medien (2001).

[50] *See also* Helena Haapio & Margaret Hagan, *Design Patterns for Contracts*, *in* Networks: Proceedings of the 19th International Legal Informatics Symposium 381, 383 (Erich Schweighofer, Franz Kummer, Walter Hötzendorfer & Georg Borges eds., 2016); Law by Design, http://www.lawbydesign.co/en/home/ (last visited Aug. 16, 2020); Stefania Passera, Beyond the Wall of Contract Text: Visualizing Contracts to Foster Understanding and Collaboration Within and Across Organizations (2017) (unpublished Ph.D. thesis, Aalto University).

[51] A consensus is building around the Legal Design Alliance definition of legal design as "an interdisciplinary approach to apply human-centred design to prevent or solve legal problems." Legal Design Alliance, https://www.legaldesignalliance.org (last visited Aug. 16, 2020).

[52] Perry-Kessaris 2019.

[53] Timur Bocharov, Presentation at "Socio-Legal Studies in Germany and the UK: Theory and Methods": Legal Culture v. Recht als Kultur: The UK and German Approaches to Law and Culture (Sept. 24, 2019).

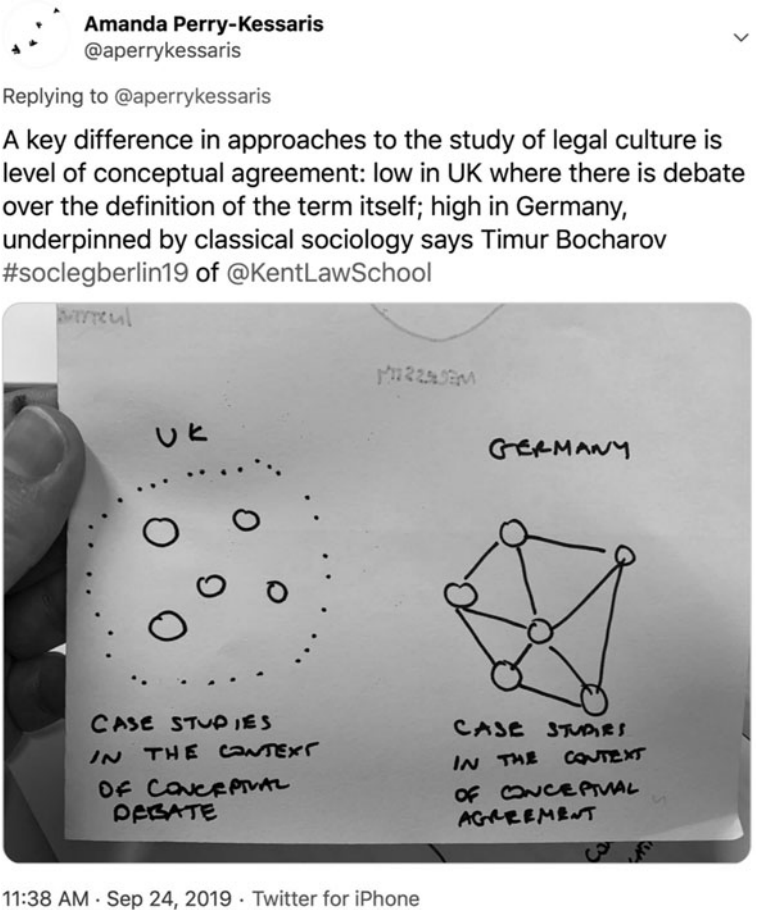

Figure 6. Live-tweeted visual summary of presentation by Timur Bocharov on "Legal Culture v. Recht als Kultur: the UK and German Approaches to Law and Culture" at "Socio-Legal Studies in Germany and the UK: Theory and Methods"[54].

above, that German socio-legal culture is perceived to be relatively structured and UK socio-legal culture is perceived to be relatively free. What might be the impact of any difference in general aversion/adherence to canon, or in divergence in the content of said canon, on the possibility of future Anglo-German collaboration on socio-legal research? And might it be overcome with the aid of design?

I. Socio-Legal Model-Making

Multiple sub-fields, such as transition design and social innovation design, have seen designers collaborating with communities through design for more or less radical social change.[55] For

[54]Amanda Perry-Kessaris, Screenshot of a Tweet During Timur Bocharov's Presentation, Twitter (Sept. 24, 2019, 11:38 AM), https://twitter.com/aperrykessaris/status/1176445860449792000?s=20.

[55]Ezio Manzini, Design, When Everybody Designs 11 (MIT, 2015); Robin Murray, Julie Caulier-Grice & Geoff Mulgan, The Open Book of Social Innovation (NESTA, 2010), https://youngfoundation.org/wp-content/uploads/2012/10/The-Open-Book-of-Social-Innovationg.pdf.

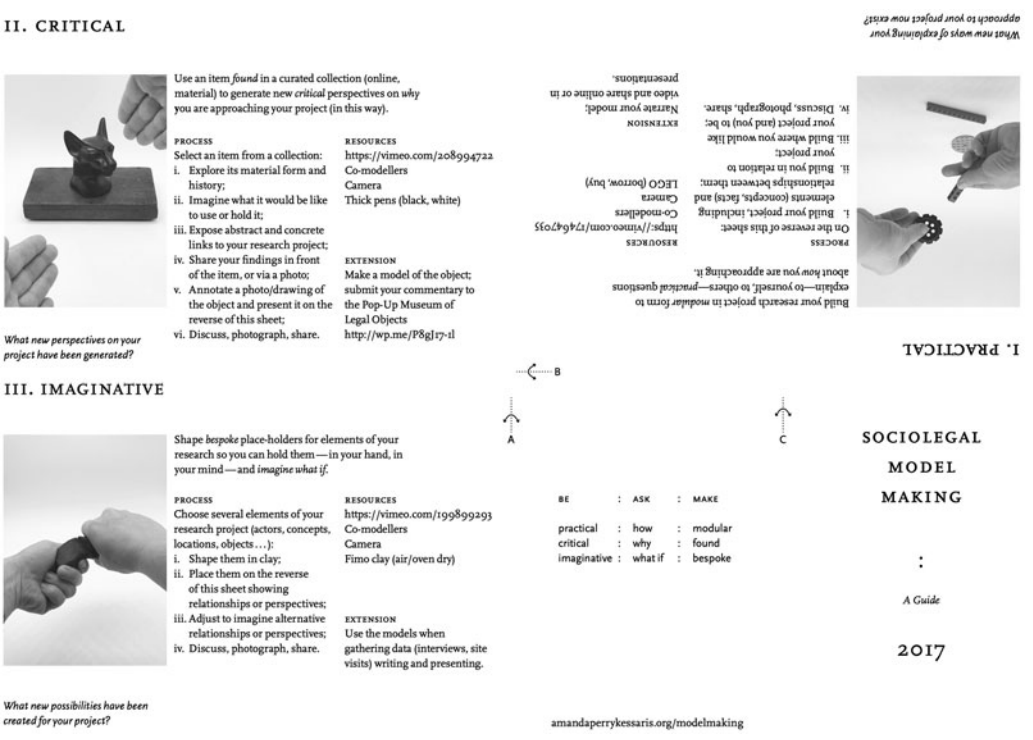

Figure 7. A guide to socio-legal model-making, designed to be downloaded and folded into a booklet[56].

example, social innovation designers provoke and facilitate us—"diffuse designers"—to work collaboratively for social change by approaching our own field of expertise or life in "design mode."[57] Here, the intended users of the social design output—which may be, for example, an artifact, environment, service, or event—become "co-researchers and co-designers exploring and defining the issue, and generating and prototyping ideas."[58]

Between 2016–2017, I drew on these practices to run a series of experiments in the UK that eventually included around 100 researchers and focused on how we might make socio-legal ideas "visible and tangible," and how that might affect the social dimensions of socio-legal research. Participant researchers engaged in individual and collaborative model-making in relation to their ongoing projects. The primary outcome of those experiments was an open-access guide introducing three forms of socio-legal model-making (See infra Figure 7): 'Modular" model-making, in which systems such as LEGO are used primarily for the practical purpose of explaining; "found" model-making, in which stumbled-upon or curated items are used primarily for the critical purpose of generating new perspectives; and "bespoke" model-making, in which artifacts are made—for example—from clay, primarily for the imaginative purpose of speculating about new possibilities.[59]

[56]Amanda Perry-Kessaris, Image of a Guide to socio-legal Model-Making (2017).

[57]*Id.* at 31, 77.

[58]KIMBELL, *supra* note 38, at 64.

[59]*See socio-legal Model Making*, AMANDA PERRY-KESSARIS, https://amandaperrykessaris.org/modelmaking; Amanda Perry-Kessaris, *socio-legal Model Making*, VIMEO, https://vimeo.com/album/4228144 (video collection).

Figure 8. Postgraduate research students modelling their projects at Kent Law School[60].

The most potentially significant of these instances of socio-legal model-making occurred during the compulsory postgraduate Research Methods in Law module at Kent Law School, which became distinctly more social and more communal as a result. The module runs for autumn and spring terms. A model-making session is held towards the end of the first term. The session is based around an A3 landscape printed worksheet on which participants from all over the world are asked to use a LEGO set to complete three builds relating to their research project[61]: First, they build a representation of their project, focusing on key concepts, actors, and relationships; second, they add in a representation of themselves in relation to the representation of the project; third, they build a representation of what they hope their project will be in the future. More experienced student researchers attend the session to act as mentors. Participants are encouraged to video or photograph the process throughout to remind themselves of how their build progressed; to explain their model to other participants, especially mentors; to ask each other questions about the models of others, and to offer critical feedback. Feedback reveals that model-making not only helps participants to better understand their research but also reminds them of the need to "discuss our projects more, to learn more from each other." They provoked and facilitated to form trusting relationships with each other, and to engage in depth with each other's projects; and these relationships extend beyond their cohort. A sociomaterial community of practice is formed (Figure 8).

It is particularly gratifying—and relevant to the present context—that students, such as Steve Crawford, have transferred socio-legal design skills learned at Kent Law School to other postgraduate and faculty in the UK and elsewhere in Europe,[62] including to postgraduate

[60]Amanda Perry-Kessaris, Photograph of Students Modeling Projects at Kent Law School (2018).

[61]The purchase was provoked by my attendance at a LEGO-based workshop on "Exploring Stuckness," run by Graham Barton, Academic Support Coordinator at Central St Martins, University of the Arts, London.

[62]Steve Crawford, *Reflection on Socio-Legal Research Methods*, Socio-Legal Stud. Ass'n Blog, http://slsablog.co.uk/blog/blog-posts/reflection-on-socio-legal-research-methods/ (last visited Aug. 16, 2020).

researchers Lisa Hahn and Siddharth de Souza, who have in turn introduced it to the postgraduate research community at Humboldt University in Berlin via their vibrant socio-legal Lab, on which more below.

II. Making Anglo-German socio-legal Research Community?

The question that arises then is whether designerly ways might be especially well-suited to facilitating Anglo-German cooperation around socio-legal research. Visual summaries of the kind that I live-tweeted during the workshop[63] (See infra Figures 1, 6) are one simple example. But what if, for example, by collaboratively making our ideas visible and tangible—in material models or even virtually—we might generate a sense of community among UK and German socio-legal researchers?

For a transnational precedent, we can look to the inaugural conference of "The IEL Collective"—a collaboration of academics and practitioners from across the world who aim to work inclusively to "stimulate conversations about plurality, representation and criticality"—in the field of International Economic Law.[64] Like any possible future effort at promoting Anglo-German socio-legal community, the Collective can be framed as a "prefigurative" endeavor, in the sense that its participants seek to "perform present-day life in the terms that are wished-for," both in order "to experience a better" present, and "to advance" future change".[65] Returning to the normative agenda outlined above, we can see that for the IEL Collective collaboratively to protect and promote the "wellbeing" of international economic law as a "practical idea" requires unified-yet-diverse thinking. It is only by bringing diverse conceptual frames, empirical examples, and normative agendas into the same space that we can really respect, understand, and use them in practical, critical, and imaginative ways. Collaborative mindsets, tools, and processes are not part of traditional legal scholarship and practice. Might they be introduced though model-making? This was the question that motivated me to propose the co-production of an IEL-Pop-Up Collection as part of the IEL Collective inaugural conference held at Warwick Law School in November 2019.[66]

The Pop-Up Collection was designed to make unity from and for diversity, visibly and tangibly, and in prefigurative spirit. Delegates from across the world were invited to bring with them to the conference an artifact (object or image) that they felt was relevant to their approach to, or understanding of, International Economic Law, that was either found or made, and that would fit on an A5 page. Most delegates had never met, and were unlikely to have engaged in such an activity in the past, but these barriers to engagement were offset by the context—that is, the warm, inclusive, and non-hierarchical approach of the people at the heart of the Collective; and via specific social media prompts (Figure 9). During the conference, the artifacts were placed on designed A5 cards in the form of a grid. Arrows printed on the cards indicated possible points of contact or influence between the artifacts, and the approaches to or understandings of IEL that delegates intended them to represent. For example, Figure 10 shows delegates handling and discussing an artifact, made by Gamze Erdem Turkelli, to represent International Economic Law as a black box. On opening, we find plain notes representing the international economic activities—trade, investment, and aid—and elaborate bejeweled notes representing the promised benefits of engaging in such activities—for example, prosperity. Eventually, we realize that the box contains another hidden layer full of decentered concerns, such as climate change, colonialism, and gender. The Collection grew,

[63] *See infra* Figures 1, 6.

[64] *Disrupting Narratives and Pluralising Engagement in International Economic Law Scholarship, Teaching and Practice*, IEL Collective, https://warwick.ac.uk/fac/soc/law/research/centres/globe/ielcollective/about/ (last visited Aug. 16, 2020).

[65] Davina Cooper, *Prefiguring the State*, 49 Antipode 335 (2017).

[66] Amanda Perry-Kessaris, *The IEL Pop-Up Collection*, Amanda Perry-Kessaris, https://amandaperrykessaris.org/collections/iel-pop-up-collection/.

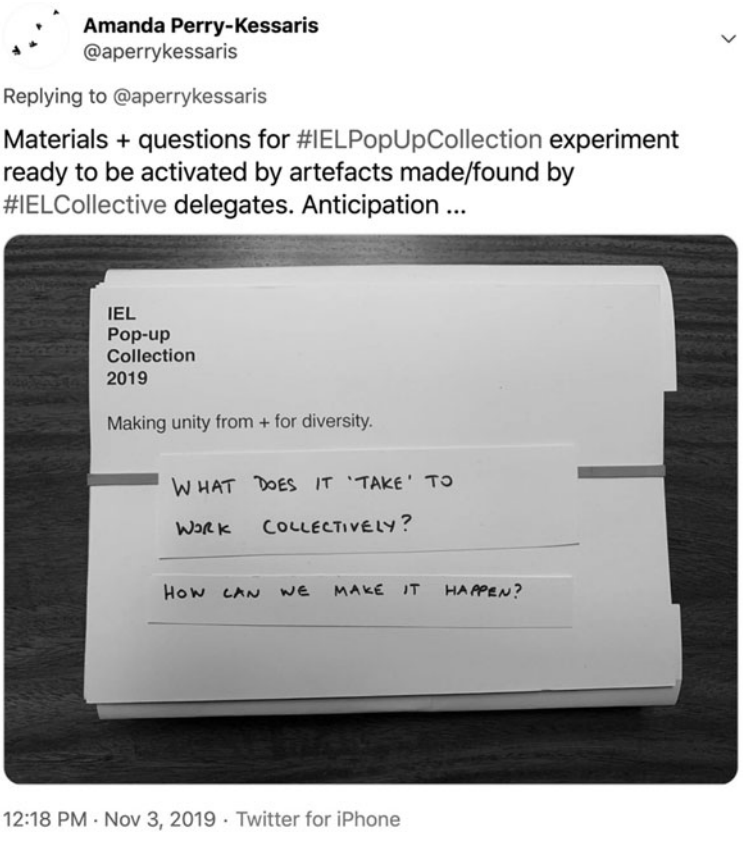

Figure 9. IEL Pop-Up Collection display cards as social media prompt[67].

Figure 10. Delegates interacting with models at the IEL Collective inaugural conference in Warwick[68].

[67]Amanda Perry-Kessaris, Screenshot of a Tweet During a Discussion on Pathways to socio-legal Scholarship, Twitter (Nov. 3, 2019, 12:18 PM), https://twitter.com/aperrykessaris/status/1190966533176074240?s=20.

[68]Amanda Perry-Kessaris, Photograph of Delegates Interacting with Models at the IEL Collective (2019).

