STRANGERS IN THE LAW: LAWYERS’ LAW AND THE OTHER LEGAL DIMENSIONS†

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Political and legal theories have long been taking for granted the idea that law is the province of government and government recognized authorities, including the judiciary. They have concentrated on the processes and principles, by which the form and substance of State law are determined, implemented, and enforced. This law is what I will call official or State law. By contrast, many non-official sites of legal production have always existed and still exist (outside and) inside the West. These sites produce rules that may flourish indifferent to or in opposition to official law and take the settlement of disputes arising out of the application of those rules outside the ordinary circuits of adjudication. Even though the discussions about the relation between the latter rules (especially those developed by merchants) and official law is one of the ancient debates of the law, stretching back centuries, in the last two hundred years the Western positivist attitude has been able to obscure and fence off the multifaceted dimensions of the legal experience from the spotlight of critical investigation. Yet in the last decades, the unofficial dimension of the law has gained new scholarly traction, also from a domestic perspective.

This essay analyzes critically the existing literature to show how State law tends to control relationships and disputes between people that are strangers to each other because, whenever there is a bond tying together a group of people, such a group tends to have their relationships and disputes controlled by different sets of rules. These "different" rules may have diverse origins (customary, religious, professional), but they are daily relied on by dozens of millions of people; they control U.S. markets worth dozens of billions of USD, and they all serve the purpose of regulating activities, for which State law is perceived by the concerned group as unfit (or, at most, as a second best choice) to meet their needs.

The paper unfolds as follows. I will first introduce the debate on the difference between State and non-State law, dwelling on language and cultural attitudes that innervate the debate itself (Sections 2-3). I will then review the literature on field studies showing the multifaceted presence and relevance of non-State law bodies of rules in a series of United States social and economic settings (Section 4). Next, I will critically analyze the arguments usually put forward to explain these departures from State law, highlighting the partiality of many of those arguments and proposing a different intellectual key to approach the issue (Sections 5-7). The final part of the essay (Section 8) will focus on the possible implications of the foregoing data and analysis for our views of the legal world and, in particular, on the impact the plurality of legal dimensions may have on our way of understanding State law and the law itself.
Loyalty is the holiest good in the human heart; it is forced into betrayal by no constraint, and it is bribed by no rewards.


## I. INTRODUCTION

Loyalty is a broad notion, and possibly the most incisive way of capturing its essence comes from the above Seneca’s quote. But the focus of this paper is on loyalty to the law and, more precisely, on the kind of law one is loyal to.

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Political and legal theories have long been taking for granted the idea that law is the province of government and government recognized authorities, including the judiciary. They have concentrated on the processes and principles, by which the form and substance of State law are determined, implemented, and enforced. This law is what I will call official or State law. By contrast, many non-official sites of legal production have always existed and still exist (outside and inside the West. These sites produce rules that may flourish indifferent or in opposition to official law and take the settlement of disputes arising out of the application of those rules outside the ordinary circuits of adjudication. Even though the discussions about the relation between the latter rules (especially those developed by merchants) and official law is one of the ancient debates of the law, stretching back centuries, in the last two hundred years the Western positivist attitude has been...
able to obscure and fence off the multifaceted dimensions of the legal experience from the spotlight of critical investigation.\(^7\)

Yet in the last decades, the unofficial dimension of the law has gained new scholarly traction,\(^8\) also from a domestic perspective.\(^9\) One


could even note, following vacuum physics principles, that if enchantment with the State and State law drove out of the picture the interest for any legal order not directly tied to the State authority, it is the weakening of the State grip on social and economic affairs that now stimulates a new wave of studies of alternative legal dimensions.\footnote{10} Law and society scholars inquire into the social structures that induce compliance,\footnote{11} law and economics scholars examine non-State law rules

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Albeit marginal to the present analysis, it may be worth recalling that in September 2012, the United Nations General Assembly in its Declaration of the High Level Meeting on the Rule of Law at the National and International Levels has acknowledged that “informal justice mechanisms, when in accordance with international human rights law, play a positive role in dispute resolution, and that everyone […] should enjoy full and equal access to these justice mechanisms” (https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf, at 3, n° 15).

\footnote{10} See also Margaret Davies, \textit{Legal Pluralism}, in \textit{Oxford Handbook of Empirical Legal Research} 804, 825 (Peter Cane & Herbert M. Kritzer eds., 2010); Braithwaite & Drahos, supra note 9, at 488 (“[M]ost citizens greatly underestimate the extent to which most nations’ shipping laws are written at the IMO in London, air safety laws at the ICAO in Montreal, food standards at the FAO in Rome, intellectual property laws in Geneva at the WTO/WIPO, banking laws by the G10 in Basle, chemical regulations by the OECD in Paris, nuclear safety standards by IAEA in Vienna, telecommunication laws by the ITU in Geneva and motor vehicle standards by the ECE in Geneva”).

\footnote{11} See, e.g., \textit{Law, Society and Community. Socio-Legal Essays in Honour of Roger Cotterrell} (Richard Nobles & David Schiff eds., 2014). Cotterrell (Roger Cotterrell, \textit{From Living Law to Global Legal Pluralism: Rethinking Traditions from a Century of Western Sociology of Law}, 49 Kobe U. L. Rev.: Int’l Ed. 242–60 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2764802, argues against the formula “law and society” because it is misleading “insofar as it seems to set “law” and “society” against each other, as two distinct monolithic phenomena. Much of sociology of law has been concerned to study the “impact” of law on society, or the “gap” between law and society, or the “influence” of
and institutions that allow for efficient and desirable social results, law and psychology scholars scrutinize the motivations that ground loyalty to non-State and State laws, and all (should) profit from the long trodden path of legal anthropologists and from their findings on the cross-cultural features of social ordering, as well as from legal historians' studies on how private and commercial law has been thriving for ages in the absence of constitutions, almighty legislatures, and State courts orderings.

