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Beyond the State? Rethinking Private Law: Introduction to the Issue

I. INTRODUCTION

“Private law beyond the state” is a topic that is fashionable, important, and widely discussed. Yet it presents so many different aspects and perspectives that it has, so far, remained remarkably poorly understood. Somehow, transcending the boundaries of “the state” and “the Westphalian model” is en vogue, albeit often in a rather vague fashion. Somehow, domestic public law seems antiquated in a globalizing world while private law seems adequate to a neoliberal worldview. A closer look reveals how much remains unclear, how many different aspects are involved in the seemingly innocuous and simple formulation of “private law beyond the state,” and how much there still is to learn and to explore. Ironically, it is precisely because globalization moves us “beyond the state” that we are, more than ever, forced to rethink private law and its relation to the state.

Such learning and exploring were the goals of a conference held in the summer of 2007 at the Max Planck Institute for Comparative and International Private Law in Hamburg, Germany.¹ Leading scholars from the United States, Germany, and Israel, came together to bring different perspectives—of legal history, law and economics, legal sociology, private international law, law and anthropology—to bear on a topic that proved to be ever more multi-faceted. After a two-day open conference at which papers were presented and discussed by a large and engaged audience, the speakers met for a half day to discuss their respective positions amongst themselves—to flesh out differences and similarities in viewpoints but also regarding their understanding of what is at stake in these debates. Both the open con-

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1. For conference reports in German, see Martin Flohr, *Beyond the State? Rethinking Private Law. Symposium in Hamburg am 12. und 13. Juli 2007*, 72 *RABELSZ* 391-96 (2008); Alexandra Kemmerer, *Auf dem globalen Basar – Juristen feilschen in Hamburg um den Wert des Privatrechts*, *FRANKFURTER ALLGEMEINE ZEITUNG*, 30 August, 2007, p. 35; Jens Kleinschmidt, *Tagungsbericht – “Beyond the State? Rethinking Private Law,”* 62 *JURISTENZEITUNG* 1044-45 (2007).

ference and the closed workshop showed how varied the approaches and focuses, even the concepts and terms, are in the debate. Much translation was necessary; much learning was achieved.

This issue presents the results of this conference and aims at instigating further learning. It brings together the papers presented as revised by the participants after the conference. We hope that this collection can spur further interest in the kind of international and interdisciplinary research that would seem adequate for a private law beyond the state.

II. STRUCTURES

In order to facilitate and structure the debates at the conference and beyond, the main organizers prepared two background papers aimed at bringing together and laying out key components and positions in various debates. These papers are survey rather than position papers. They compile and systematize the numerous debates related to the general theme. Although they are not republished here, we summarize them below because they are an essential part of the project.

The first of these papers provides comparative perceptions and historical observations.² It shows, first, how the relationship between private law and state instrumentalism plays out differently in German and U.S. law: German private law is viewed as formally based on the state yet substantively independent of it; U.S. private law is always viewed instrumentally but not necessarily as an instrument of the state in the German sense. For comparative purposes, the article suggests to look more broadly at the relationship between private law, instrumentalism, and domination. The historical exploration of this relationship reveals important insights. Since the beginning of Western law, states (or their precursors) were always involved in private law in some way. Nonetheless, private law always maintained at least a partial autonomy—not by appealing to some value-free neutrality, as critics like to depict it, but rather by developing its own normative rationality and value system. The justification of private law has always come, at least in part, neither from its grounding in governmental authority nor from its democratic establishment but from its basis in reason and its systematic character. Where these justifications are not accepted, private law has no legitimate role to play. Yet, where governmental authority and democratic (state-based) legitimacy are no longer available, private law becomes newly attractive.

2. Nils Jansen & Ralf Michaels, *Private Law and the State: Comparative Perceptions and Historical Observations*, 71 *RABELSZ* 345 (2007). See now also STEFAN MEDER, *IUS NON SCRIPTUM* (2007).