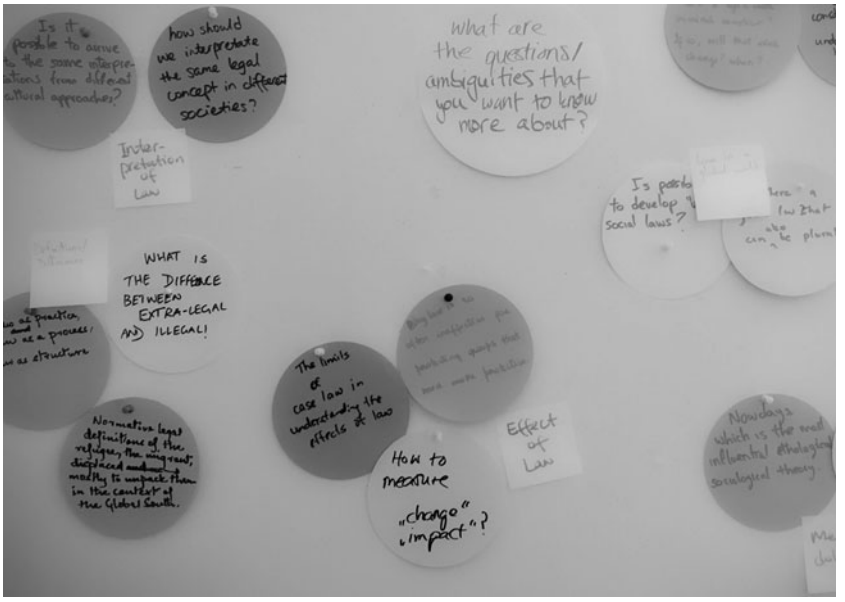

Figure 11. Brainstorming the interrelations between law and society[69].

shrank, grew again, and moved to a new venue over the course of the two days—a quiet, shifting presence. The impact of the Collection, and of the event, was extended through video tweets of such discussions.[70] This experiment was successful in generating a "structured-yet-free" prefigurative space for practical, critical, and imaginative thinking—both individual and collective. That space was necessarily limited by the usual constraints of time and attention, all the more so in the context of the heady and transformative atmosphere of the wider IEL Collective conference. But it is there to be reactivated at future events, and deepened via an online collection of commentaries.[71]

What evidence is there that it might be possible and productive to conduct an Anglo-German Socio-Legal Studies variant of this experiment? One reason for hope is the Socio-Legal Lab at Humboldt, which seeks:

> [T]o create an environment that facilitates collaboration in research, to provide a communication space that is open and safe for wide-ranging discussions, and to create communities of support for researchers such that they feel empowered to voice their anxieties and to test and incubate new ideas.[72]

It can be seen as designerly, in the sense that it promotes experimentation—both with different methods and with "different ways of communicating research," including visualization (See Figure 11)—to determine "what works best in conversation and cooperation with others." Although it is explicitly disruptive in orientation, it has been supported by institutions—such as the Law and Society Institute Berlin and the *Berliner Arbeitskreis Rechtswirklichkeit* (Berlin Working

[69]Lisa Hahn & Sisddarth de Souza, Photograph of Brainstorming Session at the IEL Collective (2020).

[70]*See* Amanda Perry-Kessaris, *Making Unity from and for Diversity: The IEL Pop-Up Collection*, Amanda Perry-Kessaris (Nov. 9, 2019), https://amandaperrykessaris.org/2019/11/09/making-unity-from-and-for-diversity-the-iel-pop-up-collection/.

[71]*Pop Up Museum of Legal Objects*, Amanda Perry-Kessaris, https://amandaperrykessaris.org/collections/pop-up-museum-of-legal-objects-2017/.

[72]Lisa Hahn & Siddharth de Sousa, *Introduction to the Blog Symposium: The Socio-Legal Lab as a Didactic Format*, Rechtswirklichkeit Blog (Mar. 12, 2020), https://barblog.hypotheses.org/3437.

Group on Socio-Legal Studies, BAR)—and attracted participants from across Germany.[73] So it is safe to predict that at least some of its innovations will be absorbed into the German mainstream.

Lest we forget, the UK and Germany share darker histories too, not least a propensity for empire-building. Much remains to be done in both jurisdictions to face the past, present, and future effects of those histories. For example, Philipp Dann has observed a "contemporary amnesia," both regarding the pursuit by the German state of empire outside Europe (18751919) and within Europe (19391945), and regarding East and West German scholarly critiques of empire-building by the "other side" during the Cold War.[74] This shared imperial history is relevant here because mainstream visions of design are—like law—infused with a particular social and political history. Design began to emerge as "an aspect of every day" during the Industrial Revolution because mechanization focused attention on making, and because European societies became "pervaded by expert knowledge and discourses." Over time, Eurocentric conceptions of design were exported, not least via empire, as part and parcel of the "universalizing ontology of dominant forms of modernity." So, argues Arturo Escobar, if design is to play a role in meaningful social change—especially in non-European and postcolonial contexts—it must first "be creatively reappropriated."[75] Any proposal to use designerly ways to promote Anglo-German socio-legal community must be open—proactively inclusive of all, especially those stakeholders whose perceptions, expectations, and experiences might otherwise be ignored.

E. Conclusion

My initial workshop preparation strategy was to look for signs of Anglo-German life in my niche field of study. This led me to questions that I would never otherwise have considered, and to answers that are both surprising and reassuring to me as a UK-based transnationalist in Brexity times. In particular, design communities in the UK and Germany can both lay substantial and roughly equal claims to establishing design as a socially-attuned discipline; and while I have since been initiating the systematic exploration of design's potential for socio-legal research, early career researchers have been early adopters and innovators in Germany. Long may this story of mutual Anglo-German provocation and appreciation continue.

The combined effect of Anglo-German scholarship and practice is to teach us that a "sociological imagination"[76] is essential if we are to fully understand possible synergies between design and socio-legal research, and the risks and rewards of activating them. At the time of writing, social relations of all kinds are being strained, broken, deepened, and reinvented to accommodate the material threats posed by a global pandemic; all on the back of sustained pressure relations, perhaps especially Anglo-German relations, arising from Brexit; and all in the context of the rise of other nationalistic movements across the world. We cannot know what socio-legal research will or ought to look like in the coming months and years. My own experience of pandemic-lockdowns-as-natural-experiment has made visible to me how important sociomaterial interaction with my socio-legal community is, and reinforced my conviction that we must pay more attention to designing those moments that we are lucky enough to share in person.

[73]Siddharth De Souza. Personal communication. *See also* Lisa Hahn & Siddharth de Souza, *The Socio-Legal Lab: Beyond Methods*, Rechtswirklichkeit Blog (May 29, 2018), https://barblog.hypotheses.org/2047.

[74]Philipp Dann, Presentation at the Law and Development Research Network Conference: German Histories of Law and Development (Sept. 25–27, 2019).

[75]Arturo Escobar, Designs for the Pluriverse: Radical Interdependence, Autonomy and the Making of Worlds xi, 19, 32, 66 (2017).

[76]C. Wright Mills, The Sociological Imagination (Penguin Books 1970) (1959).

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ARTICLE

Researching Urban Law

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Abstract
This Article considers the development of urban law. It suggests that urban law is socio-legal in its exploration of law's role in the production of the city and urban life, enabling the study of the city as a distinctive legal entity. Addressing the question "why urban law?," this Article considers similar debates in geography and urban policy before developing three arguments for studying urban law: (i) urbanism is a vibrant field of scholarly research; (ii) socio-legal research can take an explicitly normative focus in pursuit of improving urban quality; and (iii) at a city scale we can investigate governance concepts of territory, sovereignty and jurisdiction. One of the difficulties with urban law is finding the right level of analysis, covering sufficient legal and empirical detail whilst also making the city legible at an urban scale. Although this tension produces imperfect compromises, accepting the limitations means that we can begin the shared task of developing an intellectual infrastructure, a grammar, for the study of urban law.

Keywords: Urban law; socio-legal studies; law and society

A. Introduction

The extent of urban life is extraordinary. Half of humanity, 3.5 billion people, now live in cities with numbers expected to rise to over sixty percent by 2030.[1] Employment opportunities, cultural diversity and connections attract people to urban areas, producing both increased density and sprawl. Yet cities are not just the sum of their populations—they have distinctive social, spatial, cultural, political, military, and economic characteristics. Writing in 1931, Chicago sociologist Lewis Wirth highlighted the capacity of cities for soft governance:

> The influences which cities exert upon the social life of man are greater than the ratio of the urban population would indicate, for the city is not only in ever larger degrees the dwelling-place and the workshop of modern man, but it is the initiating and controlling center of economic, political, and cultural life that has drawn the most remote parts of the world into its orbit and woven diverse areas, peoples, and activities into a cosmos.[2]

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[1]United Nations Department of Economic and Social Affairs, *The World's Cities in 2016*, UN ILIBRARY (2016), https://www.un-ilibrary.org/population-and-demography/the-world-s-cities-in-2016_8519891f-en (last visited Apr. 7, 2020).

[2]Louis Wirth, *Urbanism as a Way of Life*, 44 AM. J. SOC. 1, 2 (1938).

Urbanism, for Wirth, is a way of life, a collective endeavor, a "complex of traits which makes up the characteristic mode of life in cities."[3]

And yet despite the acknowledged significance of cities to modern society, or urbanism as a process, urban law remains under-developed as a field of study. Although scholars investigate housing, environmental, protest, or economic development law in cities, there is—so far—a relative lack of scholarship examining how cities produce regulation, rules, and policies and, correspondingly, how regulation, rules, and policies co-produce cities. Drawing on a wide range of legal methodologies—socio-legal, comparative, or doctrinal analysis—urban law can study the city as a distinctive legal entity.

Urban law is most identifiable as a cohesive sub-discipline in the United States. Here, scholars analyze both individual legal aspects of housing, zoning or planning, licensing, sustainability, consumer protection, poverty, race, and data law, as well as relationships between national and state government. Even in America, however, Nestor Davidson, Director of Fordham's Urban Law Center, calls for "a renewed appreciation of urban law as a distinctive enterprise," registering a decline in forty years of scholarship since Fordham's *Urban Law Journal* was launched.[4]

This apparent absence of scholarship raises an academic question: How should we understand urban law? In Europe, there are few programmatic academic investigations, with the notable exception of Jean Bernard Auby's pathbreaking *Droit de la Ville*, praised as "le seul manuel dèdié à cet objet," synthesizing materials for lawyers and non-lawyers alike.[5] International lawyers, including Helmut Philipp Aust in Germany, have raised questions about how cities are beginning to assert themselves as internationally relevant actors through addressing climate change law or human rights implementation.[6] European criminologists have long studied the city and its effects, suggesting that "to understand crime has been in many ways to understand the city."[7] Legal and critical theorists have tilted the lens, with Andreas Philippopoulos-Mihalopoulos crafting an understanding of the city as a lawscape—embodying mutuality, and grasped as "the ever receding horizon of prior invitation by the one (the law/the city) to be conditioned by the other (the city/the law)"[8], capturing the interaction between law and urban living. Other than these interventions, however, European urban law is still largely underdeveloped. To adapt the words of James Baldwin, one of America's most famous expatriates, European cities have "a sense of the mysterious and inexorable limits of life," but we have still to inculcate a sufficiently American "sense of life's possibilities."[9]

When studying cities, we often see urban analyses couched in disciplinary specialties. Geologists see rock formations, healthcare experts identify the scope for pandemic transmissions, economists and political geographers focus on financial flows, engineers appreciate load risks, historians track past lives and events, while social scientists observe urban cultures and politics. Few, so far, have looked for the legal gridlines that structure the city, producing relationships between cities and citizens, states, and national parliaments. Legal frameworks govern housing, transportation, and infrastructure, regulatory provisions and practices are critical to understanding policing, cultural innovation, and promotion of sustainable development. While urban studies

[3] *Id.* at 4–7.

[4] Nestor Davidson, *What is Urban Law Today? An Introductory Essay in Honor of the Fortieth Anniversary of the Fordham Urban Law Journal*, 40 Fordham Urb. L.J. 1579, 1579 (2016).

[5] Jean-Bernard Auby, Droit de la Ville: Du fonctionnement juridique des villes au droit à la Ville 348 (2016); Julien Betaille, *Jean-Bernard Auby, Droit de la ville – Du fonctionnement juridique des villes au droit à la Ville, 2013*, 38 Revue juridique de l'Environnement 385, 385 (2013).

[6] H.P. Aust, *Shining Cities on the Hill? The Global City, Climate Change, and International Law*, 26 Eur. J. Int. L. 255, 278 (2015).

[7] Rowland Atkinson & Gareth Millington, Urban Criminology: The City, Disorder, Harm and Social Control 1 (2018).

[8] Andreas Philippopoulos-Mihalopoulos, Law and the City 10 (2007).

[9] James Baldwin, Nobody Knows My Name 12 (2013).

have long been driven by debates about the appropriate level of analysis, balancing micro with macro, case studies, and theory, legal analysis is often beyond this cross-disciplinary boundary. By drawing regulation, rules, and policies into urban studies, urban law can contribute to these cross-disciplinary debates, asking how cities are legally co-produced, managing themselves, their residents—both human and otherwise—as well as their landscapes, financial flows, and reputations.

For socio-legal scholars, studying the city enables us to ask questions in action, that leitmotif of law in society work. We can focus on both processes and perspectives, understanding law as an ongoing dynamic activity, full of compromise, negotiation, and meaning-making. Urban lawyers can borrow from urban anthropologists who investigate modern urban life not only "in the city," but also "of the city."[10] The city is more than a background location for fieldwork; the urban becomes the research question: How is urban life created, governed, and experienced? To understand the city from a socio-legal perspective, we do of course need to be open to the difficulties of being comprehensive, avoiding reduction where possible, whilst also acknowledging the need to retain legibility. It is not a simple task to study urban law, but it is one that is both timely and inviting.

B. Socio-Legal Studies and Methodology

Is urban law a socio-legal form of study? To answer this question, we need a working definition. For some scholars, socio-legal studies foregrounds society. Susan Silbey, argues, for example, that socio-legal studies require "a doubling of the social, both the subject and the method."[11] Other formulations understand socio-legal studies as the multidisciplinary studies of law and legal institutions. Such a framing puts law at the center—not "law first" necessarily—but identifying law and legal institutions as the subject of study, noting that "law" here can include rules, customs, norms, and practices because socio-legal scholars rarely confine their analysis to legislation, case law, or other formal sources. In this characterization, socio-legal studies can include doctrinal legal analyses, understanding the legal landscape to ground other empirical research or providing a basis from which to argue for reform.[12]

This broader formulation of socio-legal studies suggests that even when legal analytical methods predominate, if it is society rather than "law in books" that is under the microscope, it is the shift of subject—from law to society—that confers socio-legal significance to the research.[13] We are altering our focus, as Carrie MenkelMeadows explains, from the formalism of jurisprudence —"what" is law—or doctrinal studies of law—"what is" the law—to instead concerning ourselves with "what does law do?"[14] So urban socio-legal studies investigate what urban law does, how it creates urban structures, policies, and practices, which themselves contribute to spatial, social, economic, cultural, and historical factors to produce the city itself.

[10]Rivke Jaffe & Anouk De Koning, Introducing Urban Anthropology (2015).

[11]Susan S. Silbey, *What Makes a Social Science of Law? Doubling the Social in Socio-Legal Studies*, *in* Exploring the 'Socio' of Socio-Legal Stud. 20–36 (Dermot Feenan ed., 2013), 20.

[12]Sarah Blandy, *Socio-legal Approaches to Property Law Research*, *in* Researching Property L. 24–42 (Susan Bright & Sarah Blandy eds., 2016).

[13]Lawrence M. Friedman, *The Law and Society Movement*, 38 Stan. L. Rev. 763 (1986); Joel F Handler, *Postmodernism, Protest, and the New Social Movements*, *in* The Presidential Address 697 (1992); David Nelken, *Law in Action or Living Law? Back to the Beginning in Sociology of Law*, 4 Cambridge University Press 157 (1984); Susan S. Silbey, *Everyday Life and the Constitution of Legality*, *in* The Blackwell Companion to the Sociology of Culture 332 (2007); Mariana Valverde, *"Which Side Are You On?" Uses of the Everyday in Socio-legal Scholarship*, 26 Pol. & L. Anthropology Rev. 86, 86–98 (2003).

[14]Carrie Menkel-Meadow, *Uses and abuses of socio-legal studies*, *in* Routledge Handbook of Socio-Legal Theory and Methods 35–57, 39 (Naomi Creutzfeldt, Marc Mason, & Kirsten McConnachie eds., 1 ed. 2019).

I. Qualitative Research

To investigate the interaction between law and society, methodologies and methods are articulated through a research design. Empirical socio-legal researchers use both qualitative and quantitative methods to empirically test their theories and hypotheses. Qualitative socio-legal research is predominantly naturalistic, ethnographic, and/or participatory, looking for evidence of meaning-making. Here, methodologies draw primarily from social science and humanities research, including, increasingly, anthropology. Many legal scholars would also argue that legal research, insofar as it draws on legislation, case law, and policy documents, is itself empirical, being concerned with observation or experience rather than theory or pure logic. Lisa Webley explains the connection, suggesting that "[m]any common law practitioners are unaware that they undertake qualitative empirical legal research on a regular basis—the case-based method of establishing the law through analysis of precedent is in fact a form of qualitative research using documents as source material."[15]

We can use qualitative research, defined broadly to include doctrinal, comparative, and law-in-context approaches, to investigate cities encompassing the many, the diverse, and the outsiders. As Hendrik Hartog explained in *Pigs and Positivism*, customs, histories, people, buildings, sightlines, and even pigs can make up a city.[16] When an 1819 judgment prohibited the animals from running freely in the streets of New York, preferring judicial reasoning to established custom, this "creation of a modern bureaucracy, the transformation of relatively self-sufficient artisans and mechanics into a working class, and the growth of a commercial rural agriculture dedicated to feeding urban residents" combined to present a coherent articulation of nineteenth century urban modernity.[17] For Hartog, it enabled the city to be "derived imaginatively" from the judgment prohibiting the pigs.[18] Analyzing the judgment is a form of qualitative research, making meaning from the decision to better understand urban governance, reading decisions for both their ratio and for their absences, in this case the legal customs, everyday practices, and the perspectives of excluded participants, in this case, the pigs.

We must, as Andreas Philippopoulos-Mihalopoulos explains, be careful of our vantage points and blind spots in urban law.[19] We all experience "the city" differently, not least due to race, gender, age, or additional needs with racism, gender vulnerability, and ableist infrastructures often built into the fabric of cities. One famous story concerns the decision by Robert Moses to design bridges on parkways running through Long Island to be too low to allow regular use by buses, thereby preventing the twothirds of New Yorkers who did not have access to a car from visiting the State's beaches.[20] In his biography of Moses, Robert Caro suggests that was a conscious decision, embedding political decisions in concrete rather than relying on legal restrictions:

> Mr. Moses did this because he knew that something might happen after he was dead and gone. He wrote legislation [clauses prohibiting the use of pathways by "buses or other commercial vehicles"] but he knew you could change the legislation. You can't change a bridge after it's up. And the result of this is that a bus from New York couldn't use the parkways if we wanted it to.[21]

[15]Lisa Webley, *Qualitative Approaches to Empirical Legal Research*, *in* The Oxford Handbook of Empirical Legal Research 927, 927 (Peter Cane & Herbert M. Kritzer eds., 2010).