This paper relies on this literature to show how State law tends to control relationships and disputes between people that are strangers to each other because, whenever there is a bond tying together a group of people, such a group tends to have their relationships and disputes controlled by different sets of rules. These 'different' rules may have diverse origins (customary, religious, professional), but they are daily society on law. But a view of law as existing in and created in communal networks avoids these crude oppositions. It suggests, indeed, that even the concept of "society" might now be of limited use for sociology of law and a concept of social relations of community might be more useful – because this latter concept can recognize explicitly the diversity of types of these relations and how law reflects and grows out of them" (id. at 13).

12 See, e.g., ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 253 (1991), and the works cited infra notes 134–39.

13 See, e.g., TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990; repub. 2006); Jason Sunshine & Tom R. Tyler, Moral solidarity, identification with the community, and the importance of procedural justice: The police as prototypical representatives of a group’s moral values, 66 SOC. PSY. Q. 153 (2003).


15 See, e.g., GROSSI, supra note 7, at 20 ff., 34 ff., 51 f., and the works quoted supra, note 5.

16 On the historical roots, development and current debates on the place of “custom” in the functioning of (Western and non Western) legal systems, see BEDERMAN, supra note 9, at xi–xii, according to whom “the best algorithm for the creation of customary norms is the traditional notion that there must be both proof of an objective practice within a relevant community and a subjective determination of the value of the norm, whether expressed as a sense of legal obligation or the reasonableness of the rule. … custom has a rightful place as a source of legal obligation in mature and sophisticated legal cultures such as our own. More than that, custom is all around us. It is followed in a multiplicity of communities, recognized in a variety of jurisdictions, and enforced in many different doctrinal situations. Custom is alive and
relied on by dozens of millions of people; they control U.S. markets worth dozens of billions of USD,17 and they all serve the purpose of regulating activities, for which State law is perceived by the concerned group as unfit (or, at most, as a second best choice) to meet their needs. Thus, this paper moves from an analytical perspective, rooted in an existing line of research, to enrich the debate about the actual reach and coverage of what we call the “law.”

Two caveats are in order, though. First, it is beyond the scope of this paper to advance a comprehensive theory of non-State law or of legal pluralism18—even though the analysis carried on in the following

17 See infra Section 6.

sections may be seen as a contribution to those theoretical debates. Nor will I dwell on the controversy about how and to what extent official and/or unofficial law can be distinguished from morality (or on how and to what extent loyalty to any law can crosscut morality issues) and the disparate bonds this broad notion may entail. Grounded on the reservoir of comparative law knowledge and findings, I take law in its broadest (and, as we will see, social limits on the sovereign power of the state, and as a promise of the social potential to transcend the state and its repressive ideological apparatuses, Upendra Baxi, Discipline, Repression and Legal Pluralism 53 LEGAL PLURALISM (Peter Sack & Elizabeth Minchin eds., 1986).

19 A classic reference on this subject is LON L. FULLER, THE MORALITY OF LAW (1964); and, for a survey of the debate, see THE HART-FULLER DEBATE, supra note 6; Symposium: The Hart-Fuller Debate at Fifty, 83 NYU L. REV. (2008); SEBOK, supra note 6. “Morality” may in fact be a powerful factor driving loyalty to the law (see Jason Sunshine & Tom R. Tyler, The role of procedural justice and legitimacy in shaping public support for policing, 37 LAW & SOC. REV. 513–48 (2003); Sunshine & Tyler, supra note 13; see also James M. Buchanan, Markets, States, and the Extent of Morals, 68 AM. ECON. REV. 364 (1978)). But every complex society has more than a single moral code. It has many different ones and people disagree about issues of right and wrong, morality and immorality, and how to deal with situations in which the various versions clash (LAWRENCE M. FRIEDMAN & GRANT M. HAYDEN, AMERICAN LAW: AN INTRODUCTION 233 (3d ed. 2017); see also JEREMY WALDRON, LAW AND DISAGREEMENT 1–4 (1999); TYLER, supra note 13, at 4, 26, 66). Debates and conflicts can be hard and frequent, and their potential list is long—from abortion to death penalty, from same-sex marriage to the treatment of endangered species, from immigration to the war against terrorism, and so forth. The legal system may reflect moral principles and ideas, but the issue is then whose morality? To put it another way: a complex, pluralistic society—a society made up of a variety of majorities and minorities, a society that aims to be open and democratic—should tolerate different morals, different moral loyalties, different ways of life to the extent that they are not harmful to the rest of the same society. See FRIEDMAN & HAYDEN, supra in this note, at 235. See also FREDERICK F. SCHAUER, THE FORCE OF LAW 48–52, 57–67 (2015); FLETCHER, supra note 2, at 172 (“The ethic of loyalty brings to bear an historical self; impartial morality derives from the universality of reason or of human psychology. The former is pitched to humans as they are; the latter, to the spiritual aspirations of humans as they might be. Systems that are so radically different cannot be brought together within any single common denominator”).

unbiased meaning of the set of rules that a group, a community, or a society recognizes as binding and enforceable through positive or negative sanctions—i.e., a reaction, or the threat or promise of a reaction by the members of the group (or community, or society) showing approval or disapproval of a conduct.