The other preparatory paper takes up this last challenge to private law—the relative absence of governmental authority—in the context of globalization, Europeanization, and privatization.³ Much of the article is devoted to conceptual clarification, in particular of the core concepts of private law and of the state, which are often given different meanings in different contexts. These concepts are complex already within traditional law; the new developments create additional new challenges. If law within the state is always public, as the legal realists argued, it seems plausible to expect that law outside the state is private. The article addresses four challenges that arise from these considerations and that need new responses once they are conceived beyond the state: the validity, method, legitimacy, and autonomy of private law. The article also presents different types of responses to these issues, grouped according to how they relate to the old ones developed under the state.

III. RELATIONS

Not all of the themes addressed in these preparatory articles are taken up in the contributions to the conference, and many of the themes in these contributions are new. Nonetheless, the papers can be grouped alongside themes addressed in the preparatory essays. A first block of articles deepens our general understanding of the interrelation between private law and the state. These articles demonstrate how unclear and contested the basic concepts involved in this topic are—the state, law, private as opposed to public law—and yet how they shape our thinking about the law, whether we know it or not. Conceptual work is therefore crucial groundwork in this area. Each of these articles challenges traditional thinking about the basic concepts and their interrelationships and presents new ways of looking at law beyond the state. Equally importantly, each of them also challenges us to rethink law under the state.

Both *private law* and the *state* are ambiguous terms, and their meanings have shifted over time. This theme runs through the article by Charles Donahue,⁴ whose overview of centuries of development tells a highly ambiguous and differentiated story. There have always been systems of private law, Donahue argues, without the need for a state or, for that matter, for any structures of power and authority. Indeed, for much of history, neither *state* in our modern sense nor *private law* as distinct from public law would have been meaningful concepts at all. Yet, effectively, private law systems rarely flourished unless they were supported, even if indirectly, by state or pre-state

3. Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843 (2006).

4. Charles Donahue, Jr., *Private Law Without the State and During its Formation*, 56 AM. J. COMP. L. 541 (2008).

structures of lordship or domination. In the Middle Ages, lawyers studied and discussed texts of Roman Law that were not promulgated by current secular or religious authorities; these authorities were not exactly states in our modern sense. Still, these very authorities themselves made education in those texts a requirement for positions of power. The sixteenth century saw the birth of the modern nation state and grounded law more firmly in the state. But although the legal humanists now began to focus on the national level and in particular on royal ordinances, the method of resolving cases was still remarkably similar to that of the Middle Ages. Using marriage as an example, Donahue shows how private law never existed without public intervention altogether: papal decisions, the Council of Trent, and state legislation gave shape to the law, but legal reasoning always transcended these positive texts and relied on texts and traditions beyond the state.⁵

The latter topic—the relation between the state and legal reasoning—is the theme of Christiane Wendehorst’s contribution.⁶ Her starting point is a distinction of four “idealities of perspective” regarding legal reasoning under the state.⁷ Two such perspectives are well-known in legal theory: the internal perspective of the judge as a participant in the legal system and the external perspective of the comparatist as an outside observer. Wendehorst complements these with two additional perspectives: the sovereign perspective of the legislator (and its advisors) as the creator of the law and the subordinate perspective of the citizens (and their lawyers) as the subjects of the law. During much of the twentieth century, the internal perspective has been closely linked with the state which provided the main source of legal normativity and kept the need for conflict rules and harmonizing tools within narrow confines, not only in civil but also (though to a lesser degree) in common law systems. Thus, the methodological relation between private law and the state could serve as a “basis for coherence-maximizing interpretation”: the assumption that the legal system is grounded on one legislator with a coherent will makes it necessary to interpret individual legal rules with a view to maintaining the coherence of the legal system at large. Now, states are increasingly forced to share their role with other legislators and authorities within an increasingly plural and fragmented multi-level legal world. This development does not make traditional methods of legal interpretation inapplicable. But legal arguments from an inter-

5. See also CHARLES DONAHUE, *LAW, MARRIAGE, AND SOCIETY IN THE LATER MIDDLE AGES: ARGUMENTS ABOUT MARRIAGE IN FIVE COURTS* (2008).