[16]Hendrik Hartog, *Pigs and Positivism*, 4 Wis. L. Rev. 899 (1985).

[17]*Id.* at 912.

[18]*Id.* at 911–12.

[19]Philippopoulos-Mihalopoulos, *supra* note 8.

[20]*See also*, Langdon Winner, *Do Artifacts Have Politics?*, 109 Daedalus 121, 121–36 (1980).

[21]Robert A. Caro, The Power Broker: Robert Moses and the Fall of New York 952 (2015).

In this New York context, anyone lacking access to a car could not rely on buses to use the roads. The rules permitting Moses to determine the height of bridges despite their discriminatory effect, provided a physical legacy still felt today, illustrating how rules can be built into the urban infrastructure itself. Pouring Moses' decision-making into concrete made the prejudiced assumptions about who should leave the city to visit the beach both spatially difficult and expensive to alter. Similarly, the protection of statues of men involved in slavery or oppression by heritage bodies has caused huge pain and unhappiness to urban residents, prompting extra-legal responses to administrative procedures of officials.[22] By recognizing these interrelationships, using qualitative research methods including close reading of texts, interviews, participant observations, and site visits, socio-legal scholars can investigate urban law as an ongoing dynamic activity—identifying how legal provisions, practices, customs, bridges, statues or pigs order the city.

II. Quantitative Research

Legal quantitative research does not differ significantly from quantitative research in other disciplines. Socio-legal scholars still design their projects, collect and code data, conduct analyses, and present results. The biggest difficulty in empirical legal research, as Andrew Epstein and Lee Martin suggest, is a lack of statistical understanding in their readership, communicating "complex statistical results to a community lacking in statistical training."[23] As with qualitative research, quantitative analyses can be exploratory, explanatory, and/or descriptive. Socio-legal scholars can add to this sustained interrogation of categories, which is premised on legal definitions that underpin the data.

One area where legal definitions and quantitative assessments interact is in indicators, an increasingly hot topic in comparative law, with possible implications for urban law. An indicator has been defined as "a named collection of rank-ordered data that purports to represent the past or projected performance of different units."[24] The critical aspect here is that the data are "generated through a process that simplifies raw data about a complex social phenomenon" and are, "in this simplified and processed form, ... capable of being used to compare particular units of analysis (such as countries or institutions or corporations), synchronically or over time, and to evaluate their performance by reference to one or more standards."[25]

Exploring the genealogy of indicators, investigating how individual criteria have developed, by whom and for what purpose, has led Sally Merry to identify their "seductive qualities."[26] She raises the alarm, writing that indicators, "particularly those that rely on ranks or numbers, convey an aura of objective truth and facilitate comparisons" even while they "typically conceal their political and theoretical origins and underlying theories of social change and activism ... [relying] on practices of measurement and counting that are them-selves opaque."[27] Scoring progress against indicators encourages partial compliance—and even cheating or changing definitions and assessments of whether compliance has been achieved.[28] Scholars are critical of how indicators function

[22]Briana Millett, *Historic England has say on future of Edward Colston statue*, Bristol Post (June 8, 2020), https://www.bristolpost.co.uk/news/bristol-news/historic-england-edward-colston-statue-4203119 (last visited Jun 8, 2020).

[23]Lee Epstein & Andrew D. Martin, *Quantitative Approaches to Empirical Legal Research*, *in* The Oxford Handbook of Empirical Legal Research, 902 (Peter Cane & Herbert M. Kritzer eds., 2010).

[24]Kevin E. Davis, Benedict Kingsbury & Sally Engle Merry, *Indicators as a Technology of Global Governance*, 46 L. & Soc'y Rev. 71, 73–74 (2012).

[25]Kevin E. Davis, Benedict Kingsbury & Sally Engle Merry, *Introduction: The Local-Global Life of Indicators: Law, Power, and Resistance*, *in* The Quiet Power of Indicators 4 (Sally Engle Merry, Kevin E. Davis & Benedict Kingsbury eds., 2015).

[26]Sally Engle Merry, The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking (2016).

[27]Sally Engle Merry, *Measuring the World: Indicators, Human Rights, and Global Governance: With CA Comment by John M. Conley*, 52 Current Anthropology S83, S84 (2011).

[28]Amanda Perry-Kessaris, *Prepare Your Indicators: Economics Imperialism on the Shores of Law and Development*, 7 Int'l J.L. Context 401, 410 (2011).

as a technology of governance, noting their "deep managerial roots," with Amanda Perry-Kassaris' video providing an excellent representation of how indicators narrow down the view—translating something into a definition to be counted, relying on a particular form of recognizability—which may not translate into all contexts and cultures.[29] Indicators are both a form of knowledge production and a technique of governance, producing both co-option and resistance.[30]

And yet, despite all of these critiques, indicators are likely to continue in policy evaluations. They provide a method to attempt to achieve equivalence, critical to any form of comparative urban assessment. By understanding quantitative data analysis, the legal formulations that underpin categorizations, and the critiques of numeric reduction, socio-legal scholars can contribute to these debates, explaining how legal and numeric taxonomies interact at the urban scale.

III. Urban Law: A Grammar

As analysts, in any discipline, we need some way to make cities legally legible, we cannot see the city in its legal totality, at a scale of 1:1. This frustration was famously captured by Luis Borges and Adolfo Bioy Casares' one-paragraph story, *On Exactitude in Science*, where the Guild of Cartographers "struck up a map of the Empire whose size was that of the Empire, and which coincided point for point with it."[31] To map on a scale of 1:1, the cartographers had to create a map as big as the space they were mapping, and in their case, the Empire. To map the urban on a scale of 1:1, we would have to create a city.

This necessity for analytical reduction is not only a problem for lawyers. Algebraic equations make the world readable to scientists, modern economics rests on a central tenet that profit and loss can be calculated—there are many mechanisms of legibility. If urban law aims to understand cities, then we need some mechanism of reduction, a form of intellectual infrastructure, to investigate how cities govern and are governed by people, places, reputations, and things. We cannot study the city in all its complexity.

So how do we reduce the city to be studied in urban law? One starting point is to attempt to identify the grammar of urban governance by identifying the key legal frameworks, the laws, cases, policy documents, practices, and legal cultures that govern cities—including local government arrangements, economic development, housing, transportation, public and community spaces, the community as a whole, criminal law and criminology, and infrastructure. We then use the socio-legal scholar's toolkit: Theory, qualitative, quantitative, and/or doctrinal legal analysis to understand how cities are produced by, and produce, law. Socio-legal research investigates how law constitutes everyday social relations, in this case, in an urban setting. This includes a focus on administrative rationality, asking how a city sees as well as investigating how the city is produced, from the ground up.[32] Quantitative data sets, including indicators, might be useful here—noting their limitations—particularly when paired with legal analyses. Although undoubtedly costly, urban law research can draw on multiple methods, engaging reflexively to interrogate and strengthen initial theories, questions, and findings.[33]

The aim is to understand how cities are legally produced with an eye to identifying shared legal concepts, regulatory approaches and practices, as well as notable differences. We can adopt the insight, if not the full critique, of Jennifer Robinson, that most urban areas are "ordinary cities,"

[29]Amanda Perry-Kessaris, *Socio-legal model making 3: Conceptualisation* (2016), https://vimeo.com/185963121 (last visited May 15, 2020).

[30]Morag Goodwin, *The Poverty of Numbers: Reflections on the Legitimacy of Global Development Indicators*, 13 Int'l J.L. Context 485, 486 (2017).

[31]Jorge Luis Borges, Collected Fictions 325 (1999).

[32]Mariana Valverde, *Seeing Like a City: The Dialectic of Modern and Premodern Ways of Seeing in Urban Governance: Seeing Like a City*, 45 L. & Soc'y Rev. 277 (2011).

[33]*See* Laura Beth Nielsen, *The Need for Multi-Method Approaches in Empirical Legal Research*, *in* The Oxford Handbook of Empirical Legal Research (Peter Cane & Herbert M. Kritzer eds., 2010).

addressing similar problems—unaffordable housing, transport congestion, and air pollution—using analogous governance frameworks. Research has often prioritized capital and mega-cities—such as London, Paris, Shanghai, or New York—yet we need to study cities regardless of their size. An ordinary city approach avoids hierarchy, privileging the "mega-cities," "global cities" or the metropolis over other cities and can help bridge geographical and epistemological divides, and broadens the number of cities understood as legal governance systems.[34] As Belgian Geographer Nick Schuermans reviewing Robinson's book notes, challenging the hierarchical production of urban theory:

> Very rarely, a scholar from the Anglo-Saxon heartland would be expected to cite a Belgian case study for the sake of the originality of the theory, and not just to embellish his list of references with a publication from an exotic country imitating and confirming the theories produced in London, Los Angeles or New York.[35]

To truly understand the urban everyday, we need to understand "ordinary" as well as "mega" or "global" cities—assessing both the differences and similarities between them, and producing legal legibility for analysis.

C. Why "Urban"?

For lawyers, the urban area can fall into administrative boundaries, drawing a line beyond which a city government's formal jurisdiction on local affairs does not run. One risk with this bounded approach is that it can transform urban law into local government or localized administrative law—raising the argument that we should no more study cities than rural administrative areas. A related concern is that focusing too much on city boundaries can also prioritize the rights, duties, and interests of city government—downplaying the significance of land ownership, private capital flows, ecosystems or movements by people, vehicles or pollutants. More fundamentally, a focus on local government boundaries misses the quality of urbanism as a way of life.

Such questions are not limited to urban law. One of the most perplexing questions for all urban scholars—be they in anthropology, sociology, politics, history, or geography—is why we would distinguish cities from other forms of human settlement. Should we have a specifically urban focus of analysis? What, if anything, is distinctive about cities or urban places?

Summarizing this critique in the 1980s, Doreen Massey explained that "[e]stablished theory has on the whole rested content with a rather unthought-out position that there is something called 'the urban,' that urban phenomena can be treated as independent variables."[36] This led some geographers to shift their interests, focusing on networks, mobilities, and global capitalist relations, aiming to understand cities as part of broader economic, spatial, and social processes.[37] Marxist geographers raised questions about whether cities are better understood as facilitating capitalism, creating a class of workers to service wealth production, or embedding cities within broader economic and political relations.[38] David Harvey, investigating how capital and urban

[34]Jennifer Robinson, Ordinary Cities: Between Modernity and Development (2013); Saskia Sassen, Sociology of Globalization (2007); Saskia Sassen, The Global City: New York, London, Tokyo (2013); Nick Schuermans, *J. Robinson, Ordinary Cities: Between Modernity and Development.* 4, 5 (2009).

[35]Nick Schuermans, J. Robinson, Ordinary Cities: Between Modernity and Development 3, 4 (2009).

[36]Doreen Massey, *The Urban Land Nexus and the State*, London: Pion. (Book Review 1980).

[37]*See generally* Manuel Castells, The Urban Question: A Marxist Approach (1977); Manuel Castells, The City and the Grassroots: A Cross-Cultural Theory of Urban Social Movements (1983); Manuel Castells, The Rise of The Network Society: The Information Age: Economy, Society and Culture (2000); John Allen et al., Rethinking the Region: Spaces of Neo-Liberalism (2012); John Urry, Sociology Beyond Societies: Mobilities for the Twenty-First Century (2002).

[38]*Id.*

processes interact and what they spatially produce, concluded that capital accumulation takes place within geographical context, producing specific kinds of geographical structures, including cities.[39] Henri Lefebvre suggested that urbanization processes create the conditions for capitalism, underpinning his claim that "society has been completely urbanized."[40] For scholars studying the urban effects of empire, relationality proves significant. Colonial cities should not be understood as a particular category of city, explains Anthony King, but rather as the interaction of distinct elements, including national society, territory, and location, as well as the particular process of colonization experienced.[41] This critique recognises that urbanism is also a process, challenging a conception of "the urban" as just a type of place.

There are also geographic boundary criticisms. Where does the city end and the rural start? How should we understand the causes and effects of urban expansion, decentralization, and suburbanization? Roger Keil has argued that urbanization today "is mainly suburbanization in its manifold differentiation" with the "form and life of the global suburb" taking "shape in a general dynamic of multiple centralities and decentralities."[42] Infrastructure is networked, often—though not always in a "modern infrastructural ideal"—patterning urban and suburban areas in way we often take for granted outside of rural settlements, where fuel supplies, broadband connections, and sanitation connections may be missing.[43] Given these networked infrastructures, can we effectively draw lines around a city boundary?

A further challenge is to identify the best scale for research, with researchers often finding that urban inequality occurs in neighborhoods, rather than in cities as a whole. Scholars identify housing choices and residential mobility as having the capacity to improve neighborhood deprivation at the neighborhood scale.[44] They examine experiences of structural racism, high rates of poverty, and social isolation in communities suffering from poor infrastructure, job opportunities, and reputational stigma.[45] Economic geographers, in particular, investigate urban difference at a granular level to try to understand whether living or growing up in certain neighborhoods affects life chances—even when they are embedded in broader national, regional or city-wide processes such as recessions, de-industrialization, or local government austerity.[46] Scholars researching one Swedish neighborhood found that "individuals who lived with their parents in a poverty concentration neighborhood, experience negative effects on their income later in life, even seventeen years after they have left their parental home."[47] Although there is much more that needs to be understood here, research so far indicates that housing tenure and social welfare programs

[39] *See* David Harvey, *The Geography of Capitalist Accumulation: A Reconstruction of the Marxian Theory**, 7 Antipode 9 (1975); David Harvey, Spaces of Global Capitalism (2006); David Harvey, Rebel Cities: From the Right to the City to the Urban Revolution (2012).

[40] Henri Lefebvre, The Urban Revolution (2003), 1.

[41] *See* Anthony D. King, Urbanism, Colonialism, and the World-Economy (2015).

[42] Roger Keil, *Extended urbanization, "disjunct fragments" and global suburbanisms*, 36 Environ Plan D 494–511, 494 (2018).

[43] Olivier Coutard, *Placing Splintering Urbanism: Introduction*, 39 Geoforum 1815, 1815–20 (2008); Steve Graham & Simon Marvin, Telecommunications and the City: Electronic Spaces, Urban Places (2002); Steve Graham & Simon Marvin, Splintering Urbanism: Networked Infrastructures, Technological Mobilities and the Urban Condition (2002).

[44] Wenda Doff, Puzzling Neighbourhood Effects: Spatial Selection, Ethnic Concentration and Neighbourhood Impacts (2010).

[45] William Julius Wilson, The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy, Second Edition (2012).

[46] Jürgen Friedrichs, George Galster & Sako Musterd, Life in Poverty Neighbourhoods: European and American Perspectives (2013); David Manley et al., Neighbourhood Effects or Neighbourhood Based Problems?: A Policy Context (2013).

[47] Lina Hedman et al., *Cumulative Exposure to Disadvantage and the Intergenerational Transmission of Neighbourhood Effects*, 15 J. Econ. Geography 195, 207 (2015).

appear to improve neighborhood outcomes, providing more equitable life chances for children growing up in deprived urban areas.[48]

Despite these findings, legal rules and practices are rarely implemented at a neighborhood scale, with these effects continuing to be poorly understood, despite studies of "the divided city."[49] Neighborhoods have been studied in the context of planning and ideologies of localism, or as relationships between neighbors.[50] Scholars have addressed legal questions at a micro-scale, particularly on the street or sidewalk, investigating how such interactions are produced and managed[51], and these are important contributions to understanding how urban flows are regulated by people, objects, rules, and practices. However, just as urban studies cannot ignore neighborhood effects on health, wealth or participation, neither can urban law. We need city, neighborhood, and street-scale analyses to combine if we are to understand urban legal dynamics. The task is to use the granular findings from streets and neighborhoods to inform a broader understanding of urban law, even if this widens out our understanding of "the urban".

Yet another critique of urban law is that governance arrangements vary, with many cities having only limited jurisdictional scope. Not all can determine economic policies, make their own transportation improvements, or cap rents. Sometimes responsibility rests with regional governance, as with German Länder. At other times, as in the United Kingdom, centralized governments make the most fundamental urban decisions, limiting local tax raising powers, controlling local budgets, and mandating rental laws and employment frameworks. Different histories embodying the legacies of the Hanseatic League or Italian city states have emerged into distinctive jurisdictional arrangements.[52] The task of urban law must acknowledge the variabilities of constitutional law, identifying the powers of cities. Having set out the local government framework, urban law must then go beyond it, explaining how cities operate in both law and policy in the gaps that are left—or in the governance fields cities claim, depending on the jurisdiction. Such analyses can draw work in international law where scholars consider the scale of human rights—investigating their possibility at the citylevel, questioning the value of legalizing urban citizenship, and analyzing the effects of framing places as sanctuary cities.[53]

A broader riposte still to urban law is to ask whether—even if we study deprivation, pollution, and poor housing quality in cities—we should neglect economic, welfare, or environmental law outside urban and spatial boundaries. Is housing law not the same inside and outside of cities? Even if we argue that some policy problems accumulate in certain places, that air quality is worse in urban areas and high demand can exacerbate poor quality housing, this is not necessarily an argument for urban law *per se*.

[48]Friedrichs, Galster & Musterd, *supra* note 46.

[49]Susan S. Fainstein, Ian Gordon & Michael Harloe, Divided Cities: New York & London in the Contemporary World (1992); Alan Mallach, The Divided City: Poverty and Prosperity in Urban America (2018); Carl H. Nightingale, Segregation: A Global History of Divided Cities (2012).