Second, the focus of this essay is limited to private law matters (and culture). I will neither delve into issues pertaining to explicitly prohibited and socially unacceptable activities such as those carried on by mafias and other criminal networks, nor into the public law realm,
such as constitutional, administrative, criminal, tax, and social security laws. To be sure, in the latter fields too one can find enclaves of unofficial rules controlling behaviors and driving choices of concerned actors. Yet, these are fields where official law usually is the powerful and pervasive beacon of private and public conducts and where, in principle, any disloyalty to it directly entails the reaction of the State and its apparatuses, thereby equating the lack of allegiance to a wrong. This equation does not necessarily apply in the field of private law. In the latter, loyalty may be split over different legal sets. It may have manifold meanings and ways of displaying itself, and this is a field where the contribution of social processes to (unofficial) law-making and enforcement may be direct, i.e., without the mediation of the legislature, the judiciary, and/or another administrative body.

On these premises, the paper unfolds as follows. I will first introduce the debate on the difference between State and non-State law, dwelling on language and cultural attitudes that innervate the debate itself (Sections 2–3). I will then review the literature on field studies showing the multifaceted presence and relevance of non-State law bodies of rules in a series of United States social and economic settings. Not involved in their criminal activities) makes their analysis inconsistent with the purposes of this paper.

25 E.g., on the survival and flourishing of customary unofficial practices in U.S. separation of powers constitutional law, see Bederman, supra note 9, at 90 ff. (also for further references). See also Robert M. Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 31 (1983) (discussing communities committed to different “constitutional visions”); Sanford Levinson, Constitutional Faith (rev. ed., 2011) (on the tensions generated by the encounter of American constitutionalism and religious beliefs). For a field study of bureaucratic institutions, their formal and informal mechanisms of control, adaptation, and change, see Peter M. Blau, The Dynamics of Bureaucracy. Study of Interpersonal Relations in Two Government Agencies 183–206 (2d ed. 1963). On informal adjudication procedures in U.S. administrative law, Paul R. Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chicago L. Rev. 739 (1976) (discussing “administrative decisions that are not governed by statutory procedures, but which nevertheless affect an individual’s rights, obligations, or opportunities”: id. 739, note 1).


27 The choice is based not only on the fact that this is the country where this paper was presented, but also because most of the field studies conducted on the relevance of non-State law in Western societies concern U.S. settings, and because most of the arguments advocating legal monotheism rely (as we will see infra notes 31–33 and accompanying text) on the idea that legal dimensions different from official law may find their way only in pre-modern environments.
Next, I will critically analyze the arguments usually put forward to explain these departures from State law, highlighting the partiality of many of those arguments and proposing a different intellectual key to approach the issue (Sections 5–7). The final part of the essay (Section 8) will focus on the possible implications of the foregoing data and analysis for our views of the legal world and, in particular, on the impact the plurality of legal dimensions may have on our way of understanding State law and the law itself.

II. “INFORMAL NORMS” AND “LEGAL RULES”: DENIAL AND ACCOMMODATION

A conventional (and all-Western28) dividing line between norms29 and the law sees law as the subset of norms that are created and