6. Christiane C. Wendehorst, *The State as a Foundation of Private Law Reasoning*, 56 AM. J. COMP. L. 567 (2008).

7. See already Christiane Wendehorst, *Von Arbeit im Recht, am Recht und über Recht*, in *FESTSCHRIFT FÜR CLAUS-WILHELM CANARIS ZUM 70. GEBURTSTAG 1403* (Andreas Heldrich et al. eds., 2007).

nal perspective are likely to become so complicated that it might be impossible to maintain the traditional standards. This, in turn, might force participants in legal discourse to switch perspectives and to draw on different types of legal argument. Since there is no principled basis for such strategies, this would result in a rather messy, unreliable state of the law. A more appealing perspective, for Wendehorst, would be an increasingly self-referential, even auto-poietic, system of private law. Private law would then be identified with what authoritative authors say it is. Whether these authoritative authors will be judges, academics, or other participants in the legal system is not predetermined and is not a defining element for this system.

Annelise Riles takes both the picture of a fragmented, multileveled world and the self-referential character of globalized law one step further.⁸ As she points out, private law beyond the state is frequently depicted as a network created by a homogenous community of actors—like-minded merchants, transnational lawyers or ethnic groups. In this picture, these actors together create a multifaceted yet ultimately coherent system of norms. Riles challenges this picture by questioning its central element—the homogenous community that builds these networks. Using the example of the derivatives industry, Riles points out that the actors producing the derivatives are not at all a homogenous community or a veritable network—they are isolated back office workers who fill out documents and have no contact or shared experience with similar workers in other countries beyond their similar task of filling out the same documents. The truly private law thus created is neither enabled by the ultimate backing of the state, as the realist critique of the public/private distinction would have it, nor is it based on closely knit communities, as sociologists of globalization argue. If there is a private law of derivatives beyond the state, it is created by the standardized practice of completing documents. The core of private law beyond the state lies not in norms or in power but in techniques and in material artifacts.⁹ There is no global network of private law that replicates the law of the state. If anything, Riles argues, the influence should go the other way: the anti-network that she discovers beyond the state provides a promising model for understanding state law as a knowledge practice much more than a system of power-backed norms and rules.

Marietta Auer, in commenting, finds Riles's attempt to look radically at what is actually happening attractive and enlightening.¹⁰ If

8. Annelise Riles, *The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State*, 56 AM. J. COMP. L. 605 (2008).

9. See also DOCUMENTS: ARTIFACTS OF MODERN KNOWLEDGE (Annelise Riles ed., 2006).

10. Marietta Auer, *The Anti-Network. A Comment on Annelise Riles*, 56 AM. J. COMP. L. 631 (2008).

Auer finds anything worth criticizing, it is the extent to which Riles juxtaposes anti-network and the law of the state. Instead, Auer suggests, the difference between the state and the anti-network is merely gradual: both channel the chaotic acts of individuals into socially privileged alleys, and both facilitate social ordering. The perspective of globalization thus provides us with a new and enlightening view of traditional state law as well.¹¹

IV. ACTORS

If, as Riles argues, private law beyond the state must be viewed as a compartmentalized knowledge practice, then we should look more closely at these different compartments, groups, institutions, and societal subsystems involved in the creation of this private law. This is the focus of the articles in the next section.