[50]*See* Alexandra Elizabeth Flynn, *Re-Imagining Local Governance: The Landscape of "Local" in Toronto*, Osgoode Digital Commons: PhD Dissertations (2017), https://digitalcommons.osgoode.yorku.ca/phd/35; Alexandra Flynn & Zachary Spicer, *Re-Imagining Community Councils in Canadian Local Government* (2017); Alexandra Flynn & Mariana Valverde, *Planning on the Waterfront: Setting the Agenda for Toronto's 'Smart City' Project*, 20 Plan. Theory & Prac. 769, 769–75 (2019); Robert C. Ellickson, Order without Law: How Neighbors Settle Disputes (2009).

[51]Nicholas Blomley, Rights of Passage: Sidewalks and the Regulation of Public Flow (2010); Rodrigo Meneses-Reyes, *Out of Place, Still in Motion: Shaping (Im)Mobility Through Urban Regulation*, 22 Soc. & Legal Stud. 335 (2013); Padmapriya Vidhya-Govindarajan, *Who Owns the Sidewalk?: Analysing Spatial Reorganization Amidst Regulation and Hierarchies in the Pondy Bazaar Street Market, Chennai, India*, *in* Global Perspectives in Urban Law 114 (Nestor M. Davidson & Geeta Tewari eds., 2018).

[52]Saskia Sassen, Territory, Authority, Rights: From Medieval to Global Assemblages (2008).

[53]Aust Helmut Philipp, *Urban Citizenship – a Status or a Practice?*, Verfassungsblog (Jan. 29, 2020), https://verfassungsblog.de/urban-citizenship-a-status-or-a-practice/; Harald Bauder & Dayana A. Gonzalez, *Municipal Responses to 'Illegality': Urban Sanctuary across National Contexts*, 6 Soc. Inclusion 124 (2018).

The imperfect answer to all of these criticisms is that they undoubtedly hold a kernel of truth, and yet we should still act. Half of humanity, 3.5 billion people, live in cities,[54] many in quite terrible personal circumstances, produced by a lack of regulatory oversight of housing quality, pollution control, or planned economic development. Urban law gives us a rare opportunity to engage holistically, investigating how laws interact in time and space from the ground up. We cannot capture every urban aspect. Instead, urban lawyers attempt to study cities from the inside, trying to commit to paper how the city operates around us and how legal rules on local government, finance, transportation, education, sustainability, housing, policing, and protesting —to name just a few—operate at the same time.

D. Why Urban "Law"?

Taking all these difficulties and limitations on board, we can identify three further sets of reasons to develop urban law as a field of study: The first is the subject's potential to contribute to vibrant interdisciplinary research; the second is to put law in service of improved urban quality; the third is to further develop legal concepts and understandings of interest to lawyers including governance, territory, jurisdiction, sovereignty, networks, and money.

I. Urbanism

The first argument for urban law is perhaps the most compelling—urbanism is interesting. In 1973, New York urban lawyer Frank Grad suggested that then, in a period of urban decline, one contributing factor to the relative lack of urban law scholarship rested on "the many so-called urbanists who either hate the city or have given up on it."[55] Today, cities and urban living are back in vogue, providing a growing focus for interdisciplinary research. Cities attract socio-legal scholars, the intellectual descendants of Ehrlich's study of "living law," keen to study urban rules and practices in urban sites that are still, to some extent, living laboratories—to use the language of 1930s Chicago sociology. Anthropological and sociological methodologies and methods, particularly ethnography, interviews, and observations, provide valuable ways for scholars interested in urban law to gather data to better understand the legal production of the city, even if at the moment much of this research is undertaken by scholars with their initial training outside of law.[56]

And so, despite the vibrant discourse of urban studies, legally-focused scholarship is, with notable exceptions, mostly absent.[57] Nonetheless, lawyers have much to contribute here, asking

[54]United Nations Department of Economic and Social Affairs, *supra* note 1.

[55]Frank P. Grad, *The City is Here to Stay*, Urb. L. Ann. 3, 3 (1973).

[56]Nicholas Blomley, Unsettling the City: Urban Land and the Politics of Property (2004); Mariana Valverde, *Seeing Like a City: The Dialectic of Modern and Premodern Ways of Seeing in Urban Governance*, 45 L. & Soc'y Rev. 277 (2011); Insa Lee Koch, Personalizing the State: An Anthropology of Law, Politics, and Welfare in Austerity Britain (2018).

[57]Phil Hubbard, *Kissing is Not a Universal Right: Sexuality, Law and the Scales of Citizenship*, 49 Geoforum 224 (2013); Phil Hubbard & Rachela Colosi, *Sex, Crime and the City: Municipal Law and the Regulation of Sexual Entertainment*, 22 Soc. & Legal Stud. 67 (2013); Jason Prior, Spike Boydell & Philip Hubbard, *Nocturnal Rights to the City: Property, Propriety and Sex Premises in Inner Sydney*, 49 Urb. Stud. 1837 (2012); Nicholas Blomley, *How to Turn a Beggar into a Bus Stop: Law, Traffic and the "Function of the Place"*, 44 Urb. Stud. 1697 (2007); Anna Barker et al., *Everyday Encounters with Difference in Urban Parks: Forging 'Openness to Otherness' in Segmenting Cities*, 15 Int'l J.L. Context 495 (2019); John MacDonald et al., *The Privatization of Public Safety in Urban Neighborhoods: Do Business Improvement Districts Reduce Violent Crime Among Adolescents?*, 47 L. & Soc'y Rev. 621 (2013); Mariana Valverde, *Seeing Like a City: The Dialectic of Modern and Premodern Ways of Seeing in Urban Governance: Seeing Like a City*, 45 L. & Soc'y Rev. 277 (2011); Mariana Valverde, *Authorizing the Production of Urban Moral Order: Appellate Courts and Their Knowledge Games*, 39 L. & Soc'y Rev. 419 (2005); Ann Varley, *Modest Expectations: Gender and Property Rights in Urban Mexico*, 44 L. & Soc'y Rev. 67 (2010).

about the significance of property, feeding into debates about urban land acquisition,[58] protest and free expression, policing and urban criminology, and cultural practices—complementing sociological focus not only on people in cities but also people in urban law and society.

Certainly, the ideal type of the European city, so influenced by Weber and his *Die Stadt* with its emphasis on urban associations, cannot provide a single template for urban law. Weber's "Politico-Administrative concept of the City"[59] undoubtedly informs urban life in some countries but cannot encapsulate all cities in their entirety. In particular, as Weber himself noted, urbanism as a form of consciousness is distinct from its physical embodiment. Contrasting these as the *cité* and the *ville*, Richard Sennett identifies the *cité* as representing "the character of life in a neighborhood," its anthropology and a "kind of consciousness," while *ville* encompasses the built environment—both buildings and "the product of the maker's will."[60] These two conceptions can be bridged, Sennett argues, if the urbanist is a partner to the urbanite, being both critical and self-critical.[61] Similarly, for urban lawyer and theorist Andreas Philippopoulos-Mihalopoulos, there is far more to cities than built environment alone, remaining in pursuit of careful critical analysis which produces "the ideal conversion from *urbs* to *civitas*."[62] Fordham's Nestor Davidson and Nisha Mistry also point to the broader possibilities for urban law, borrowing from Jan Gehl's 1973 *Life Between Buildings*, to call for "Law Between Buildings," providing a careful investigation of cities beyond their physical form.[63] With participatory governance a conventional way to understand the *cité*, and planning, building and infrastructure regulations conventional ways to understand the *ville*, urban lawyers can bring their appreciation for how these regimes interact, by producing, for example, opportunities for local residents to object to contentious development applications, even if they are not always heard.

Urban studies can also be enriched through analysis of repeated techniques used in urban law, fitting into modern debates framed as "planetary urbanism", drawing on the broader question about what is distinctive about "the urban", whether there is an "outside" to urbanity.[64] This line of scholarship, developed by Neil Brenner and Christian Schmid, builds on Henri Lefebvre's argument from the 1960s that, given the extension of networks both human, technological and financial, we are, in effect, "all urban now".[65] These arguments are highly theorized and polarized, highlighting urbanization as a process, prioritizing dynamics in terms of explanatory power, preferring to understand "urban" as a verb rather than as a noun.[66] Theories of planetary urbanism have been criticized for "occluding" central aspects of urban studies, including difference, centrality, and the everyday, as well as privileging particular epistemologies.[67] Arguing for progressive urban change, Clive Barnett and Susan Parnell have noted that while planetary urbanism provides space for aspects of Southern urban realities, it does not provide much assistance in thinking

[58]Allen J. Scott, The Urban Land Nexus and the State (2013); Allen J. Scott & Michael Storper, *The Nature of Cities: The Scope and Limits of Urban Theory*, 39 Int'l J. Urb. & Regional Res. 1 (2015).

[59]Max Weber, *The Nature of the City*, *in* Richard Sennett, Classic Essays on the Culture of Cities (1969).

[60]Richard Sennett, Building and Dwelling: Ethics for the City 1–2 (2018).

[61]*Id.* at 16.

[62]Philippopoulos-Mihalopoulos, *supra* note 8, at 7.

[63]*See* Nestor Davidson & Nisha Mistry, Law Between Buildings: Emergent Global Perspectives in Urban Law (2016).

[64]Henri Lefebvre, The Urban Revolution (Robert Bononno tran., 2003); Planetary Urbanization: An Urban Theory for Our Time?., (Neil Brenner & Christian Schmid eds.,); Neil Brenner, Implosions/explosions: Towards a Study of Planetary Urbanization (2014); Christian Schmid, *Journeys through planetary urbanization: Decentering perspectives on the urban*, 36 Environ Plan D 591–610 (2018).

[65]Id.

[66]Neil Brenner, Implosions/Explosions: Towards a Study of Planetary Urbanization (2014).

[67]Sue Ruddick et al., *Planetary Urbanization: An Urban Theory for Our Time?*, 36 Envtl. Plan. 387 (2018).

concretely about how local city governments can find opportunities about how city-based actors can be supported "to expand their influence and agency relative to national and international actors such as firms, political parties or governments."[68]

And yet while there may be limits to the planetary urbanism thesis, the focus on repetition within debates on planetary urbanism provides space for lawyers to demonstrate how repeated practices—sometimes by global commercial players using familiar techniques of property management and urban renewal—can replicate across jurisdictions.[69] In *Urban Warfare: Housing Under the Empire of Finance*, Special Rapporteur on Adequate Housing, Raquel Rolnik argues that the financialization of housing since 2008 has been disastrous for many left homeless and dispossessed.[70] Rolnik points to familiar legal techniques, often resting on property commodification, including home ownership, sub-prime mortgages, and the right to buy, arguing that these legally facilitated transactions enable global urban wealth to be concentrated disproportionately in the hands of a few. Many cities have been affected by the same legal techniques, conceptually similar, if tweaked by jurisdiction.

Similarly, repeated practices have characterized urban retail development. Legal and spatial enclosures of previously public spaces, "malls without walls," are often based on repeated prototypes, particularly using long leases from public authorities to private developers for 250 years—whilst maintaining on websites or public documents that the city still owns the land, which of course it does in terms of the freehold estate, though this is a long-postponed interest in reversion. The standard pattern is to masterplan a neglected urban area, using public powers of compulsory purchase and highway adaptation to subdue unruly landscapes into economically productive sites of consumption, governed by standard leases networks of experience.[71]

Transportation is also subject to repeated moves, including the designation of express or motorways, governed often at a national or regional scale, used by individual and corporate drivers.[72] Automobility is a cultural, economic, and political practice, which, all around the world is "the predominant global form of 'quasi-private' *mobility* that subordinates other mobilities of walking, cycling, travelling by rail and so on, and reorganizes how people negotiate the opportunities for, and constraints upon, work, family life, childhood, leisure and pleasure."[73] Observing these repeated patterns and practices provides legal scholars opportunities to investigate transfers of both progressive and regressive urban practices. More fundamentally, by exposing the legal basis for these practices, urban lawyers can ask whether these repetitions are urban in their conception or in their effect. Urban lawyers have real scope to contribute to broader debates on whether "the urban" is a place or a process, engaging with debates in "planetary urbanism" or "planetary gentrification" explaining how we can often see the same techniques used again and again. It is in picking up these repeated legal forms—as well as noting progressive good practice or cultural distinctions—that urban law can develop in its own right as well as contributing to comparative legal development and urban studies.

[68]Clive Barnett & Susan Parnell, *Ideas, Implementation and Indicators: Epistemologies of the Post-2015 Urban Agenda*, 28 Env't & Urbanization 87, 87 (2016).

[69]See Loretta Lees, Hyun Bang Shin & Ernesto López-Morales, Planetary Gentrification (2016); Antonia Layard, *Property and Planning Law in England: Facilitating and Countering Gentrification, in* Handbook of Gentrification Studies (2018).

[70]Raquel rolnik, Urban Warfare: Housing Under the Empire of Finance (Gabriel Hirschhorn trans., 2019)

[71]Antonia Layard, *Shopping in the Public Realm: A Law of Place*, 37 J.L. & Soc'y 412 (2010).

[72]*See generally* John Urry, *The 'System' of Automobility*, 21 Theory, Culture & Soc'y 25 (2004); Jim Conley, Car Troubles: Critical Studies of Automobility and Auto-Mobility (2016); Nicholas Low, Transforming Urban Transport: From Automobility to Sustainable Transport (2012); Sudhir Chella Rajan, The Enigma of Automobility: Democratic Politics and Pollution Control (1996).

[73]Urry, *supra* note 72, at 26.

II. Law in Service of Urban Quality

The United Nations couch their call for policy engagement by extrapolating from current trends, in that "the future will be urban for a majority of people, the solutions to some of the greatest issues facing humans—poverty, climate change, healthcare, education—must be found in city life."[74] The city provides a test case for policy questions, while "sustainable urbanism" becomes a policy rubric to address shared problems of infrastructure, housing, economic development, and environmental adequacy. This is a pragmatic—if sometimes contested— strategy. For while sustainable development has long been understood as a contested subject, modern formulations, beginning with the Millennium Goals, have reduced complexity—compared to Agenda 21's 351 pages—fitting objectives onto a single page, using simplicity to raise public awareness, facilitating mobilization, advocacy, and continuity.[75]

Law and legal practice are clearly relevant to this progressive task. The "New Urban Agenda" was adopted at the United Nations Conference on Housing and Sustainable Urban Development (Habitat III) in Quito, Ecuador in 2016 and endorsed by the United Nations General Assembly later that year.[76] It presents a "shared vision," promoting the agenda as "a powerful tool for sustainable development for both developing and developed countries."[77] The Agenda incorporates the newly developed Sustainable Development Goal 11, which proclaims that we should make "cities and human settlements inclusive, safe, resilient and sustainable."[78] Such policy activity is increasingly coupled with rising interest in behavioral economics or "nudge theory" in policy and decision-making circles, encouraging scholars to contribute understanding of "the human dimension" in more accessible forms.[79] Any legal contributions come, of course, with an acknowledgement of disciplinary normativity, explicitly acknowledging urban aims to build better, cleaner, and more equitable cities. It requires urban law scholars explicitly to lay bare their intellectual foundations, which is an unfamiliar scholarly move.

Socio-legal studies are primarily concerned with the "how," investigating the ways in which law and society, people and rules, customs and practices, objects and places, interact and inter-relate. Of course, it will always be critically important to separate the research from policy prescriptions. Nonetheless, urban law has potential not only to understand the "how" but also to inform the "how to." Socio-legal studies have seen increasing numbers of self-identified "scholar activists" at a time where politicians have sometimes claimed that "people have had enough of experts" or where identifying a point as "academic" consigns it to the sidelines of debate.[80] M. V. Lee Badgett, writing in *The Public Professor: How to Use Your Research to Change the World,* calls on scholars to engage with problems of climate change, social and economic inequality, war, violence, threats to democracy, and infrastructure meltdowns. He argues that while "it's tempting to keep our heads in books and computers, hoping that our students and published ideas will trickle down from the ivory tower into the world to make a difference," this rarely happens.[81] Indeed, Badgett believes that "giving into this temptation would be a lost opportunity and an abdication of our social responsibility."[82] Martin Partington agrees, particularly given the growing preference

[74]United Nations Department of Economic and Social Affairs, *supra* note 1.

[75]Jeffrey Sachs, *From Millennium Development Goals to Sustainable Development Goals*, 379 Lancet 2206, 2210 (2012).

[76]United Nations Conference on Housing and Sustainable Urban Development (Habitat III), *New Urban Agenda,* (Oct. 20, 2016).

[77]*Id.* at iv.

[78]*Id.* at 4.

[79]Noel Castree et al., *Changing the Intellectual Climate*, 4 Nature Climate Change 763, 763–68 (2014).

[80]*Britain has had enough of experts, says Gove*, Financial Times, https://www.ft.com/content/3be49734-29cb-11e6-83e4-abc22d5d108c (last visited May 13, 2020); *Michael Gove on the Trouble With Experts*, Chatham House (March 3, 2017), https://www.chathamhouse.org/expert/comment/michael-gove-trouble-experts (last visited May 13, 2020).

[81]M.V. Lee Badgett, The Public Professor: How to Use Your Research to Change the World 15–16 (2016).

[82]*Id.*

for "evidence-based" policy-making, noting drily that evidence-based policymaking is always "likely to be better than policy-making shaped by anecdote or personal preference."[83]

Of course, taking a normative position, being "pro-urban," is not a neutral step. It is important to be explicit about it, separating "research" from "policy implementation" to the greatest extent possible. Given socio-legal academics' substantial—if sometimes imperfect—academic freedom all research starts from a subjective viewpoint. It is increasingly important to acknowledge researcher positionality within socio-legal studies. Urban law is no different in this respect.