28 Outside the West, comparative and field researches have long shown how State law is constantly challenged by the relevance societies assign to other legal layers. For example, in the Sub-Saharan region traditional rules (besides being linked to the sacred to the point that they root their legitimacy therein) control large parts of the legal reality, ranging from personal status to family relationships, from property rights to the distinction between encouraged and prohibited conduct, to the methods of dispute resolution (see, e.g., Jack Goody, Introduction, in Succession to High Office 1 ff. (Jack Goody ed., 1966); Alain Rochequude, Ubi societas ibi jus: ubi jus, ibi societas, in A LA RECHERCHE DU DROIT AFRICAIN DU XXIE SIÈCLE 115 (Camille Kuyu ed., 2005); Thomas W. Bennett, Comparative Law and African Customary Law, in Oxford Handbook of Comparative Law, supra note 20, at 641). On Latin America, see, e.g., D. López-Medina, The Latin American and Caribbean legal traditions, in The Cambridge Companion to Comparative Law, supra, note 20, 344; Jorge L. Esquivel, The Failed Law of Latin America, 56 AM. J. COMP. L. 75 (2008); and Hernando De Soto, The Other Path: The Invisible Revolution in the Third World (June Abbott trans., 1989). In the Islamic culture, the šarī’a, the revealed body of rules, segregates its role from secular customs and from the rules adopted by the State, namely, the siyāsa (Wael B. Hallaq, The Origins and Evolutions of Islamic Law (2005); Gregory C. Kozlowski, When the ‘Way’ Becomes the ‘Law’: Modern States and the Transformations of Halakhab and Shari‘a, in Studies in Islamic and Judaic Traditions II 97 (William M. Brinner & Stephen D. Ricks eds., 1989); Faiz Ahmed, Shari‘a, Custom, and Statutory Law: Comparing State Approaches to Islamic Jurisprudence, Tribal Autonomy, and Legal Development in Afghanistan and Pakistan, 7 Global Jurist (2007), https://bepress.com/gj/vol7/iss1/art5. The Indian vision of the law does not blend sources of law as different as secular customs, State law, and the various bodies of religious law (Werner Menski, Hindu Law: Beyond Tradition and Modernity (2003), especially at 121, 247; Robert Lingat, The Classical Law of India 176 (1973) (translated by John D. M. Derrett, from Les Sources du Droit dans le Système Traditionnel de l’Inde (1967)); John D. M. Derrett, Hindu Law: Past and Present 1, 42 (1957); John D. M. Derrett, Religion, Law and State in India 158 (1968); see also Ludo Rocher, Hindu Conceptions of Law, 29 Hastings L. J. 1304 (1978); Religion and Law in Independent India (Robert D. Baird ed., 2d ed. 2005); Upendra Baxi, People’s Law in India. The Hindu Society, in Asian Indigenous Law in Interaction with Received Law 216 (Masaji Chiba ed., 1986); Hinduism and Law: An Introduction (Timothy Lubin, Donald R. Davis Jr. & Jayanth K. Krishnan eds., 2010)). Equally, the Japanese perspective as passed down demarcates State rules from those stratified in popular customs, the nature of which mixes moral principles of religious as well as secular origin (Joseph Sanders, Courts and Law in Japan, in Courts, Law and Politics 315 (Herbert Jacob, Erhard Blankenburg, Herbert M. Kritzter, Doris M. Provine & Joseph Sanders eds., 1996); Kahei Rokumoto, Law and Culture in Transition, 49 AM. J. COMP. L. 545 (2001); see also Eric A. Feldman, The Ritual of Rights in Japan 6, 34 (2000)). The same can be said for the traditional Chinese conception, which does not mix the fa, the rule imposed by the authority, with the su, the popular and secular custom, nor with the li (conventionally translated as: “rite”), the ensemble of rules suggested by the traditional wisdom
steeped in Confucianism (Werner Menski, COMPARATIVE LAW IN A GLOBAL CONTEXT. THE LEGAL SYSTEMS OF ASIA AND AFRICA 518, 523 (2d ed. 2006); see also Derk Bodde, Authority and Law in Ancient China, 17 J. AM. OR. SOC. 54 (1954); Jun Ge, Mediation, Arbitration and Litigation: Dispute Resolution in the People’s Republic of China, 15 UCLA PACIFIC BASIN L. J. 124 (1996); Deborah Chow, Development of China’s Legal System Will Strengthen its Mediation Programs, 3 CARDOZO ONLINE J. CONFLICT RES. 4 (2002); Robert F. Utter, Tribute: Dispute Resolution in China, 62 WASH. L. REV. 383 (1987); RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD THE RULE OF LAW 288 (2002)). For an introduction to the role of guanxi, i.e., the set of beliefs and rules centered on mutual commitments, reciprocity, and trust, underpinning Chinese community, family, friendly, hierarchical and business relationships, see, from a perspective useful to the present analysis, YADONG LUO, GUANXI AND BUSINESS (2d ed. 2007); Christopher A. McNally, China’s Changing Guanxi Capitalism: Private Entrepreneurs between Leninist Control and Relentless Accumulation, 13 BUS. & POL. art. 5 (2011); Nailin Bu & Jean-Paul Roy, Guanxi Practice and Quality: A Comparative Analysis of Chinese Managers’ Business-to-Business and Business-to-Government Ties, 11 MGMT. & ORG. REV. 263 (2015).

For further illustrations see, among the many, THE DISPUTING PROCESS, supra note 27, and (concerning mostly tort law), Mauro Bussani & Marta Infantino, Tort Law and Legal Cultures, 63 AM. J. COMP. L. 77, 83–107 (2015).

The distinction between norms and behavioral regularities may in turn be found in that the departure from the former entails sanctions – and the nature of these ‘sanctions’ is obviously debatable, and debated. See Robert E. Scott, The Limits of Behavioral Theories of Law and Social Norms, 86 VA. L. REV. 1603, 1606, 1610 (2000); see also HERBERT L.A. HART, THE CONCEPT OF LAW 86–91, 136–45 (2d ed. 1994); and compare SCHAUER, supra note 19, at 223–4, note 4. According to POSNER, supra note 22, at 24, “norms govern what clothes one may wear but not the order in which one puts on one’s clothes.” Further, the same author relies on the distinction between (observable) shame and (non-observable) guilt: “If I tip [the waiter of a strange restaurant] so that people do not think I am cheap, then I tip to avoid shame. If I tip to avoid the unpleasant sensation that I have done wrong, then I tip to avoid guilt” (id. at 43). Richard A. Posner, Social Norms and the Law: An Economic Approach, 87 AM. ECON. REV. 365 (1997), defines a social norm as “a rule that is neither promulgated by an official source, such as a court or a legislature, nor enforced by the threat of legal sanctions, yet is regularly complied with (otherwise it wouldn’t be a rule).” See also Eric B. Rasmussen & Richard A. Posner, Creating and Enforcing Norms, with Special Reference to Sanctions, 19 INT’L REV. L. ECON. 369 (1999); George A. Bermann, Enforcing Legal Norms Through Private Means, in ENFORCEMENT AND EFFECTIVENESS OF THE LAW/LA MISE EN ŒUVRE ET L’EFFECTIVITÉ DU DROIT 33, 34 (Nicolás Etcheverry Estrázulas & Diego P. Fernández Arroyo eds., 2018); Paul G. Mahoney & Chris William Sanchirico, Competing Norms and Social Evolution: Is the Fittest Norm Efficient?, 149 U. PA. L. REV. 2027, 2030 (2001) (“norms” are “rules of conduct that constrain self-interested behavior and that are adopted and enforced in an informal, decentralized setting”); Richard H. McAdams, The Origin, Development, and Regulation of Norms, 96 MICH. L. REV. 338, 340 (1997) (norms are “informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both”). Further relevant contributions to the law and norms literature are Eric A. Feldman, The Tuna Court: Law and Norms in the World’s Premier Fish Market, 94 CAL. L. REV. 313 (2006); Barak D. Richman, Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering, 104 COLUM. L. REV. 2328 (2004); Symposium. Law, Economics. & Norms, 144 U. PA. L. REV. 1643 (1996); Symposium. The Legal Construction of Norms, 86 VA. L. REV. 1577
enforced by governments.30 Yet, when lawyers take into account non-State law they usually do it not only with a blasé attitude, feeding the latter with the assumption that unofficial law may thrive (only) in societies where independent judiciaries have not (yet) taken root,31 but also looking at history through instrumental glasses, i.e., focusing on the progressive path that enlightens how our societies came to get rid of legal disorder and unpredictability to embrace the current legal