James Gordley examines the role of academics in the creation of private law.¹² He sees a twofold crisis in academic legal thought in the United States and in Western Europe: German and French scholars have completely subordinated legal thinking to collecting positive law (both legislative and judge-made) while American scholars have completely separated legal thinking from positive law and essentially substituted law for other disciplines and approaches, most prominently economics. Thus, both have abandoned true legal argument as it existed for much of Western history. For Gordley, the source of this impoverishment of legal thought lies in what he calls the Cartesian turn. The Cartesian assumption that no real knowledge exists unless it is proven deductively resulted in a fundamental crisis of the Western legal tradition, because purely deductive arguments in normative legal matters are necessarily inconclusive. Whereas lawyers in the Roman and Aristotelian tradition could safely rely on purposive practical arguments, lawyers after Descartes and Pufendorf were threatened by the danger that the law could become arbitrary. In consequence, European legal scholars confined themselves to deducing solutions from authoritative legal texts, such as statutes or court decisions, and thus to legal argument within the state. American lawyers, by contrast, abandoned pure legal argument and replaced it with other—supposedly more scientific—arguments based on economics or social sciences. Thus, legal academia remained rather distant from the state and simultaneously became rather irrelevant for the actual practice of the courts. Now, Gordley advocates the return to a tradition of private law that develops in a constant discourse

11. See also MARIETTA AUER, *MATERIALISIERUNG, FLEXIBILISIERUNG, RICHTER-FREIHEIT: GENERALKLAUSELN IM SPIEGEL DER ANTINOMIEN DES PRIVATRECHTSDENKENS* (2005).

12. James Gordley, *The State's Private Law and Legal Academia*, 56 *AM. J. COMP. L.* 639 (2008).

among legislators (and judges) who lay down authoritative texts and academic writers who formulate general principles and concepts that are then “applied.” Such an explicitly traditional understanding of the law fits surprisingly well with more modern, autopoietic concepts of the law and the methodological picture drawn by Wendehorst: the law’s validity and legitimacy cannot be found outside the law, in the (democratic) political process, but must largely be generated within the legal discourse. From this point of view, it does not matter very much whether private law goes beyond the state, since there can be authoritative texts independently of modern nation states, as shown by the example of Roman law sources in the *Ius Commune* and early natural law.

Susanne Lepsius, in her commentary on Gordley, does not disagree with this description.¹³ However, like Donahue, she sees the impetus for the connection between law and state not so much within legal and philosophical thought but outside of it, in the institutional settings of the law and especially in legal academia and education. For Lepsius, the control of the legal examinations by the Prussian and German states proved a decisive factor of tying private law to the state. At the private universities in Bologna, like at better U.S. law schools, it was possible to teach law on the basis of texts that were not backed by state authority. At the same time, such institutional settings made it possible to connect legal academia closely with other sciences. Thus, while a merely exegetical approach to the law could become routine for continental jurists even at the university, it was regarded as unscientific by many lawyers in the tradition of the *Ius Commune* and in modern American universities.

The heyday both of law as a science and of academic influence on the law, it is often thought, was in nineteenth century German law, the topic of Hans-Peter Haferkamp’s article.¹⁴ Following Savigny, leading German jurists told the “great mythical story of a national private law without a state,” depicting private law as an emanation of the national *Volksgeist*. What is more interesting, however, than the role of academia in the development of scientific private law beyond the state, is the role the judiciary played in this development. Haferkamp shows that scholars did not reserve the task of scientific legal thought to themselves; they saw an active role for the judiciary as well. This story of a private law without a state was plausible for much of the nineteenth century when there was no state that could represent the German people as such. However, after its establishment in 1871, the newly unified German Empire became active also

13. Susanne Lepsius, *Taking the Institutional Context Seriously. A Comment on James Gordley*, 56 AM. J. COMP. L. 655 (2008).

14. Hans-Peter Haferkamp, *The Science of Private Law and the State in Nineteenth Century Germany*, 56 AM. J. COMP. L. 667 (2008).

in matters of private law legislation, and lawyers began to identify private law with the state. This law was not individualist as is often said. Instead the “social question” demanded political answers also in the area of private law, and such answers could be given only by the legislator and an increasingly sovereign judiciary. Once we take into account that the judges had acquired their education from academics and that both the employment of these academics and the examination of these judges were administered by the state, we see the complex relationship between law and state emerge, to which Donahue refers elsewhere in this issue: private law is thought as outside of the state and yet dependent on it.