In the absence of formal treaties or legislation focusing on urban law, charters and indicators provide one way to engage in detailed legal scrutiny of explicitly pro-urban agendas, using well-established doctrinal skills. The 1996 Habitat II Charter, agreed to in Istanbul, had already called for legal implementation of urban objectives, including through "national laws and development priorities, programs and policies," as "the sovereign right and responsibility of each State in conformity with all human rights and fundamental freedoms [...] to achieve the objectives of adequate shelter for all and sustainable human settlements development."[84] Such definitions provide lawyers with opportunities to track language and meanings, noting how rhetorically attractive declarations can shift objectives over time.

In housing, Habitat II already emphasized the importance of legal rights to security of tenure in 1996 when it called for states to provide "legal security of tenure and equal access to land to all people, including women and those living in poverty."[85] Nevertheless, by 2016, the Habitat III *Quito Declaration on Sustainable Cities and Human Settlements for All*, security of tenure, such a key legal concept, was only to be "promoted".[86] Paragraph 13, rather than confirming the significance of secure tenure, "envisage[s] cities and human settlements that: Fulfil their social function, including the social and ecological function of land, with a view to *progressively achieving* the full realization of the right to adequate housing as a component of the right to an adequate standard of living, without discrimination."[87] The understanding of hard and soft law, policy, and the limits of rights legislation by lawyers, is critical to understand what States have signed up to.

Such linguistic and legal limits to international declarations have long been understood. Their limitations provide one reason why modern global urban policymaking has turned to targets and indices to encourage progress. Sustainable Development Goal 11 "to make cities and human settlements inclusive, safe, resilient and sustainable" has been crafted in ostensibly quantitative form, with four priority targets and accompanying indices.[88] The four targets are to: (i) Improve housing and upgrade slums; (ii) reduce harm to people and economic losses from disasters; (iii) reduce the adverse per capita environmental impact of cities, particularly from air quality and waste management; and (iv) substantially increase the number of cities and human settlements adopting and implementing integrated policies and plans.[89] The SDG housing target 11.1 assesses whether States can "[b]y 2030, ensure access for all to adequate, safe and affordable housing and basic services and upgrade slums," with an indicator measuring the "proportion of urban population living in slums, informal settlements or inadequate housing."[90]

[83]Martin Partington, *Empirical Legal Research and Policy-Making*, *in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 1004 (Peter Cane & Herbert M. Kritzer eds., 2010).

[84]UNITED NATIONS, *Report of the United Nations Conference on Human Settlements* (HABITAT II), 17 (1996).

[85]*Id.*

[86]United Nations, *New Urban Agenda: Quito Declaration on Sustainable Cities and Human Settlements for All* 35 and 109 (2016).

[87]*Id.*

[88]*Global indicator framework for the Sustainable Development Goals and targets of the 2030 Agenda for Sustainable Development*, (2017), https://unstats.un.org/sdgs/indicators/indicators-list/ (last visited May 15, 2020) [hereinafter SDG Indicators].

[89]*Id.*

[90]SDG Indicators, *supra* note 88 (Target 11.1).

As Sally Merry *et al.* have explained in their explorations of the genealogies of indicators, categorizations are deductive, raising democratic questions of who assesses, what is measured, and why.[91] One task for legal scholars is to engage with the definitions that underpin these targets and indicators in meaningful ways. Clearly, definitions of a "slum" or a "plan" can vary considerably[92] so that even if slums and plans can be counted, they may not all be equivalents, with the potential that some quite shocking urban housing conditions could be ignored. A definition of a "slum" matters, particularly when listing the proportion of a country's urban population living in slums[93]: any number is not absolute, instead it provides a perspective of what a "slum" is and how it can be counted. Theoretical and political objections remain to using reductive quantified assessments of this type that may miss important lived realities, while data tables and visualizations are only as reliable as the information entered into the software. Focusing on SDG 11, and indicator 11.1 specifically, the United Nations itself acknowledges the difficulties in differentiating between slum and non-slum areas, suggesting that, "methodologically, such an approach would start with innovative digital-based satellite imagery analysis, coupled with community ground-truthing and local observation, and participatory slum mapping."[94]

Ultimately, lawyers can make their own decisions as to whether or not to engage with these debates. Sally Merry has encouraged scholars to think about how to make indicators better, avoiding the overgeneralization, over-homogenization, and lack of context that so often limit the development and application of indicators.[95] Arguing that numbers can give us important knowledge, she exhorts policymakers to get more complicated and nuanced information into the process, particularly by drawing on categories of knowledge and information from the people themselves.[96] Socio-legal research is particularly well-suited to contributing to this task, drawing both on understanding of legal and official policy formulations as well as conducting empirical investigations into everyday meanings and understandings of key terms.

We should, then, be sensitive to the limits of quantitative analysis, slow to suggest that a particular legal framework can definitively improve a given variable, be that economic growth or urban quality. Some legal concepts have already indicated their potential in urban law. The best known, perhaps, is the "right to the city," formulated both in political geography and in legal form, primarily rhetorical but sometimes also a legal right.[97] Activists and scholars have used the concept of a right to formulate a deontological response to problems of urban insecurity as well as challenging growing private control of public functions and spaces. Similarly, the legal concept of security of tenure is understood to promote housing safety, linked to wellbeing at the neighborhood scale.[98] One question here is whether equivalent—and this is the key test—framings of security of tenure can reduce populations living in urban housing insecurity. A German lease differs significantly from an English lease in terms of renter protection, yet security of tenure can be

[91]Sally Engle Merry, The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking (2016), http://www.bibliovault.org/BV.landing.epl?ISBN=9780226261287 (last visited May 11, 2020).; Sally Engle Merry, Kevin E. Davis & Benedict Kingsbury, The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law (2015); Kevin Davis et al., Governance by Indicators: Global Power Through Classification and Rankings (2012).

[92]Nestor M. Davidson & Geeta Tewari, Law and the New Urban Agenda (2020).

[93]*Id.* (Indicator 11.1.1).

[94]United Nations, *Tackling Progress Towards Inclusive, Safe, Resilient and Sustainable Cities and Human Settlements: SDG 11 Synthesis Report, High Level Political Forum 2018*, 44 (2018).

[95]Sally Merry, *How to Make Global Indicators Better*, YouTube, 2016, =https://www.youtube.com/watch?v=68gTttIn2xM (last visited May 15, 2020).

[96]*Id.*

[97]*See* Edésio Fernandes, *Constructing the 'Right to the City' in Brazil*, 16 Soc. & Legal Stud. 201 (2007); Edésio Fernandes, *The "Right to the City" as a Legal Right: Lessons from Latin America* 2; Abigail Friendly, *The Right to the City: Theory and Practice in Brazil*, 14 Plan. Theory & Prac. 158 (2013); Harvey, *supra* note 39; Peter Marcuse, *From Critical Urban Theory to the Right to the City*, 13 City 185 (2009).

[98]Hedman et al., *supra* note 47; Manley et al., *supra* note 46.

achieved in both with sufficient political will.[99] Rights and security of tenure are recurring legal concepts often producing, both in their observance or non-observance, how a city feels. Does it have high levels of civic engagement and political participation? Are there many people living on the streets or in inadequate housing? Urban studies do not conventionally study the work done by legal concepts even though, as Raquel Rolnik reminds us, there is remarkable repetition in cities all over the world.[100]

III. Governance Concepts

A third, more conceptual justification for urban law is that cities provide spaces to work out ongoing puzzles. These include the interaction of territory, sovereignty, and jurisdiction at a manageable legal scale. This is useful for internally-facing legal studies, but also for engaging with related social science and arts disciplines where legal frameworks are often disregarded in favor of more theoretical or conceptual frameworks of governance.

There is clearly scope for synthesis in qualitative work on urban decision-making studying the processes through which government is organized and delivered in urban areas as well as the relationships between state agencies and civil society. Questions of democratic representation, power, and decision-making have been longstanding issues of interest, with classic American studies, for example, producing discordant results. For while Hunter Floyd identified a small, interlocking elite as governing 1950s Atlanta, Robert Dahl rejected such "sovereignties," finding instead a pluralist model of community power in 1980s New Haven.[101] Urban governance scholars aim to understand the interaction of public, private, and community participants, all of which happens within a legal framework, and usually, structures of democratic participatory involvement, which may—of course—be more or less ignored depending on the type of decision being made.

Recent urban research indicates, however, that there is more interaction between the legal and governance worlds than might at first be supposed. In their study of "seeing like an investor" in London, Mike Raco *et al.* conclude that complex imaginations of planning and regulation have led to many firms realizing that "market success results from becoming more deeply embedded in the local political, social, and regulatory environments in which they are investing."[102] This finding echoes studies of de-centered governance where lawyers and political scientists are reaching largely compatible conclusions, including the Foucauldian insight that power and control are disposed amongst social actors and the state, a finding which has been particularly significant in studies of "street level bureaucrats."[103] For as socio-legal scholars know well, regulatory decisions are dynamic, both in their drafting and in their enforcement, with processes sometimes informing the look, feel, or smell of a city as much as planned decisions.

[99]Susan Bright, Landlord and Tenant Law in Context (2007); Alison Clarke, Principles of Property Law (2020); Peter A. Kemp & Stefan Kofner, *Contrasting Varieties of Private Renting: England and Germany,* 10 Int'l. J. Housing Pol'y, 379 (2010).

[100]Raquel Rolnik, Urban Warfare: Housing Under the Empire of Finance (2019).

[101]Floyd Hunter, Community Power Structure: A Study of Decision Makers (1953); Robert A. Dahl, Who Governs?: Democracy and Power in an American City (2005).

[102]Mike Raco, Nicola Livingstone & Daniel Durrant, *Seeing Like an Investor: Urban Development Planning, Financialisation, and Investors' Perceptions of London as an Investment Space*, 27 Eur. Plan. Stud. 1064, 1064 (2019).

[103]*See generally* Julia Black, Critical Reflections on Regulation (2002); Julia Black, Martin Lodge & Mark Thatcher, Regulatory Innovation: A Comparative Analysis (2006); Michael Lipsky, Street-Level Bureaucracy: The Dilemmas of the Individual in Public Service (1983); Michael Lipsky, *Street-Level Bureaucracy and the Analysis of Urban Reform*, 6 Urb. Aff. Q. 391 (1971); Richard Crook & Joseph Ayee, *Urban Service Partnerships, 'Street-Level Bureaucrats' and Environmental Sanitation in Kumasi and Accra, Ghana: Coping with Organisational Change in the Public Bureaucracy*, 24 Dev. Pol'y Rev. 51 (2006); Peter Hupe, Research Handbook on Street-Level Bureaucracy (2019); Einat Lavee & Nissim Cohen, *How Street-Level Bureaucrats Become Policy Entrepreneurs: The Case of Urban Renewal*, 32 Governance 475 (2019); Jesse Proudfoot & Eugene J. McCann, *At Street Level: Bureaucratic Practice in the Management of Urban Neighborhood Change*, 29 Urb. Geography 348 (2008).

Municipal budgets provide yet another relatively understudied aspect of law, despite their undoubted effects on urban areas.[104] Cities may have the broadest jurisdictions and range of powers, but if they lack allocated funds or cannot directly tax their residents, they are limited in what they can achieve. In a call to update studies of public law in the 1980s, Terence Daintith identified "imperium" and "dominium" as mechanisms of governance.[105] For Daintith, imperium represents a legislative expression of government deployment of force—or the threat of force—and respect for rules, while dominium describes policy instruments that involve the deployment of wealth by government. The two interact, particularly after periods of budget reductions.[106] While localism initiatives can bring much vaunted freedom for local authorities to set their own imperium regulatory priorities, the ability to enact urban rules reduces when coffers are bare.

Money matters enormously to legal studies of urban governance. With financial austerity so devastating in many cities, these concepts prove useful in understanding decisions between mandatory and discretionary funding choices. This governance distinction is often blurred in practice as Mia Gray and Anna Barford explain in their study of urban child welfare.[107] For while protection for "at risk" children is mandatory, the funding of youth centers is discretionary, with many vulnerable children relying on youth centers for socializing and networks of support.[108] Understanding the inter-relationship between funding and administrative rationality is critical to understanding the practice of urban law and governance.

The urban context also provides space for legal scholars to continue to study ongoing questions of networks, jurisdiction, scale, territory, and sovereignty. So far, these questions have primarily emerged in studies of international law and settler colonialism, with notable exceptions only in municipal law.[109] Territory, in particular, is understood as a politico-geographic concept, as well as a process, whose relevance to administrative law is not yet well understood.[110] Sometimes, jurisdiction is understood as having fixed geographic boundaries. However, lawyers know well that jurisdiction can be contested and does not necessarily stop at national boundaries.[111] There are also tensions between globalization and territory, which the city, particularly with an understanding of both repeated public and private practices, as well as networks and infrastructures, can help us to interrogate.[112] Lastly, urban law continues to provide a rewarding context in which to

[104]Tony Prosser, The Economic Constitution (2014); Fred L. Morrison, Fiscal Rules - Limits on Governmental Deficits and Debt (2016); Ann Mumford, Fiscal Sociology at the Centenary: UK Perspectives on Budgeting, Taxation and Austerity (2019).

[105]T. C. Daintith, *Legal Analysis of Economic Policy*, 9 Journal of Law and Society 191–224 (1982).

[106]*See* Peter Vincent-Jones, *Values and Purpose in Government: Central-Local Relations in Regulatory Perspective*, 29 J.L. & Soc'y 27 (2002).

[107]Mia Gray & Anna Barford, *The Depths of the Cuts: The Uneven Geography of Local Government Austerity*, 11 Cambridge J. Regions Econ. Soc'y 541 (2018).

[108]*Id* at 555.

[109]*See generally* Henry Jones, *Property, Territory, and Colonialism: An International Legal History of Enclosure*, 39 Legal Stud. 187 (2019); Jeremy J. Schmidt, *Bureaucratic Territory: First Nations, Private Property, and "Turn-Key" Colonialism in Canada*, 108 Annals of the Am. A. Geographers 901, 901–16 (2018); Nicholas Blomley, *Precarious Territory: Property Law, Housing, and the Socio-Spatial Order*, 52 Antipode 36 (2020); Mariana Valverde, Everyday Law on the Street: City Governance in an Age of Diversity (2012); Mariana Valverde, *Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory*, 18 Soc. & Legal Stud. 139 (2009); Nicholas Blomley, *The Territory of Property*, 40 Progress in Human Geography 593 (2016); Blomley, *supra* note [56].

[110]Robert David Sack, Human Territoriality: Its Theory and History (1986).

[111]Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 Michigan Law Review 843–930 (1999); Mariana Valverde, *Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory*, 18 Social & Legal Studies 139–157 (2009); Shaunnagh Dorsett & Shaun McVeigh, Jurisdiction (2012); Stephen Allen et al., The Oxford Handbook of Jurisdiction in International Law (2019).

[112]Stuart Elden, *Missing the Point: Globalization, Deterritorialization and the Space of the World*, 30 Transactions Inst. Brit. Geographers 8 (2005).

investigate legal pluralism in both formal and informal settings.[113] Cities provide a "bottom up" way to investigate territory, networks, and jurisdictional scaling in one place, developing a new scholarly setting for legal studies.

E. Conclusion

Urban law is an emerging field of socio-legal studies where scholars aim to understand how law produces and is produced by the city. While the urban is understood as a form or place, legal research can also identify repeated provisions and practices that contribute to urban patterns, particularly in land use, transportation or infrastructure, even if these techniques are not necessarily urban in and of themselves. Identifying these repeated legal moves, drawing on specific provisions and practices, can help identify what is distinctive about "the urban" as a subject of study. Urban law can also be pragmatic, starting "on the streets", in quite classic socio-legal fashion, investigating cities in their everyday form, asking how urban areas are legally produced and co-produced as well as how better urban laws and legal practices might produce more sustainable, equitable and hopeful cities.

One of the key difficulties for urban law lies in identifying the right level of analysis, covering sufficient legal and empirical detail whilst also making the city legible at an urban scale. Focusing on small-scale case studies can illustrate repeated patterns or trends with investigations explaining, as Don Mitchell notes, "the structured and intense struggles" in urban development processes.[114] Such granular analyses, Mitchell explains, need to be studied alongside an understanding of the legal framework of law, governance, and practices within which cities operate.[115] As this article has explained, finding an intellectual infrastructure remains a key task for urban law, recognizing that scalar tensions produce imperfect compromises. Nevertheless, we should accept this challenge, just as cities continue to grow and develop so too should urban law.

[113] *See* Boaventura de Sousa Santos, *The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada*, 12 L. & Soc'y Rev. 5 (1977).

[114] Don Mitchell, *Mitchell on Fainstein, "The Just City"*, H-Environment, https://networks.h-net.org/node/19397/reviews/20588/mitchell-fainstein-just-city (last visited Apr. 24, 2020).

[115] *Id.*

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ARTICLE

Working Politically: Combining Socio-Legal Tools to Study Experiences of Law

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Abstract
This Article provides a novel insight into how early-career scholars in the UK may combine different theoretical tools in their research, and the implications that this may have for the socio-legal discipline. This Article draws upon the author's experience of combining theoretical tools from different schools of thought: Feminist legal theory, Bourdieusian theory, and Actor Network Theory, within the context of recent research into experiences of those representing themselves in family court hearings in England and Wales. Combining these theories for the first time, this Article explores the difficulties, tensions, and benefits of combining tools within socio-legal research and reflects upon the influence of the pedagogical and institutional resources that characterize the socio-legal research environment in the UK. This Article argues that the task of combining different tools provides scholars with the opportunity to work politically, because the process of reconciling tensions between different approaches requires researchers to reflect upon the worldviews that underpin their selected theories. In this sense, it argues that combining different theories within socio-legal research is a political activity, because researchers are required to reflect not only on how theoretical choices may contest, expand, or develop dominant assumptions that characterize socio-legal scholarly traditions.