Halfway between unofficial rules and behavioral regularities one can find the codes of conduct followed by one’s relationships with the so-called consequential stranger (term coined by Karen L. Fingerman, The Consequential Stranger: Peripheral Relationships across the Life Span, in Growing Together. Personal Relationships across the Life Span 183–209 (Frieder R. Lang & Karen L. Fingerman eds., 2004)). These are individuals other than intimates, with whom one repeatedly interacts, and whose ties involve a certain degree of mutual recognition. Consequential strangers may be crossing everybody’s life and be encountered through daily contacts with other people or by taking part to different social activities. While some of these relationships entail a certain degree of formality — as between health practitioners, or nurses and their recurrent patients — others can go little beyond the edge of “acquaintanceship”: the latter may be the case, e.g., of gym buddies, of work colleagues, of the relationship with the person who sells us the newspaper each morning, or with the doorman who regularly collects our mail on our behalf. To be sure, consequential strangers form a key dimension of human sociability, resting “above the realm of strangers and below the threshold for intimacy” (Karen L. Fingerman, Consequential Strangers and Peripheral Ties: The Importance of Unimportant Relationships, 1 J. Fam. Theory & Rev. 69, 72 (2009)). For further illustrations, see Milenda Blau & Karen L. Fingerman, Consequential Strangers: The Power of People Who Don’t Seem to Matter. . . But Really Do (2009); Karen L. Fingerman, Bradford Brown & Rosemary Blieszner, Informal ties across the life span: Peers, consequential strangers, and people we encounter in daily life, in HANDBOOK OF LIFE-SPAN DEVELOPMENT 487–511 (Karen L. Fingerman, Cynthia A. Berg, Jacqui Smith, & Toni C. Antonucci eds., 2011); Karen L. Fingerman & Patrick S. Tennant, Weak Ties/Consequential Strangers, in THE ENCYCLOPEDIA OF ADULTHOOD AND AGING 1–4 (2015). Nonetheless, these ties and the possible sanctions (if any) that the departure from their codes of conduct may engender are so weak as to become irrelevant from the perspective of this paper.


framework.\textsuperscript{32} In other terms, one could say, the mainstream legal debate places the cart of legal monotheism before the horse of its historical meaning.\textsuperscript{33}

Moreover, what is common across the disciplinary fields (that is, in the law-law and in the “law & ...” fields) is the use of the label “informal” as the controlling adjective to describe any sort of legal arrangement or enforcement that does not stem from state law. This is an inaccurate and, to a certain extent, unfortunate choice.\textsuperscript{34} “Formal” usually means something “pertaining or following established procedural rules, customs and practices,”\textsuperscript{35} and the formal character of the law is found in that “rules and other legal precepts, basic functional elements of law such as legislatures and courts, and the legal system taken as a whole … conform to accepted conceptions of their essential forms.”\textsuperscript{36} Thus, neither the general nor the technocratic definitions exclude from their meanings or scopes any set of rules that have their source outside the State. By contrast, if by formality we mean the respect of ritual and/or solemn and/or written procedures, we must acknowledge that formality varies widely across and within State\textsuperscript{37} and non-State law. The latter too—as is known and we will see\textsuperscript{38}—may rely on the absence of formality, on loose formalities, or on sophisticated formalized infrastructures.

\textsuperscript{32} See also Posner, supra note 28, at 366; MARGARET DAVIES, LAW UNLIMITED 26 ff. (2017).

\textsuperscript{33} Let me stress how this view is nothing but the fruit of European ethnocentrism and its legacy taken on by the rest of the Western world. That it is mainly due to the way European legal thought has systematised the reality that it was faced with. To the European rulers of the last few centuries, it has been only too convenient to imagine that the law and the State coincide because both have long been their own. See, e.g., EUROPEAN EXPANSION AND LAW: THE ENCOUNTER OF EUROPEAN AND INDIGENOUS LAW IN 19TH-AND 20TH-CENTURY AFRICA AND ASIA (Wolfgang J. Mommsen & Jaap A. de Moor eds., 1992); ASIAN INDIGENOUS LAW, supra note 28; Bennett, supra note 20, at 641.


\textsuperscript{38} See infra Section 4.
This is why in this paper the more neutral dichotomy of official/unofficial law (and rules) has been adopted, with the former term referring to State law and the latter to the remaining legal dimensions.\(^{39}\)

As always language is telling, though. The inaccuracy in the use of the term “informal” has a cultural pedigree that is worth disclosing. First, as I said, most of the participants in the legal debate identify the word “law” exclusively with the explicit product of the State. This compels dissidents to underline the adjective (non-State, informal, soft, customary or, as in this paper, unofficial) when discussing any other type of law. Secondly, facing the potential deficiencies of this posture, a series of intellectual strategies are deployed to keep connecting the positivistic dogma\(^{40}\) with a reality that shows many other dimensions, in which rules live and thrive without any sort of blessing by the State. Two of these strategies are common: denial and accommodation. On the shoulders of the late Roderick Macdonald,\(^{41}\) one can describe these strategies as follows.