Chaim Saiman’s comment demonstrates that the German idea of legal science and scholarly law is alien to the U.S. framework but quite similar to a law that was for the longest time truly beyond the state—Jewish law.¹⁵ Because it had no state, Jewish law was developed by judges and scholars alone. Because it had no final arbiter, judges and scholars would constantly wrestle over the best understanding of the texts. Since Jewish law has always been confined by the circumstances to being “scientific,” social considerations had to be implemented without a state to back or require them. And although no distinction between public and private law is made, most of Talmudic law deals with private law issues—contract, tort, property, agency, inheritance, trust, and family law.

Jürgen Basedow focuses on another subsystem of society and another group of law creators: the economy.¹⁶ His article fits in with discussions about the alleged *lex mercatoria*, a private law created outside of, and independently from, the state, based on the customs and rationality of commerce. Basedow, however, draws a different picture. First, today’s commercial developments are too fast-paced to allow for the slow and organic development of true custom and customary law. Where economic subsectors create law, they do so mainly through rule-making associations. Second, the economy rarely creates law in complete independence from the state. Instead, what we find are different forms of coordination between the state and the economy. Privately generated rules fill in where the state lacks expertise and interest, especially in transnational transactions. Such private rules are unstable where they are drafted to avoid the state; they are more successful where they are supported by the state’s authority. The state still has a role to play, as Basedow argues, but it is

15. Chaim Saiman, *Public Law, Private Law, and Legal Science*, 56 AM. J. COMP. L. 691 (2008); see also Chaim Saiman, *Legal Theology: The Turn to Conceptualism in Nineteenth-Century Jewish Law*, 21 J.L. & RELIGION 39 (2006).

16. Jürgen Basedow, *The State’s Private Law and the Economy—Commercial Law as an Amalgam of Public and Private Rule-Making*, 56 AM. J. COMP. L. 703 (2008).

largely limited to the provision of dispositive law, the protection of property rights, and the maintenance of proper market conditions.

David Snyder, in his comment, also envisages a coordinate relationship between public and private lawmakers.¹⁷ For him, state and economy together produce what he calls a mixed jurisdiction of publicly and privately made laws, in which private economics and political economy compete over their different goals and logic. However, his view of how this mix is administered differs from Basedow's. Basedow suggests relatively clear criteria as to whether publicly or privately made law is superior and thereby, implicitly, leaves that decision to the state. Snyder, by contrast, suggests to "embrace and even foment competing systems" (of publicly and privately made law) and thereby leaves the decision to the market, in this case the market for legal rules.

V. VALUES

The discussions of the various actors in the creation and administration of private law lead easily to the primary concern of the authors in the last section: the question of values and normative justifications.

Florian Rödl, drawing on Kant and Habermas, argues that private law requires democratic legitimacy just like public law.¹⁸ This creates problems for transnational transactions where law sometimes needs to be applied to a party that had no say in its making. Private international law rules must thus be justified on the basis of the democratic process.¹⁹ Rödl addresses a specific aspect of this question: whether party choice of the applicable law can replace democratic legitimacy of that law. Prima facie, elections of legislators and election of applicable law seem to provide similarly strong bases of justification for the applicability of a law. But Rödl brings arguments against this equalization from legal and democratic theory: party choice of law undermines the very principles of democracy it claims to fulfil because it raises individuals above the legal order. The free choice of law can therefore not be justified on the basis of individual liberty because private autonomy in substantive private law and free choice of law must be seen as two entirely different aspects of individual freedom. Substantive private autonomy is constituted by positive

17. David V. Snyder, *Contract Regulation, With and Without the State: Ruminations on Rules and their Sources. A Comment on Jürgen Basedow*, 56 AM. J. COMP. L. 723 (2008); see also David V. Snyder, *Molecular Federalism and the Structures of Private Lawmaking*, 14 IND. J. GLOBAL LEG. STUD. 419 (2007).