Keywords: Socio-Legal; legal theory; legal aid; inequality; England and Wales; methodology; feminism; Actor-Network Theory; Bourdieusian theory

A. Introduction

The discipline of "socio-legal" encompasses a broad range of scholarship which distinguishes itself from doctrinal approaches to law. Notwithstanding this breadth, the discipline is far from fragmented in the UK. Rather, in addition to using analytical tools from a variety of other disciplines beyond law—and often beyond sociology—pioneering scholars have also invested decades into organizing themselves under the banner of socio-legal.[1] Particularly within the UK, this innovation has resulted in a fertile research environment for early-career scholars, who frequently benefit from socio-legal pedagogical influences within their legal education, institutional support for socio-legal doctoral projects, as well as the systematic supervision and guidance of more senior scholars who continue to play an important role in consolidating and pushing the boundaries of the discipline. As a result, the emerging generation of socio-legal researchers in the UK are less likely to face barriers in establishing the value of using interdisciplinary approaches to study the complex and situated role of law within society. However, they are instead faced with a different

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[1] *See generally* Sally Wheeler & Phil Thomas, *Socio-Legal Studies*, *in* LAW(S) FUTURES 267 (David Hayton ed., 2000).

challenge—important choices about how to use the tools and resources available to them from the different schools of thought which fall under this banner of socio-legal studies. These choices have important implications for which scholarly traditions are strengthened and reiterated, and how the discipline is to continue to develop.

The purpose of this Article is to provide an insight into how early-career socio-legal researchers may build upon the work of previous generations by combining multiple socio-legal tools from different schools of thought. It contributes a reflective account of how it was possible to draw together multiple socio-legal tools within my own recent research project undertaken in the UK. The aim of this research was to provide a deeper understanding of what it is like for people who are representing themselves as Litigants in Person in court in England and Wales, following a major withdrawal of legal aid for private family law cases by the UK government.[2] As part of this project, I conducted interviews with Litigants in Person to find out about the difficulties they experienced following this reform.[3] In doing so, I required conceptual resources that enabled me to do two things. First, I needed to understand how structural inequalities in society may shape the experiences that people in England and Wales have of using law. Second, I needed to reflect on how the culture and procedure of the legal system in England and Wales may itself facilitate or exacerbate experiences of disadvantage. To these ends, I devised a unique theoretical framework by drawing together three different approaches, each originating from distinct schools of thought which have, to varying degrees, been used by scholars working within the socio-legal discipline in the UK but have never before been drawn together: Feminist legal theory, Pierre Bourdieu's theory of social class, and Actor-Network Theory (ANT).

This Article will begin by outlining the usefulness of these approaches for understanding experiences of inequality and disadvantage and discussing the challenges inherent in the task of combining these approaches. First, I explain that feminist legal theory is a useful resource for appreciating how law is often formulated in a way that is blind to marginalized experiences, and how multiple structures of inequality may overlap in order to produce unique and intersectional experiences of law. Specifically, it encourages researchers to ask the "woman question," which means to ask questions aimed at exposing these hidden, diverse, and intersectional perspectives of law. Second, I argue that this approach can be reinforced with Bourdieusian theory, which specifically addresses issues of class, systems, and processes. This particular theory provides three key concepts—capital, field, and habitus—which are useful for tracing those structural inequalities that feminist theory demonstrates are otherwise absent from law and policy. Combining these two theories enabled me to use Bourdieusian concepts in an intersectional way, which meant both extending the scope of my analysis to incorporate understandings of class, as well as tracing multiple and overlapping structural forms of inequality which intersect to produce unique experiences of disadvantage.

Building upon these two combined approaches, I then discuss the value of drawing upon the third approach of ANT. While the first two approaches provide useful ways to think through the structural context of difference and inequality, it is useful to go further in order to understand how these inequalities may manifest as disadvantage within the specific context of the family court in England and Wales. ANT, therefore, provides a pragmatic tool for examining the material ways in which Litigants in Person may experience disadvantage within the legal system itself. This involves tracing the detail of the interactions that Litigants in Person have with other people, objects, and environments in the legal system. As an approach, ANT has been criticized within socio-legal studies for being problematically anti-structural, but at the same time, it is nevertheless also distinctly anti-doctrinal, because it requires researchers to view law as only one part of a complex

[2]Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, state-funded legal aid for advice and representation has been almost entirely removed from private family law cases in England and Wales.

[3]For more detail on this research project and issue within England and Wales more generally, see Jessica Mant, *Litigants' Experiences of the Post-LASPO Family Court: Key Findings from Recent Research*, 3 FAM. L.J. 300 (2019).

network of actors, instead of endowing law with symbolic significance. I will argue that ANT can be used in a way that complements the structural tools drawn from the other two approaches, because it enabled me to also explore the specific and material practices through which inequalities and difference manifest in disadvantage within the legal system in England and Wales.

This Article will then discuss the tensions that underpinned the research process as a result of the decision to use these approaches together. Here, it will argue that the task of working through these tensions is a political activity which holds important consequences for the socio-legal discipline. Different theories, particularly those which emerge from different schools of thought, are underpinned by different ontological and epistemological assumptions. As such, it is generally accepted that a researcher's choice of theory shapes their understanding of the research problem. However, when combining multiple theories, researchers are forced to consider the assumptions that underpin each of their selected theories, and how they contest each other. They must then decide which of these assumptions to prioritize and which to reject in order to reconcile their theories into a theoretical frame that can be used within their research. These decisions are political because they involve choosing which theoretical assumptions and worldviews underpin their research. Importantly, these decisions may also be political because scholars may make these decisions in a way that actively resists dominant assumptions and worldviews. On the basis of this, this Article will argue that the task of combining different theories involves an opportunity to work politically, which means to reflect not only upon how theoretical choices affect one's own research outcomes, but also upon how these choices may contest, expand, or develop the dominant assumptions and worldviews that characterize socio-legal scholarly traditions. This degree of reflexivity is imperative among early career scholars who choose to combine multiple theories because the work of these scholars will shape the future assumptions and worldviews that characterize the socio-legal discipline.

B. Feminist Legal Theory

As a dominant school of thought within socio-legal studies, feminist legal scholarship encompasses a broad and diverse literature which offers a range of insights into how law can operate to exclude and marginalize women, facilitate and contribute to their experiences of wider inequalities, and omit their subjectivities whilst presenting male subjectivities as objective, legitimate, or simply as common sense. A rich history of feminist perspectives has been useful for achieving a great deal in terms of substantive legal and political reform, as well as informing how scholars think about the basis upon which such claims should be formulated.[4] These have ranged from liberal claims for formal equality within law, radical calls for more focused attention on the relationship between sexual difference and oppression, to constructivist understandings of how men and women are constructed differently on the basis of their gender, and the specific ways in which law unevenly reinforces and reproduces these constructions.[5]

In all forms, feminism seeks to reveal and develop an understanding of the conditions of women's lives and suggest how these conditions may be improved—either by undertaking a broader critique of the structures that produce those conditions or advocating specific reforms within those structures.[6] Importantly, both tasks involve telling stories that account for the diverse experiences of women—paying careful attention to different perspectives, definitions, and meanings which have otherwise been omitted or silenced within law. By rendering the concerns of women both visible and valuable, feminist theory provides a resource for exposing how law is both actively and passively implicated in experiences of inequality and disadvantage. For example, early

[4]Hilarie Barnett, Introduction to Feminist Jurisprudence 8 (1998).

[5]*Id.* at 5–8.

[6]Jo Bridgeman & Daniel Monk, *Introduction: Reflections on the Relationship Between Feminism and Child Law*, *in* Feminist Perspectives on Child Law 1, 7 (Jo Bridgeman & Daniel Monk eds., 2000).

feminist legal scholarship has been key in campaigning for equality within law, and against the explicit and overt ways in which law may treat men and women differently. However, more recently feminists have moved beyond calls for formal equality in order to expose the more subtle ways in which law omits the concerns and realities of women's lives and is often complicit in conditions of inequality.[7]

For instance, while statutory provision may now give equality between men and women in terms of legal entitlements, feminists have argued that law nevertheless frequently fails to acknowledge the important ways in which the conditions of their lives differ, or recognize that different treatment may sometimes be required in order to achieve substantive equality.[8] Within the context of my research on Litigants in Person, for instance, it was possible to use a feminist lens to expose the distinctly gendered ways in which parents experienced the court process. Disproportionately, mothers had fewer economic resources with which to seek legal advice and representation in the absence of legal aid and are also overwhelmingly more likely to be contending with issues like domestic abuse within the court process. As such, my findings reiterated those of earlier projects in suggesting that the court process is not designed in a way that explicitly acknowledges the gendered reality of family disputes.[9]

Across many jurisdictions, scholars, activists, and lawyers have undertaken the task of rewriting judgments from a feminist perspective in order to show that even if law does not discriminate between men and women, its failure to incorporate the understandings, experiences, and perceptions of women within its legal definitions and rules is a cause of harm in and of itself.[10] As these projects show, women experience inequality in multiple ways—both by way of gender-specific harms, and also by way of law's failure to recognize and respond to them.[11] As explored by Ulrike Schultz earlier in this Special Issue, law across jurisdictions tends to be designed around the idea of a "non-gendered, non-differentiated legal subject," and this has important consequences for the role that law can play in ignoring, facilitating, and reiterating the material inequalities that women experience within society.[12]

As such, a feminist approach advocates expanding the lens of critique to include other structures and institutions which interact with law, such as the family, the labor market, or the tax and benefit system. Within different countries, cultures, and political contexts, a feminist analysis will therefore inevitably vary, but a common goal is to study law as one of several forces that form the backdrop to a society that is structured in a way that omits the concerns and realities of women's lives.[13] Using feminism to expose these hidden perspectives involves asking what is often referred to as the "woman question." In practice, this involves asking several different questions, such as: What kinds of assumptions, descriptions, or assertions underpin legal definitions and understandings? Further, how do these understandings compare to the lived realities and experiences of women? By asking

[7]Alison Diduck & Katherine O'Donovan, *Feminism and Families: Plus ca change?*, *in* Feminist Perspectives on Family Law, *supra* note 6, at 1, 2–5; Joanne Conaghan, Law and Gender 103 (2013).

[8]Diduck & O'Donovan, *supra* note 7, at 9.

[9]Mant, *supra* note 3. *See also* Liz Trinder et al., *Litigants in Person in Private Family Law Cases*, *in* Ministry of Justice Analytical Series (2014).

[10]Bridgeman & Monk, *supra* note 6, at 7. Feminist judgment projects have been undertaken in Australia, New Zealand, and the United States, as well as all UK jurisdictions. *See* Rosemary Hunter, Clare McGlynn & Erica Rackley, Feminist Judgments: From Theory to Practice (2010); Heather Douglas, Francesca Bartlett, Trish Luker & Rosemary Hunter, Australian Feminist Judgments: Righting and Rewriting Law (2014); Kathryn Stanchi, Linda Berger & Bridget Crawford, Feminist Judgments: Rewritten Opinions of the United States Supreme Court (2016); Máiréad Enright, Julie McCandless & Aoife O'Donoghe, Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity (2017); Sharon Cowan, Chloë Kennedy & Vanessa Munro, Scottish Feminist Judgments: (Re)Creating Law From the Outside In (2019).

[11]Robin West, *Jurisprudence and Gender,* 55 U. Chi. L. Rev. 1 (1988).

[12]Rosemary Hunter, *The Gendered 'Socio' of Socio-Legal Studies*, *in* Exploring the 'Socio' of Socio-Legal Studies 205 (Feenan Dermott ed., 2013).

[13]Diduck and O'Donovan, *supra* note 7, at 5; Conaghan, *supra* note 7, at 103.

these questions, it is possible to challenge the interests that are at the center of law and demand justification for the inequalities and disadvantages that this disparity perpetuates.[14]

Several feminist legal scholars have emphasized that this visibility is important for women because it raises "collective consciousness" among women who recognize and relate to the experiences that are exposed through this activity.[15] For example, there are some concerns which are common among women, such as the way in which structures like law operate to define the meaning of concepts like motherhood and mothering. Similarly, in their research into the legal aid system in Australia, Rosemary Hunter and Tracey De Simone found that although eligibility policy did not overtly distinguish between men and women, women were disproportionately disadvantaged by the fact that applications for family legal aid were afforded lower priority than those for legal aid in criminal matters, because the latter cases were presented as objectively more serious.[16] Consciousness-raising among women is therefore a means through which individual experiences of harm can be translated into collective experiences of oppression, which can in turn be used as an evidence base and an impetus to dismantle systems and structures that perpetuate inequality.[17] However, while this has obvious value, feminist scholars have drawn attention to the important limitations of research that claims to expose the experiences and perspectives of women, without accommodating the diverse and intersectional ways in which different women experience law.

Modern feminist scholarship, particularly that which is geared towards achieving legal and political reform, is intersectional. Intersectionality is a concept largely attributed to the ground-breaking work of Kimberlé Crenshaw.[18] It is derived from arguments that mainstream feminist discourse was unable to account for the unique forms of disadvantage that are experienced by women of color, who exist at the intersection between racism and sexism. The idea that multiple forms of oppression or marginalization can intersect and produce specific experiences of disadvantage has been taken up by feminists who seek to avoid producing research which claims to speak for all women.[19] In doing so, they recognize the value of raising collective consciousness, whilst also challenging the notion that women have a collective set of interests, characteristics, or needs.[20]

In this sense, asking the "woman question" means asking questions that reach beyond issues of gender, and scrutinizing how legal discourse also omits experiences of other inequalities.[21] Further, rather than someone experiencing multiple forms of disadvantage at once, the metaphor of the intersection allows researchers to appreciate how people can be marginalized as a result of different kinds of disadvantage, which intersect in ways that are situated, particular, and which cannot be untangled from one another.[22] A feminist approach which is intersectional seeks to expose the complexity of experiences that are omitted from law and legal practice, by telling stories that account for diverse experiences—including but not limited to gender—and resisting the temptation to explore just the aspects of people's lives that the law determines to be relevant or important.[23]

Asking the "woman question," therefore, can broadly be understood as a commitment to constructing a narrative that is not built out of abstract principles but is instead built "from the ground

[14]Barnett, *supra* note 4, at 23.

[15]Katherine Bartlett, *Feminist Legal Methods,* 103 Harv. L. Rev. 829, 863–67 (1990).

[16]Rosemary Hunter & Tracey De Simone, *Identifying Disadvantage: Beyond Intersectionality*, *in* Intersectionality and Beyond: Law, Power and the Politics of Location 159, 161–62(Emily Grabham et al. eds., 2009).

[17]Bartlett, *supra* note 15, at 837.

[18]Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 U. Chi. Legal F. 139 (1989); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241 (1991).

[19]*See generally* Hunter & De Simone, *supra* note 16.

[20]Joanne Conaghan, *Intersectionality and UK Equality Initiatives*, 23 S. African J. Hum. Rts. 317 (2007); Emily Grabham, *Taxonomies of Inequality: Lawyers, Maps and the Challenge of Hybridity*, 15 Soc. & Legal Stud. 5 (2006); Barnett, *supra* note 4, at 7–8, 19–21.

[21]Bartlett, *supra* note 15, at 837.

[22]Emily Grabham et al., *Introduction* to Intersectionality and Beyond, *supra* note 16, at 1.

[23]Conaghan, *supra* note 7, at 12–14.

up, out of concrete, specific practices."[24] However, in producing an account that can expose the complexity of experiences and perspectives, it is important not to lose sight of the structures that facilitate these experiences. A focus on intersectionality has, for some feminists, gone too far towards a "formulaic analysis" of individuals and their identity characteristics, and foregone the task of scrutinizing and challenging structures, institutions, and processes themselves.[25] For example, understandings of social class are frequently absent from feminist intersectionality scholarship, because class does not function easily as an identity category; intersectional understandings of inequality are focused on how law responds to people's experiences, while class analyses tend to focus on the structured processes by which those experiences are produced and mediated.[26] A theory of class was, however, of imperative importance within my research, because the accessibility of legal advice and representation has historically been framed by socio-economic inequality, and the disparity between those who can access legal support is now even more stark in light of the removal of legal aid. Within this project, it was therefore useful to reinforce a feminist approach with a theory of social class, which is useful for tracing those structural inequalities that feminist theory demonstrates are otherwise absent from law and policy.

C. Bourdieusian Theory

Although Bourdieusian theory is not widely used within socio-legal studies in the UK, Pierre Bourdieu's theory of class is particularly useful for studying experiences of law.[27] This is because his theory provides three foundational concepts—capital, field, and habitus—which can be used to understand how socio-economic inequality is reproduced through culture. This cultural focus permits an analysis which accounts for both the unequal distribution of resources, as well as the inequalities of recognition and value which characterize structures and institutions such as law. Further, these conceptual tools also enable researchers to explore how unequal arrangements are frequently reiterated through the interpretations of individuals themselves, as they subjectively assess and interpret their own position in relation to others within particular contexts like the legal system. As will be discussed shortly, this cultural dimension has enabled subsequent scholars to develop Bourdieu's theory in order to understand the reproduction of other forms of difference beyond class, such as gender. In this section, I will outline these three concepts before discussing how these can be usefully combined with feminist legal theory in order to highlight how different inequalities may intersect with each other to produce complex experiences of disadvantage that are omitted within law.

I. Capital, Field, and Habitus

The first foundational Bourdieusian concept is capital. Economic capital is a resource that can be exchanged for benefits or used as a means of influence. However, for Bourdieu, capital also comes in three additional forms—cultural, social, and symbolic. Cultural capital refers to the skills, knowledge, and dispositions that people gain during their life, the form of which depends on the interactions and experiences they have within society.[28] Similarly, social capital refers to the social networks that people can draw upon for support during these interactions and

[24]Adrienne Barnett, *Contact and Domestic Violence: The Ideological Divide, in* FEMINIST PERSPECTIVES ON CHILD LAW, *supra* note 6, at 129, 133.

[25]Joanne Conaghan, *Intersectionality and the Feminist Project, in* INTERSECTIONALITY AND BEYOND, *supra* note 16, at 21.

[26]*Id.* at 30.