Denial is a simple strategy. It relies on the assumption that any data challenging the mainstream approach are either unreliable, misconstrued, irrelevant, or said to evidence no more than a failure of analysis. Denial simply requires the repeated assertion that all law comes from the State and that accepting any other definition would blur the borders of the law, undermining its role in society and opening the floodgates of the legal system to chaos.\(^{42}\) Accommodation rests on the

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\(^{39}\) Galanter (Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEG. PLUR. (1981)) uses the terms “indigenous ordering” and “indigenous law” to refer to social ordering which is indigenous, i.e., familiar to and applied by the participants in the everyday activity that is being regulated. More precisely, by indigenous law he refers “not to some diffuse folk consciousness, but to concrete patterns of social ordering to be found in a variety of institutional settings—in universities, sports leagues, housing developments, hospitals, etc.\(^{2}\) id. at 17–8. “Stateless” (instead of “lawless” as used by A VINASH K. DIXIT, LAWLESSNESS AND ECONOMICS: ALTERNATIVE MODES OF GOVERNANCE (2004) is the adjective promoted by Richman (Richman, *supra* note 24) to describe the legal rules adopted by merchant communities.

\(^{40}\) See *supra* note 6.


\(^{42}\) See, e.g., Merry, *supra* note 18, at 878–9 (“Why is it so difficult to find a word for non-state law? It is clearly difficult to define and circumscribe these forms of ordering. Where do we stop speaking of law and find ourselves simply describing social life? Is it useful to call all of
idea that law is posited as an “instrumental technology.”

According to this idea, lawyers’ law exists as an identifiable datum, and if sometimes law may appear irrelevant or ineffective to the social or economic phenomena, to which it is directed, this simply is a descriptive deficit or the result of society’s over-inflated and unrealistic expectations of law. Should one scale down the expectations of law’s reach, any failure would appear either as (again) a failure of understanding reality or as a failure of adapting the law to it, and both may be easily fixed through more appropriate doctrines or through an intervention of State law itself.

Needless to say, these strategies are each designed also to preserve an intellectual and professional status quo. To hold to a limited definition of law buttressed by denial and accommodation allows official legal debate and actors to keep on theorizing that law’s universe is dynamic but within strictly defined borders. Beyond the latter, it becomes hard to imagine law schools, textbooks, lawyers, judges, and technocratic apparatuses as we know them, and this is enough to falsify or discredit any different theory claiming the existence of law outside those frontiers.

these forms of ordering law? In writing about legal pluralism, I find that once legal centralism has been vanquished, calling all forms of ordering that are not state law by the name law confounds the analysis”).

Macdonald, supra note 41, at 73.

See, e.g., Brian Z. Tamanaha, The Folly of the ’Social Scientific’ Concept of Legal Pluralism, 20 J. L. & Soc’y 192, 216–7 n. 81 (1993) (“Legal pluralists (and legal sociologists generally) have repeatedly shown that social norms (or non-state “law”) often conflict with and are more compelling than state legal norms. Their point is that the state is not always successful in its efforts in relation to normative ordering. I am suggesting a different tack: we should not automatically see the state legal system as an institution involved in maintaining normative order. It often does more than that and less than that. We should view it as a socially-constructed power-yielding apparatus, then observe what this apparatus does”). On all this see also Roderick A. Macdonald, Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law, in Théories et Émergence du Droit: Pluralisme, Surdétermination, Effectivité 12–23 (Guy Rocher et al. eds., 1998).

Hadfield & Weingast, supra note 7, at 32.

A posture that makes sense if one considers that in 2017 overall revenues of the legal services sector in the U.S. amounted to over $290 billion (https://www.census.gov/services/qss/qss-current.pdf, Tables 1.a and 1.b).
III. ENTROPY V. NEGENTROPY?

To be clear, I am not trying to overturn the usual way of looking at the relationship between unofficial and official law placing unofficial law in a position of primacy. Neither do I mean to romanticize unofficial law as either more virtuous or more efficient than official law nor to depict the latter as the realm of turbulent entropy as opposed to a smooth negentropy proper to unofficial law. As is well known, and we will see over the next chapters, unofficial law may have the virtues of being familiar, understandable, and independent of legal professionals, but it is not always the expression of harmonious egalitarianism. It may even reflect narrow and parochial concerns, be based on hierarchical relations, and its coerciveness may be harsh and discriminatory. Thus, my point is different. The traditional hypothesis of lawyers’ law—that law is about only those forms, processes, and institutions of normative ordering that find their legitimacy in the

47 Galanter, supra note 39, at 18. See also POSNER, supra note 22, at 3. According to Ellickson (Robert C. Ellickson, When Civil Society Uses an Iron Fist: The Roles of Private Associations in Rulemaking and Adjudication, 18 AM. L. & EC. REV. 235, 245 (2016)), “even those who are generally enthusiastic about associations, are aware of their potential shortcomings … An association that serves the interests of its members may disserve society overall. Standard illustrations are associations organized to inflict violence on nonmembers, such as the Ku Klux Klan and Al-Qaeda, and associations designed to limit competition, such as cartels and guilds.” On the possible overconsumption of the resources available to the group, see supra, note 80.