18. Florian Rödl, *Private Law Beyond the Democratic Order? On the Legitimatory Problem of Private Law "Beyond the State"*, 56 AM. J. COMP. L. 743 (2008).

19. See FLORIAN RÖDL, *WELTBÜRGERLICHES KOLLISIONSRECHT. ÜBER DIE FORM DES KOLLISIONSRECHTS UND IHRE EINLÖSUNG IM RECHT DER EUROPÄISCHEN UNION* (PhD Thesis, EUI Florence, 2008).

law and conceivable only within its limits. It follows that to detach private law from the state would necessarily mean to deprive it of its legitimacy. In this sense at least, there cannot be a legitimate private law beyond the state.

Peer Zumbansen addresses a related theme: the return to formalism and functionalism in transnational law.²⁰ Formalism, he argues, was an attribute of nineteenth century law and as such bore a close relation to a laissez-faire approach to economic regulation. When formalist law declined because of its insufficient attention to the substantive values at stake, functionalism, in turn, was used in order to justify state regulation. However, an increasingly complex society made effective regulation ever more difficult; in consequence, functionalism likewise fell out of favor. Now, Zumbansen sees a current trend towards what he calls a neo-formalist and neo-functional-ist vision of law that ignores the considerations underlying the old functionalism and formalism, as well as the reasons for their decline. In this new vision, the formality of law serves only to enable parties to bargain over it. The functionality of law is limited to one function—that of enabling private ordering. Zumbansen contrasts this vision of transnational law with another trend, that of reflexive law (in Europe) or responsive law (in the United States) that is connected to societal developments and thus able to learn from them. Such a law has promise beyond the state also. At the same time, his is a plea for a political view of law that does not collapse into social norms or economic rationalities.

This idea of an autonomous private law is the focus of Hanoch Dagan's article.²¹ The assumption that certain values or normative arguments are specific to private law is, as was argued before, usually taken for granted by European and especially German lawyers. Yet, even in North America there exists a school of neo-Kantian formalism, represented by authors who defend this distinction on more theoretical grounds.²² Dagan takes a more differentiated and nuanced view. Although he defends the position that the integrity of private law rests on the bipolar structure of corrective justice, he maintains that private law as a whole and individual legal positions in particular are influenced by public or collective values. Private law follows its own intrinsic normative logic and must therefore not be used as an instrument of public policy, but it cannot be fully sepa-

20. Peer Zumbansen, *Law After the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law*, 56 AM. J. COMP. L. 769 (2008); see also Peer Zumbansen, *The Law of Society: Governance through Contract*, 14 IND. J. GLOBAL LEG. STUD. 191 (2007).

21. Hanoch Dagan, *The Limited Autonomy of Private Law*, 56 AM. J. COMP. L. 809 (2008).

22. E.g. JULES COLEMAN, *RISKS AND WRONGS* (1992); ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* (1999); ERNEST J. WEINRIE, *THE IDEA OF PRIVATE LAW* (1995).

rated from public morality either. Thus, while it would be wrong to use matrimonial law instrumentally for population policy, the marital property rule of equal division upon divorce can be justified on the basis of a social ideal of marriage as an egalitarian liberal community. It follows, according to Dagan, that there are good normative reasons for distinguishing private from public law. Private law is partly detached from the state even if the state monopolizes public policy-making. Even if large parts of the substance of private law are influenced by collective values, its basic structure remains independent of public policy.

This position creates a challenge to the realist perspective on private law which asks for a political justification for such a depoliticized private law. Yet, even if one accepts that legal subsystems have their own internal rationalities, it is doubtful whether the distinction between public and private law exists as such a distinction of internally consistent rationalities. This is the starting point for Gunther Teubner, who questions whether such a picture is sufficiently complex to serve as an account of the law of modern societies.²³ According to Teubner, there is no longer a homogenous public sector that could be opposed to private law. Besides the state, there is the economy as a partly autonomous social world and there are many other similar discourses. Teubner thus suggests replacing the traditional distinction of public and private law with a polycontextural conception of society and the law. Private law should be conceived as autonomous and responsive—vis-à-vis not only the state but also the other social worlds.²⁴ The legitimacy of such an autonomous private law is achieved through constitutionalization—private law itself must create the values necessary for its legitimacy.