[27]A notable exception to this is the work of Hilary Sommerlad, who has productively drawn Bourdieusian theory into socio-legal research. *See* Hilary Sommerlad, *Socio-Legal Studies and the Cultural Practice of Lawyering, in* EXPLORING THE 'SOCIO' OF SOCIO-LEGAL STUDIES, *supra* note 12, at 205; Hilary Sommerlad, *The "Social Magic" of Merit: Diversity, Equity and Inclusion in the English and Welsh Legal Profession,* 83 FORDHAM L. REV. 2325 (2015).

[28]PIERRE BOURDIEU, THE SOCIAL STRUCTURES OF THE ECONOMY 211 (2005).

experiences. Therefore, both forms of capital are accumulated through life experiences—they differ according to the people that an individual has met and formed connections with, as well as what they have learned, been exposed to, and taken interests in throughout their lives. In practice, both function as tangible resources that can be exchanged or used to gain advantages in different contexts.

Symbolic capital, however, refers to things like authority, reputation, and prestige, which can easily be used to accrue other forms of capital. Education is an important example of symbolic capital because it is something that can be exchanged for other forms of valuable capital in a variety of different contexts.[29] By distinguishing between these different kinds of resources, it is possible to understand how people from different social origins have different opportunities and possibilities available to them. However, rather than just signifying differences between people, the concept of capital can be used to expose the different value that is attributed to different kinds of capital within society.

This leads to Bourdieu's second concept: Field. Bourdieu argued that society is made up of several overlapping fields which all have their own practices and hierarchies of value. If capitals are synonymous with wealth, then fields are the marketplaces in which those capitals are spent and exchanged. Within each field, therefore, capitals are assigned value which determines how they can be used and the extent to which people can succeed in each context. In this sense, fields are sites of competition in which people struggle against each other in order to establish their "cultural competence" within any given arena.[30] In other words, the capitals that are useful within one field may be completely different from those that are valuable in another. However, there are some kinds of capital—such as the skills and confidence that may come from a university education—which are valuable across several fields, but the opportunities to accumulate this kind of symbolic privilege are by no means evenly distributed. In practice, Bourdieu argues, there are overlaps between fields relating to law, politics, and economics, because the holders of symbolic capital across each of these fields have "kindred world views."[31] In other words, those who hold power within society generally have a greater capacity to continually influence the shape and structure of official fields, and inevitably do so in their own interests.

In relation to law, Bourdieu extensively discussed that one way of doing this is by privileging unique practices and hierarchies that characterize the "juridical field."[32] Here, he explains that law is a field with its own underpinning set of protocols and assumptions, as well as its own internal social, psychological, and linguistic codes which all frame the way that law is practiced and negotiated but are never specifically recorded or acknowledged.[33] For example, valued capitals in the juridical field include knowledge of and familiarity with legal rules, as well as specific ways of behaving and communicating which are perceived as authentic to law. These unique forms of cultural capital enable those who are initiated in law to "explore and exploit the range of possible rules and use them effectively as symbolic weapons to argue a case."[34] Similarly, within the juridical field, certain forms of speech and written text have greater meaning and value than they do outside of this context. For example, when giving legal judgments, the act of speaking has the specific power of making something true. Additionally, the written formalization of text in a court document gives those words power in ways that would not be possible if they were simply said aloud.[35] The value that is placed on juridical capital within the juridical field therefore has a distinctly exclusionary effect for those who have not been initiated through legal education and training. These exclusionary practices

[29]Pierre Bourdieu, *The Force of Law: Towards a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 812 (1987).
[30]PIERRE BOURDIEU, DISTINCTION 86–87 (1984).
[31]Bourdieu, *supra* note 29, at 842.
[32]*Id.*
[33]*Id.* at 806.
[34]*Id.* at 827.
[35]*Id.* at 809–10.

enable the juridical field to set its own cultural parameters of what is legally relevant and important, and to dismiss and devalue other skills and perspectives.[36]

Bourdieu's final concept is the habitus. The habitus is the internal mechanism through which people accumulate different kinds of capital and develop their own sense for which capitals are useful when they engage with different fields. This concept requires researchers to consider how people perceive the context in which they find themselves, and how their responses can in turn further shape their experiences. As Mike Savage explains, "it is one thing to point to growing economic inequalities, but we need to see how people themselves see these divisions."[37] An important benefit of exploring experiences through the habitus, therefore, was to gain an insight into the subjective ways Litigants in Person themselves perceived the processes of the family court in England and Wales.

Taken together, these three concepts provide a means of tracing the ways that structural inequality and different perspectives may be discounted within the legal system, because the authority and legitimacy of law is instead derived from the supposed objectivity of legal rules and practices. However, through Bourdieusian theory, it is possible to expose that this is by no means objective —rather, the juridical field operates to selectively recognize certain capitals, and to discount capitals that do not fit neatly into the structure of this field. For example, within my research, Bourdieusian theory was useful for exploring how Litigants in Person frequently experienced cultural forms of exclusion from decision-making during court hearings, due to specialist language that was used by legal professionals, or because they were unable to comply with highly specialized procedure such as advocacy or cross-examination. In other words, they were often unable to participate in the manner expected by those working in the juridical field, and as such, perceived the court as an environment in which they were powerless to influence the outcome of hearings.[38] Bourdieusian concepts can therefore be used to compliment and reinforce the feminist objectives of exposing the hidden narratives of law, as well as the implications of law's blindness to inequality.

II. An Intersectional Understanding of Inequality

In relation to socio-economic inequality, these Bourdieusian concepts are extremely useful for understanding the important links between economic and cultural forms of subordination, and the implications of this for people who are attempting to participate in the juridical field. However, it is clear from feminist theory that economic inequality is not the only structural force that shapes experiences of law. Nancy Fraser argues, for instance, that although inherently linked with economic inequality, there are many other ways in which people can be oppressed or disadvantaged on the basis of who they are, and their status within other structures in society, like gender and race.[39]

Although Bourdieu did not explicitly discuss this, his concepts are flexible enough to provide an understanding of these other structures of inequality, because they account for the historical reiteration of both unequal outcomes and the processes by which these outcomes are produced.[40] For example, the task of extending these concepts to address other forms of disadvantage has already been taken forward by a new generation of Bourdieusian sociologists in the UK.[41] Approaching these concepts from very different academic backgrounds to Bourdieu, these

[36]*Id.* at 828–29.

[37]Mike Savage, Social Class in the 21st Century 1 (2015).

[38]Mant, *supra* note 3.

[39]Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a "Postsocial" Age*, *in* Adding Insult to Injury: Nancy Fraser Discusses Her Critics 9, 10–16 (Kevin Olson ed., 2008); Nancy Fraser, Fortunes of Feminism: From State-Managed Capitalism to Neoliberal Crisis 193–94 (2013).

[40]Hilary Sommerlad & Peter Sanderson, Gender, Choice and Commitment: Women Solicitors in England and Wales and the Struggle for Equal Status 29, 37 (1998).

[41]Ciaran Burke et al., *Introduction: The Development of Bourdieu's Intellectual Heritage in UK Sociology*, *in* Bourdieu: The Next Generation 1 (Jenny Thatcher et al. eds., 2016).

scholars have been able to develop concepts like "black cultural capital," and drawn links between the habitus and the concept of respectability in order to address the ways in which structures of value are racialized and gendered as well as classed.[42]

This means that it is possible to use these concepts in a way that is aligned with the feminist commitment to intersectionality. In relation to law, for instance, Hilary Sommerlad and Peter Sanderson use Bourdieusian theory to argue that the juridical field facilitates a culture that is specifically exclusionary to women.[43] In their work, Sommerlad and Sanderson use the concept of field to demonstrate how legal rules are gender blind, and therefore do not account for structural constraints like caring responsibilities or other social arrangements which disproportionately affect women. As such, the inequality that women experience across society is constructed as irrelevant within the juridical field.[44] Additionally, through the concept of capital, they explore the ways in which women can be ascribed certain characteristics based on their sex or gender, which are then devalued within the juridical field. In their work, characteristics associated with femininity or motherhood were ascribed to women by others in the field, and these were then undermined, misrecognized, and devalued in ways that those held by men were not.[45] In this sense, Bourdieusian concepts can be used to understand how gender-based inequality can produce disadvantage which is different to the disadvantages which stem from socio-economic inequality, and that both of these structural inequalities can compound and intersect each other within the lived experiences of women.

Bourdieusian concepts can therefore be used to think through not only how different structures of inequality operate, but also be applied in an intersectional way, so as to gain an understanding of how categories like class and gender work together to produce unique experiences of disadvantage. A major benefit of doing this is that it enables analysis to move beyond talking about categories like gender, race, and class as if they are mutually exclusive. Instead, an intersectional application of Bourdieusian theory provides an imperative to "complicate our understanding of the social dynamics of inequality" by embracing the complex and overlapping ways in which these categories may operate.[46] For example, within the context of this research, this meant I was able to recognize not only the cumulative ways in which Litigants in Person were affected by different structures of inequality, but also the unique and complicated ways in which they experienced disadvantage as a result of their different social positions.

Taken together, Bourdieu's concepts and feminist legal theory provide extremely useful and versatile tools which can be used to expose a rich understanding of how different structural inequalities may shape the experiences that people have of law, and how law operates to cut through these lived realities. However, they do not in themselves provide tools to understand how these inequalities may manifest as disadvantage within the legal system itself. Given that the purpose of this research was to understand the disadvantages that may be facilitated within this system, it was important to reinforce these structural tools with the third approach of ANT, which provides a materialist understanding of disadvantage within specific contexts.

D. Actor-Network Theory

Despite the word "theory" in its name, Actor-Network Theory is best understood as an analytical method that can be used to explore social arrangements, rather than a theory through which to

[42]Beverley Skeggs, Formations of Class and Gender: Becoming Respectable (1997); Nicola Rollock, *Legitimizing Black Academic Failure: Deconstructing Staff Discourses on Academic Success, Appearance and Behaviour*, 17 Int'l Stud. in Socio. of Educ. 275 (2007); Derron Wallace, *Re-Interpreting Bourdieu, Belonging and Black Identities: Exploring 'Black' Cultural Capital Among Black Caribbean Youth in London*, *in* Bourdieu: The Next Generation, *supra* note 41, at 37.

[43]Sommerlad & Sanderson, *supra* note 40, at 17.

[44]*Id.* at 2.

[45]*Id.* at 28–29, 37–38.

[46]Grabham et al., *supra* note 22, at 13.

understand or explain them. This approach was developed within the field of science and technology studies and is commonly attributed to the work of Bruno Latour.[47] Taking inspiration from the scientific tradition, ANT advocates examining social arrangements on a micro scale, and encourages researchers to consider how material objects and locations play important roles within those arrangements.[48] Although ANT is still used by only a few scholars within socio-legal studies,[49] it can be understood as part of a broader materialist turn within the discipline, which has emphasized the importance of recognizing that law is, in fact, inseparable from its physical conditions.[50] The material reality of law has sometimes been neglected within approaches that focus more heavily on the cultural manifestations of law and society.[51] While feminist theory and Bourdieusian theory are useful for asking questions about the structural context in which Litigants in Person are navigating the legal system, Actor-Network Theory is therefore useful for documenting the specific and material ways in which these experiences actually play out in the court process. However, because of its explicit focus on the micro-scale, there were also epistemological difficulties inherent in combining it with the other structural theories that comprised this framework. In this section, I will first outline the resources that this approach held for the research, before turning to reflect on how it was possible to reconcile this challenge and combine these three theories.

I. The Actor-Network Theory Approach

There are two central tenets of Actor-Network Theory. The first is that everyone and everything is both an actor within a network, and a network in itself. The second is that actors can be both human and non-human. The family court, for example, can be understood as one actor within the network of the legal system. However, if analytically useful, it can also be examined as a network that can be broken down into its own constituent actors: Litigants in Person, judges, lawyers, as well as courtrooms and paperwork. In turn, these actors can also be deconstructed and examined, and there is no limit to how far any object of analysis can be broken down into its constituent parts. This means it is possible to explore in detail the relationships between its actors, and specifically trace how certain actors are able to influence others and shape the network. While some actors may be able to translate the objectives of others into those that mirror their own, others may have difficulty negotiating some of these relationships.[52] Therefore, Actor-Network Theory is extremely useful for unpacking exactly how people may face specific problems at various stages of filling out paperwork, navigating court buildings, and constructing legal arguments, where their success depends on their relationships with other actors. Taking an Actor-Network Theory approach to this project involved carefully documenting the interactions that Litigants in Person had with different aspects of the legal system and paying specific attention to the material detail of those interactions. For example, this enabled me to appreciate the difficulties that Litigants in Person faced as a result of how physical court environments were designed, such

[47]Bruno Latour, Reassembling the Social: An Introduction to Actor-Network-Theory (2005).

[48]John Law, After Method: Mess in Social Science Research (2004).

[49]Annelise Riles, The Network Inside Out (2000); David Cowan & Helen Carr, *Actor-Network Theory, Implementation, and the Private Landlord*, 35 J.L. & Soc'y 149 (2008); Alain Pottage, *The Materiality of What?*, 39 J.L. & Soc'y 167 (2012); Emilie Cloatre, Pills for the Poorest: An Exploration of Trips and Access to Medication in Sub-Saharan Africa (2013); Emily Grabham, Brewing Legal times: Things, Form and the Enactment of Law (2016); Caroline Hunter, *Solar Panels, Homeowners and Leases: The Lease as a Socio-Legal Object*, *in* Exploring the 'Legal' in Socio-Legal Studies 137 (David Cowan & Daniel Wincott eds., 2016).

[50]Marie-Andree Jacob, Matching Organs with Donors: Legality and Kinship in Transplants (2012); Andreas Philippopoulos-Mihalopoulos, Spatial Justice: Body, Lawscape, Atmosphere (2014); Nicole Graham, Margaret Davies & Lee Godden, *Broadening Law's Context: Materiality in Socio-Legal Research*, 26 Griffith L. Rev. 480 (2018).

[51]Margaret Davies, Law Unlimited: Materialism, Pluralism and Legal Theory 42 (2017).

[52]Helene Buzelin, *Unexpected Allies: How Latour's Network Theory Could Compliment Bourdieusian Analyses in Translation Studies*, 11 The Translator 193, 196–97 (2005).

as feeling intimidated by lawyers in court waiting areas and feeling disparaged by the formal layout of courtrooms.[53]

In this sense, ANT is often described as "ethnographic," because it requires researchers to describe the material manifestations of social arrangements, as well as the detailed process by which social arrangements come to be.[54] This commitment of ANT has been particularly useful for socio-legal researchers who are interested in unravelling how law operates within society. As I have highlighted through Bourdieusian theory, the legal system is often artificially conceived as an arena with its own culture, assumptions, codes, and practices. These all operate as internal sources of legitimacy for the juridical field but are never specifically recorded or acknowledged.[55] Several scholars have already demonstrated the value of using ethnographic approaches in order to challenge these underpinning assumptions about how law is understood and experienced.[56] However, it is this combination of an ethnographic commitment to detail with a particular attentiveness to materialism which distinguishes ANT from just "good ethnography," and made it a particularly useful tool for this project.[57]

The materialist focus of ANT means that it asks questions about how non-human actors can play important roles and have significant effects for social arrangements. For example, Annelise Riles has used ANT to explore the role that documents play within the legal system.[58] Legal documents, she argues, have the power to foreclose important and contentious debates. A document can be used as a means of rendering complex discussions as "a matter of settled history," because the act of recording something in a document can never fully capture the oral discussions that took place to produce that document. In this sense, documents are artifacts of a prior struggle, which themselves provide sources of further authority which can be drawn upon at a later stage by those who were able to influence the record in the first place.[59] By tracing the specific role of the document within law, therefore, Riles is able to disrupt our thinking about how law is able to function and reinforce itself.[60]

Focusing on the micro scale through ANT therefore also means having to re-engage with the very nature of law as a social category, discipline, institution, and label. Importantly, and in alignment with the criticisms of intersectionality, this ensures that the structures and processes of the legal system itself are subject to critical scrutiny. Rather than conceiving of law as something that is already made, ANT requires researchers to provide a detailed account of law in the making—how specific interactions and relationships work together to produce outcomes like disadvantage.[61]

II. Combining Structural and Anti-Structural Approaches

Taken together, the tenets of ANT require researchers to avoid taking social arrangements for granted, and instead to scrutinize the relationships that make those arrangements possible. In

[53]Mant, *supra* note 3.

[54]Emilie Cloatre, *Law and ANT (and Its Kin): Possibilities, Challenges and Ways Forward*, 45 J.L. & Soc'y 646 (2018); Gianpaolo Baiocchi et al., *Actor-Network Theory and the Ethnographic Imagination: An Exercise in Translation*, 36 Qualitative Socio. 323, 330 (2013).

[55]Bourdieu, *supra* note 28, at 806.

[56]An important example is legal consciousness scholarship. *See* Patricia Ewick & Susan Sibley, The Common Place of Law (1998).

[57]Cloatre, *supra* note 54, at 659.

[58]Annelise Riles, Documents: Artifacts of Modern Knowledge (2006).

[59]*Id.* at 76–78, 83.

[60]This is further reinforced by the work of other scholars who focus more generally on spatial and temporal dimensions of law. *See* Marie-Andree Jacob, *The Strikethrough: An Approach to Regulatory Writing and Professional Discipline*, 37 Legal Stud. 137 (2017); Linda Mulcahy, Legal Architecture: Justice, Due Process and the Place of Law (2010); Emily Grabham, *Legal Form and Temporal Rationalities in UK Work-life Balance Law*, 29 Australian Feminist Stud. 67 (2014).