48 Waldron, supra note 18, at 135, 137, 153–4.


Needless to say, the reverse may hold true. People can go through proper formal legal procedures and end up feeling unfairly treated, while “informal legal procedures may correspond more closely than trials to people’s intuitions about what is a fair procedure”: TYLER, supra note 13, at 155. See also GEORGE A. AKERLOF & RACHEL E. KRANTON, IDENTITY ECONOMICS. HOW OUR IDENTITIES SHAPE OUR WORK, WAGES, AND WELL-BEING 11 (2010), underlining that “people’s tastes for fairness depend on who is interacting with whom and in what social setting.”
political State or its emanations—needs to be tested against a widespread phenomenon crisscrossing all societies, Western or otherwise. The reference goes to families, workplaces, neighborhoods, social, professional, business communities and networks, and an array of other locations of human interaction that may be seen and do function as sites of legal regulation. Indeed, as Michael Reisman, Lawrence Friedman (and many others, besides the comparativists)

50 Macdonald, supra note 41, at 72; Last Stone, supra note 26, at 835.

51 As I said, this is not a novelty: see supra, Section 1, notes 5–9, 28. See also Max Weber, Economy and Society 133–8 (Gunther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., 1968). The low visibility of the phenomenon to Western lawyers’ debates “and hitherto disdainful rejection by scholars of the law should not obscure the significant effects they can have on social order” (W. Michael Reisman, Looking, Staring and Glaring: Microlegal Systems and World Public Order, 12 Denv. J. Int’l L. & Pol’y 165, at 178 (1982–1983)).

52 Macdonald, supra note 41, at 77. See also Patricia Ewic & Susan Silbey, The Common Place of Law: Stories From Everyday Life 20 (1998) (“by reckoning the boundary of law to correspond neatly to its formal institutional location, we drastically narrow our vision … We exclude from observation that which needs yet to be explored and explained: how, where, and with what effect law is produced in and through commonplace social interactions within neighborhoods, workplaces, families, schools, community organizations”).

53 W. Michael Reisman, Law in Brief Encounters 2 (1999) notes that “the law of the state may be important, but law, real law, is found in all human relations, from the simplest, briefest encounter between two people to the most inclusive and permanent type of interaction. Law is a property of interaction. Real law is generated, reinforced, changed, and terminated continually in the course of almost all of human activity.” See also Schauer, supra note 19, at 136–7, 143.

54 Friedman & Hayden, supra note 19, at 21 (“No legal system in a developed country can be purely formal or informal. It is invariably a mixture of both”: id. at 29); Raz, supra note 30, at 116 (“It would be arbitrary and pointless to try to fix a precise borderline between normative systems which are legal systems and those which are not”).

According to Fuller (Lon L. Fuller, Human Interaction and the Law, 14 Am. J. Juris. 1 (1969)), one should be interested in “not only the legal systems of states and nations, but also the smaller systems—at least “law-like” in structure and function—to be found in labor unions, professional associations, clubs, churches, and universities” (id. at 1). He calls these legal systems “miniature legal systems” (id.).

Discounting the fact that unofficial law world is not comprised only of small communities (see infra note 57 and accompanying text, as well as Section 4), Reisman focuses on what he designates as “microlaws,” noting that the latter “have the complex and significant normative components that are characteristic of law in its conventional usage. … It is appropriate to refer to these microsystems as legal systems because, for all of their informality, there is a rule and an attendant set of expectations about proper subjective and objective responses to norm violation, intimating some sort of system for enforcing the norm”: W. Michael Reisman, Lining Up: The Microlegal System of Queues, 54 U. Cal. L. Rev. 417, at 419 (1985). Further, he questions: “What accounts for the jurisprudential resistance to microlaw? Writers who identify law with the apparatus of the state must necessarily dismiss microlaw as
remind us, the term “law” can be applied to processes of many kinds, even those that are very far from the official legal system. Any group of any nature and size has rules and tries to enforce them. What makes

law. De minimis non curat praetor, they intone gravely, without explaining how one determines what is de minimis in the lives of people. As a result of capriciously and inconsistently applied definitions [this piece of legal dimension] has been dismissed as mere etiquette: Reisman, supra note 51, at 176, 181.

55 An obvious reference is to the then groundbreaking studies of Romano (SANTI ROMANO, THE LEGAL ORDER (2017; Mariano Croce transl. from L’ORDINAMENTO GIURIDICO (1918)); see also Filippo Fontanelli, Santi Romano and L’ordinamento giuridico: The Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Legal Relations, 2 TRANSN. LEG. THEORY 67–117 (2011)) where the author argues that any social order is a legal one and that the State cannot be the only institution in which legal science ought to be interested, thereby refuting the idea that reduces all law to the law of the State), and of Ehrlich (EUGEN EHRLICH, GRUNDLEGUNG DER SOZIOLOGIE DES RECHTS (1913); Eugen Ehrlich, The Sociology of Law, 36 HARV. L. REV. 129 (1922)), in which the author emphasizes the role of social norms widely accepted in a particular population, treated within that population as authoritative, and validated under the cultural point of view, whether or not recognised by state authorities as law. See also William G. Sumner, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS (1906) (turned on the historical and comparative evolution of customs and their relationships with official laws). More recently, Cover, supra note 25, at 9–11; Robert M. Cover, The Folktales of Justice: Tales of Jurisdiction, 14 CAP. U. L. REV. 179, 181–2 (1985); DE SOUSA SANTOS, supra note 18, at 21 ff., 85 ff., 426 ff. Pospisil (POSPISIL, supra note 14, at 97 ff., 112) argues against the assumption that law may be “conceived as the property of a society as a whole” (id. at 99). Falk Moore (Susan Falk Moore, Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study, 7 L. & SOC’Y REV. 719 (1973)), maintains that “the essential difference between the legal rules and the others is not in their effectiveness. Both sets are effective. The difference lies in the agency through which ultimate sanctions might be applied. Both the legal and the non-legal rules have similar immediately effective sanctions for violation attached. Business failures can be brought about without the intervention of legal institutions. Clearly neither effective sanctions nor the capacity to generate binding rules are the monopoly of the state” (id. at 734–4). According to Brian Tamanaha, “Law is a ‘folk concept,’ that is, law is what people within social groups have come to see and label as ‘law’” (Tamanaha, supra note 18 at 396). Law, therefore, “is whatever people recognize and treat as law through their social practices … any members of a given group can identify what law is, as long as it constitutes a conventional practice” (BRIAN Z. TAMANAH, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY 166 (2001)).