VI. CONCLUSION

We have come full circle. A multiplicity of social sectors with law as only one among many others, a private law that is at the same time autonomous and nonetheless interacts in multiple ways with other sectors, was already the theme in Donahue's article. Indeed, the consecutive introduction of the essays in this issue cannot do justice to the richness of each of them nor to the multiple interconnections between them. For example, several contributions suggest that private law was never strictly separated from the state in a broader sense, and that a fully separate private law would be normatively unattractive and perhaps even conceptually impossible. If, then, relations always exist, this issue shows that these relations are not at all

23. Gunther Teubner, *State Policies in Private Law?*, 56 AM. J. COMP. L. 835 (2008).

24. See also Gunther Teubner, *After Privatisation? The Many Autonomies of Private Law*, 51 CURR. LEG. PROBS. 393 (1998).

confined to a mere hierarchy of one over the other. Neither is there a true private law existing in total autonomy, where each intervention by the state requires justification, nor can all law be based entirely on the state. Instead, the authors demonstrate far more complex and differentiated relations between state and private law, and they show how both *state* and *law* carry multiple meanings and present multifarious aspects. Several contributions highlight the relationship between systematicity and autonomy of private law. Although traditionally the order of state law is often opposed to the spontaneity and anarchy of privately made law, in reality it appears that private law can remain outside the state only where it creates its own system, whereas the state's interventions are often localized and unsystematic. One example of such a law beyond the state, Jewish law, is mentioned independently by three authors (Donahue, Saiman, Wendehorst) and is sometimes suggested as a law that can serve as a model for our times, because it has always transcended and evaded the state.²⁵

The reader will find these and numerous other connections between the contributions. We have neither the authority nor the ambition to precondition these explorations. Our more limited final task is to thank all the individuals who helped create this issue and the conference underlying it. Mathias Reimann and Reinhard Zimmermann first had the idea of a joint conference between the *American Journal of Comparative Law* and *Rabels Zeitschrift für ausländisches und Internationales Privatrecht*. They found our topic of private law beyond the state attractive and entrusted us with most of the organization. Mathias Reimann's rigorous scrutiny has been invaluable in the editorial process; his comments have made all papers (including our own) much better. The Max Planck Institute for Comparative and International Private Law in Hamburg was a formidable host for the conference that led to this issue. All three of its directors played a role in the project—Reinhard Zimmermann as one of the inaugurators, Jürgen Basedow as a contributor, and Klaus Hopt as chair for the discussion amongst participants in the closed part of the conference. The staff at the Institute was extremely helpful in the organization; we should name in particular Ilse Groß, Dagmar Gondolatsch, and Andrea Jahnke. In Münster, Sonja Kümper-Perk, Lukas Rademacher, and Björn Woerffel provided invaluable assistance. In Dur-

25. See also Marc Amstutz & Vaios Karavas, *Rechtsmutation. Zu Genese und Evolution des Rechts im transnationalen Raum*, 8 RECHTSGESCHICHTE 14 (2006); Michael Walzer, *Morality and Universality in Jewish Thought*, in THE GLOBALIZATION OF ETHICS: RELIGIOUS AND SECULAR PERSPECTIVES 38 (William M. Sullivan & Will Kymlicka eds., 2007); but see also Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993) (arguing that the specific religious element of Jewish law is hard to replace in secular law).

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ham, Neylân Gürel was as always a reliable and excellent assistant. Most of all, we thank all the contributors for their valuable and stimulating essays—they complied with our thematic requests and yet provided new and exciting insights that we could never have dreamed of. We also thank the numerous participants who came to the conference in Hamburg, often from far away, and ensured lively debates. We hope the publication of the papers will help broaden these debates even further.