[61]Cloatre, *supra* note 54, at 657–58; Ron Levi & Mariana Valverde, *Studying Law by Association: Bruno Latour Goes to the Conseil d'Etat*, 33 L. & Soc. Inquiry 805, 822 (2008).

a way that clearly overlaps with feminist objectives, ANT is underpinned by a bottom-up approach to understanding the complexity of social arrangements. However, by advocating that social arrangements should be examined in a purely empirical way, ANT is epistemologically and ontologically distinct from the other theories in this framework. While feminist legal theory and Bourdieusian theory each provide different resources for understanding how disadvantage may relate to structural inequality and difference, ANT has traditionally been critical of these kinds of theoretical explanations. For Actor-Network theorists, using social theory to frame research findings is to take a shortcut—to treat inequality as an explanation for disadvantage, rather than to see disadvantage an effect of a social arrangement that needs to be explored.[62] It was on this basis that Latour originally went so far as to argue that social theory such as Bourdieusian theory should be "jettisoned."[63]

Therefore, these were two contesting assumptions and worldviews that I needed to reconcile in order to draw these theories together into a theoretical framework that I could use within my research. On the one hand, ANT raises an important concern about the usefulness of social theory for understanding how people experience law. For instance, it would have been particularly detrimental to the aims of my project if I were to use theory in a way that simply reiterated theoretical presumptions and failed to extend current understandings or incorporate first-hand experiences of law. However, on the other hand, while this is an important criticism of how researchers may use theory, this also exposes a key weakness of the ANT approach. By advocating a flat ontology in which researchers may only explore what they find during their empirical investigations, ANT does not pay attention to the deeper and historically reiterated structures of inequality that provide the context within which these social practices unfold. In this sense, ANT may be interpreted as rejecting analyses that account for categories such as gender or class, or the historical dimensions of these structures. This skepticism of social theory has been heavily criticized. Feminist scholars in particular have argued that without a theoretical understanding of the ways in which macro structures and categories have historically reiterated arrangements of inequality, it is impossible to fully understand the relationships and interactions which take place on a micro scale.[64]

By focusing only on the interactions that happen on the ground, ANT risks being "an apolitical strategy that effectively effaces the violent histories and embedded power imbalances that constitute social relations."[65] In other words, while ANT theorists may criticize structural approaches for explaining without describing, ANT is also at risk of describing without explaining.[66] The task of drawing ANT into this theoretical framework was therefore a significant challenge, given that its underpinning assumptions and worldview risk reiterating a problematic blindness to structural arrangements of inequality. However, by working through this tension, I concluded that it is possible to use ANT in a way that is sensitive to this structural context for two reasons.

First, it is possible to use Actor-Network Theory without adhering to anti-structuralism. Reconciling an anti-structuralist approach with structural approaches is by no means simple, but it is still possible to use these approaches concurrently by following the example of other scholars who have explicitly rejected the anti-structuralist ontology that underpins traditional ANT approaches. As ANT has been applied in multiple disciplines, researchers have confronted these important "blind spots," and instead recommended using ANT Theory as a set of sensibilities that can be used more productively than traditional applications of Latourian ANT. For example, within law, Emilie Cloatre has most prominently mitigated these blind spots by taking the benefits of ANT's micro approach, whilst rejecting ANT's skepticism of structural theory. She argues that it is instead far more progressive to draw ANT together into theoretical frameworks with other

[62]Baiocchi et al., *supra* note 54, at 336.
[63]LATOUR, *supra* note 47.
[64]Cloatre, *supra* note 54.
[65]*Id.* at 653.
[66]Levi & Valverde, *supra* note 61, at 822.

theories that provide a proper account of how power and inequality operate on a structural scale.[67] In doing so, Latour's view of social theory has often been resigned to classical or purist forms of ANT, and is generally regarded as at best problematic, and at worst dangerous.[68]

Second, rejecting anti-structuralism does not mean that ANT's concerns about theory are discounted. Instead of jettisoning theory, researchers are encouraged instead to use ANT as a broad set of sensibilities that can be used as pragmatic guides through which to orient social theory.[69] Cloatre has described this method of using ANT "as a matter of care."[70] As discussed so far in this section, these sensibilities include an attentiveness to the relational and material nature of social arrangements, as well as how particular social arrangements come to produce effects like disadvantage.[71] By using ANT in this way, it is possible to move beyond using inequality or disadvantage as explanations for the social phenomena being studied, and instead commit to explaining how arrangements of disadvantage or inequality come to be, through a renewed attention to the micro-connections that form these arrangements.[72] Although it is unlikely that he would have embraced ANT, Bourdieu himself actually advocated the idea that researchers should be open to different approaches. He recommends, for instance, that researchers should "mobilise all the techniques that are relevant and practically useable, given the definition of the object."[73] Similarly, as discussed earlier, the field of sociology within the UK includes an emerging generation of Bourdieusian scholars who are committed to developing and refining Bourdieu's concepts beyond their original incarnation as a grand theory of society. Will Atkinson, for instance, explains that this task involves working with and against Bourdieu, and that researchers should not be afraid of deviating from him when the research demands it.[74]

Instead of undermining the structural understandings gained from the other theories, it is therefore possible to use ANT as a resource for asking more questions about how disadvantage is experienced on the ground, rather than closing down questions about how that disadvantage is rooted in broader structures of inequality. In this sense, ANT—used as a sensibility—can be used in a way that actually elevates feminist concerns and objectives, because it indicates that researchers need to remain open to experiences which do not fit with pre-existing ideas that underpin structural theories. Even more importantly, ANT can be used in a way that holds researchers accountable to using theory in a way that helps to gain a deeper understanding of the experiences that people have of law.

E. Working Politically: The Benefits of Tension

These three approaches draw different conceptual resources from distinct schools of thought. Taken together, they provide the tools to understand how people are positioned differently within society, how this may shape specific forms of disadvantage, and how this plays out on a material level within the legal system in England and Wales. Combining these tools was by no means a simple task—there are several moving parts that work together and contradict each other in different ways. Most notably, there was an important conflict between the underpinning assumptions of ANT, and the other two approaches. While ANT suggests that knowledge should be empirically driven and researchers should avoid using concepts like inequality as explanations for social

[67]Cloatre, *supra* note 54, at 660.

[68]Levi & Valverde, *supra* note 61, at 811; Cloatre, *supra* note 54, at 653, 658.

[69]John Law & Vicky Singleton, *ANT and Politics: Working In and On the World*, 36 Qualitative Socio. 485, 485–86 (2013).

[70]Cloatre, *supra* note 54, at 660–61.

[71]Baiocchi et al., *supra* note 54, at 335.

[72]Cloatre, *supra* note 54, at 653.

[73]Pierre Bourdieu & Loic Wacquant, An Invitation to Reflexive Sociology 227 (1992).

[74]Will Atkinson, *From Sociological Fictions to Social Fictions: Some Bourdieusian Reflections on the Concepts of 'Institutional Habitus' and 'Family Habitus,'* 32 British J. Soc. & Educ. 331, 344 (2011).

phenomena, feminist theory and Bourdieusian theory suggest that empirical findings cannot be properly understood without a theoretical understanding of the structural context in which they occur. In order to draw these theories together within my research, therefore, I had to make a political decision to reject the anti-structural premises of ANT, and instead conceptualize this approach simply as a sensibility. On the basis of this, I will now argue that the task of combining different theoretical approaches is frequently political, because researchers must consider how their theoretical choices affect not only their own research, but also how they may contest, expand, or develop the dominant assumptions and worldviews that characterize socio-legal scholarly traditions.

When combining approaches from different schools of thought, scholars are required to engage critically with each of their selected approaches, because they are forced to reflect on how these conceptual resources fit together and how they may contradict each other. Within the context of their own projects, this means that researchers have to distinguish between the contributions of different approaches and identify those that are valid within the context of the specific research questions at hand. However, when theories are underpinned by different epistemological or ontological assumptions, researchers will inevitably have to engage in what Davies calls a "politics of definition." This occurs when two or more theoretical objects come into contact conceptually or physically, and cannot be reduced to a single form, thus leading to a clash of ideas and objectives. It is at this point that researchers must decide how to proceed, and are forced to apply a politics of definition, through which one set of assumptions is empowered or prioritized, and the others are marginalized.[75]

Within the context of this project, for instance, the contradictions between the structural and anti-structural assumptions that underpinned these theories arose repeatedly, and as a result, the research process was characterized by a set of inherent and unrelenting tensions which frequently had to be confronted and reconciled at various key points of fieldwork and analysis. This task may be particularly difficult for researchers trained in certain scholarly traditions. For example, before undertaking this project, I had more experience working with traditional sociological approaches like Bourdieusian theory than with approaches like ANT. I was therefore conscious of the risk that I would favor Bourdieusian explanations of disadvantage in my analysis instead of taking the time to also explore these social arrangements through ANT. In order to contend with these clashes, I would continually revisit my own analysis and ensure that I was not using Bourdieusian concepts as explanatory tools, but rather employing them as tools with which to sensitize myself to wider structures, in light of the sensibilities I had drawn from ANT. The research process was by no means linear or comfortable but left me with a sense that I had been rigorous, careful, and attentive. It is understandable and common for researchers to shy away from this kind of challenge. As Davies explains, within the discipline of law, there is a deep-running preference for an "aesthetic of coherence."[76] Arguments and findings are naturally more convincing if they present logical conclusions and do not draw attention to other elements that do not quite fit. But, she argues, there is "no logical reason for theory to insist upon purity and neatness, especially if it means excluding or foreclosing the intrinsic complexity of its objects ...."[77]

Building upon this, I argue that engaging in this political task is particularly important for early career scholars because these decisions about which assumptions and worldviews to reiterate or resist are not only political within the context of individual research projects, but also hold broader political consequences for the socio-legal discipline. The research that is produced as a result of theoretical choices such as those outlined above, has the potential to contest, expand, or develop existing narratives about what the world is like, how it should be studied, and whose voices and experiences should be relied upon when building an account of social phenomena. Legal theory in

[75]DAVIES, *supra* note 51, at 10–11.
[76]*Id.* at 4.
[77]*Id.* at 5.

particular is historically rooted in works that reflect the perspectives of a narrow demographic, and it is therefore imperative for researchers to reflect upon how their theoretical choices may influence the kinds of narratives that govern socio-legal research.

This kind of reflexivity aligns with a key objective of feminist research, which is to pay due care to the way that dominant narratives may easily be reiterated within research that appeals to existing structures of legitimacy, and to instead create the space for oppositional meanings to emerge.[78] For example, Fraser has written extensively about the need for research to not only ask questions about inequalities of distribution or recognition within society, but also to pose important challenges to the ways in which particular voices are represented within the political process of determining the particular arrangements by which distribution or recognition occurs in the first place.[79] Fundamentally, this involves acknowledging the constructed nature of knowledge, and recognizing that forms of oppression can be rendered invisible not only by dominant structures of power, but also by the efforts of researchers who attempt to address these structures.[80] When combining multiple theories, therefore, researchers should take this idea forward in order to work politically, by empowering or prioritizing epistemological assumptions that expand the scope of dominant ideas and narratives, and marginalizing those that close down opportunities for deeper and more meaningful understandings. At a fundamental level, this means that when scholars combine different theoretical tools, they can work politically by asking questions such as: What kind of knowledge are they likely to produce as a result of using certain social theories? How might this knowledge contribute, resist, or reiterate existing power dynamics or structures of inequality?

If done thoughtfully and with care, therefore, working politically to combine different approaches can open researchers up to broader analytical possibilities. For example, working through this tension enabled me to use very different theoretical tools simultaneously in order to oscillate between macro and micro scales of analysis. In turn, this meant that it was possible for me to acknowledge both the broader historical significance of structural inequalities, whilst also remaining mindful as to the need to empirically explore how these inequalities actually manifest within material and everyday experiences. This sort of analytical flexibility can be extremely valuable in socio-legal projects. For example, in relation to her three conceptions of injustice, Fraser also distinguishes between different kinds of remedies that can be proposed within research. On the one hand, she argues that there are "affirmative" remedies, which attempt to redress inequality by improving current social arrangements—such as by redistributing resources or revaluing previously devalued identities within particular contexts.[81] On the other hand, there are "transformative" remedies which attempt to destabilize the assumed differentiations that exist between different social groups and transform the very basis upon which these resources are distributed or valued.[82] It is tempting, especially within the UK where a greater amount of socio-legal research is premised upon empirical work, to pay greater attention to affirmative remedies. This may often be a rational decision, as it is this work which is likely to have more immediate influence. For example, in this project it was possible to use ANT to reflect on how small changes to the court process, such as rearranging courtroom furniture or changing the order in which people spoke in the courtroom, could make a difference to many experiences of disadvantage that are currently unfolding in the legal system in England and Wales. However, by combining this with feminist theory and Bourdieusian theory, it was possible to produce research findings which also gave an insight into how arrangements within this legal system need to be transformed on a broader scale, in ways that account for the structural inequalities which characterize society as a whole and play an important role in these relationships.

[78]Bartlett, *supra* note 15, at 857; Barnett, *supra* note 24, at 132.
[79]Fraser, FORTUNES OF FEMINISM, *supra* note 39.
[80]Bartlett, *supra* note 15, at 848.
[81]Fraser, *From Redistribution to Recognition?*, *supra* note 39.
[82]*Id.*

Inevitably, the ways in which scholars make theoretical choices are likely to be influenced by the context in which they are trained. In the introduction to this Special Issue, the authors discussed how the different scholarly traditions between Germany and the UK have emerged as a result of different patterns of scholarship, pedagogical practices, and institutional structures. From the articles in this Special Issue, it appears that these differences have played an important role in shaping how early-career scholars across these jurisdictions conceptualize the possibilities of socio-legal studies. In the UK, for example, a growing interest in socio-legal research also facilitated greater retrospection among socio-legal scholars about how this scholarship might be used to inform university legal education.[83] As such, the pedagogical influences of socio-legal research can be seen even at the undergraduate level of legal study. This is reinforced by the existence of institutional and national research council funding opportunities for students to embark upon socio-legal doctoral projects, which are extremely competitive but often come with integrated training pathways for research methods. Socio-legal doctoral candidates also often have the benefit of both inter- and intra-institutional training and financial support. The Socio-Legal Studies Association, for instance, is a charitable organization which plays an important role in facilitating a socio-legal community of scholars within the UK by holding annual conferences, funding competitions for research grants, and sponsoring events which contribute to their aim of advancing education, research, teaching, and knowledge in socio-legal studies.[84] As part of their work, this includes dedicated training opportunities, workshops, and funding opportunities for postgraduate and early-career members. In recent years, the organization has seen a significant increase in the proportion of doctoral candidates within their membership, which is indicative of the structural support that exists for socio-legal early-career researchers in the UK.

As one of these early-career scholars, it is inevitable that my own attitude towards research has been significantly shaped by this fertile environment of training and supervision. The work of leading socio-legal scholars, as well as the support of the UK socio-legal community, significantly influenced my experience of legal education and doctoral study in England and Wales, and they continue to inform the teaching and research that I do through my own academic position. Early-career scholars in the UK are therefore less likely than those in other countries to face barriers to establishing the value of taking an interdisciplinary approach to studying law. However, the choices that they make about how to build upon the work of more senior scholars have important implications for which scholarly traditions are strengthened and reiterated, and how the discipline is to continue to develop. In this Article, I have argued that early-career scholars may choose to combine approaches from different schools of thought within socio-legal studies. This activity of merging theory can be inherently critical simply by reflecting on the implications of research that relies upon particular conceptions, such as the legitimacy it may lend to particular views of the world. In this sense, Davies advocates the metaphor of "pathfinding" as a means for researchers to begin navigating theory in a way that adds further dimensions to existing patterns of legal thought.[85] By following existing paths, or forging new paths, we reinforce and ultimately reimagine different understandings of law and its place within society.[86] By this, she means that theory is not only useful for understanding existing social arrangements, but also for producing alternative imaginings of what these arrangements should be like. The conceptual and analytical choices we make therefore have important consequences, because " ... drawing out aspects of the present that appear to provide direction for the future, and intensifying them theoretically, prefigures a world that is commensurable with the present and past, but which perhaps adds additional

[83]Fiona Cownie & Anthony Bradney, *An Examined Life: Research into University Legal Education in the United Kingdom and the Journal of Law and Society*, 44 J.L. & Soc'y 129, 137–38 (2017).

[84]*See* Welcome to the SLSA: Socia-Legal Studies Association, https://www.slsa.ac.uk/.

[85]Davies, *supra* note 51, at 143–53.

[86]*Id.* at 150–51.

emphasis to those elements of it worth promoting."[87] The task of combining theories can therefore in practice be an extremely productive exercise for the discipline because socio-legal scholars may be both empowered to find unanticipated potential within their research projects and enabled to embrace the political potential of the work they do with theory.

F. Conclusion

At the beginning of this Article, I stated that early-career socio-legal scholars are now faced with important choices about which theoretical, conceptual, and methodological tools they wish to employ within their research, and how they should do so. Inevitably, these choices have important implications for how socio-legal scholarship continues to grow and develop. In this Article, I have provided a reflection on my own experience of combining different socio-legal tools, in order to demonstrate the important value of merging approaches in a way that is both critical and attentive to these political possibilities. In doing so, I have outlined the difficulties and tensions that characterized the combination of feminist legal theory, Bourdieusian theory, and ANT. But there are likely to be a wide range of other complexities that come with combining other approaches. Further, it may not always be possible to reconcile underpinning contradictions between various approaches, especially those from very different traditions and disciplines. Nevertheless, this Article has demonstrated that there is value to be derived from attempting to work through these tensions. When undertaken with care and reflexivity, the task of combining socio-legal tools can be an opportunity for scholars to work politically by reflecting on how their theoretical choices affect not only their own understanding of social phenomena, but also make an important contribution to the task of contesting and expanding upon the dominant assumptions and worldviews that characterize scholarly traditions. This reflexivity is particularly imperative among early career scholars who choose to combine multiple theories, because the work of these scholars will shape the future assumptions and worldviews that characterize the socio-legal discipline.

[87] *Id.* at 17.

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