56 See supra, note 20.

them like official law is that they are recognized as binding and enforceable through positive or negative sanctions by the concerned group. What makes them—in the eyes of the mainstream debate—unfit to be labeled as “law” is an all-Western intellectual posture, grounded in history and self-interested path dependency, that I will review in the last part of the essay.

IV. FIELD STUDIES

There are many examples coming from field studies conducted in many sectors of social life and business activities, showing how in those sectors unofficial law reveals itself as the controlling factor of public and private behaviors. This section focuses on a few of the available studies, chosen because they appear to be good illustrations of the complex nature of the phenomenon. I will list examples drawn from fields as disparate as family (a), religion (b), religion-related food (c), rural


From this perspective, the group may be defined and its boundaries identified not by its organization but by the fact that it can generate rules and coerce or induce compliance to them: Falk Moore, supra note 55, at 722.

99 In Marc Galanter’s words, “[J]ust as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. People experience justice (and injustice) not only (or usually) in fora sponsored by the state but at the primary institutional locations of their activity—home, neighborhood, workplace, business deal” (Galanter, supra note 39, at 17). To put it in other terms, “law” and “justice” may stay on the same side, but they do not necessarily originate from the same source. This is why I am not concerned with the binary perspective adopted by George Fletcher, according to whom “in the realm of loyalty, playing the lawyer and insisting on justice may well undermine the bonds of loyal sentiment. Equally true, letting loyalties intrude into the proper realm of justice brings about its own form of distortion.” Then comes the question: “When should justice and when should loyalty prevail?” (FLETCHER, supra note 2, at 162–3).
communities (d), the enforcement of commercial contracts surveyed in a local dimension (e), and in a national one—concerning the markets of cotton (f), diamonds (g), and grain and feed (h) —, the online environment (i), and the global financial law (l).

The simplest examples come from the spheres of family and religion. They are so simple and obvious (to many) that it will suffice to recall the following:

(a) Families make law and enforce it as to their personal relationships. Family members endowed with personal authority lay down rules, make decisions, and settle disputes all the time—about chores, children rights and duties, parties, meals, and so on. These rules are obviously bound to change over time to find the appropriate balance between the interests and roles of the family members—parents and children get older, there may be newcomers, etc. These rules may not apply to economic matters or third parties, inside the family or at the end of the personal relationship. These rules may be indifferent to and sometimes run afoul of official law.60 But these rules are part of the “law” set and enforced daily inside most of (if not all) families.61

60 Empirically, this holds true for households too. Albeit a household commonly is family- or marriage-based, it need not be, and it can rather be seen as a set of institutional arrangements “that govern relations among the owners and occupants of a particular dwelling space where the occupants usually sleep and share meals”: ROBERT C. ELLICKSON, THE HOUSEHOLD. INFORMAL ORDER AROUND THE HEARTH 1, 92–127 (2008). According the U.S. Census Bureau (www.census.gov/quickfacts/fact/table/US/HSD410216#viewtop) a household “includes all the persons who occupy a housing unit as their usual place of residence” (a housing unit “is a house, an apartment, a mobile home, a group of rooms, or a single room that is occupied (or if vacant, is intended for occupancy) as separate living quarters”; and separate living quarters “are those in which the occupants live and eat separately from any other persons in the building and which have direct access from outside the building or through a common hall”: id.). In the U.S., in 2017, there were more than 90 million households composed by two or more people: www.census.gov/data/tables/time-series/demo/families/households.html.

61 FRIEDMAN & HAYDEN, supra note 19, at 20; Elizabeth S. Scott, Social Norms and the Legal Regulation of Marriage, 86 VA. L. REV. 1901, 1903 (2000); POSNER, supra note 22, at 72–6; see also Feldman, supra note 29, at 357, underlining the elements of formality that rules shaping family interactions may have.

(b) Any religion demands loyalty to a body of substantive rules that may be aligned, indifferent to, or even contrasting with official law. In addition, some religions set up judicial mechanisms to solve faith-related disputes—and often times these mechanisms are grounded on sophisticated and formal rules of procedure. For example, Orthodox Jews can bring disputes to a rabbinical court for settlement. The Catholic Church presides over an elaborate system of canon law, and Church courts decide for instance whether a marriage can be annulled. This does not bind the regular secular courts, but it is very important to a devout Catholic, whose religion forbids divorce, and who might want to get married again and yet stay within the church’s good graces. Neither a rabbinic court nor the Catholic Church has the power to back up decisions with force. Such institutions have no way to throw a “litigant” in jail nor, in principle, to squeeze money out of a loser. But they do have “persuasive” and pervasive force. They bind people who voluntarily submit to them.

62 On loyalty to religion (and religious beliefs that arise in congregations and communities of believers), see, e.g., Fletcher, supra note 2, at 89–100. Jacobson (Arthur J. Jacobson, Autopoietic Law: The New Science of Niklas Luhmann, 87 Mich. L. Rev. 1647, 1685–7 (1990)) has observed that, albeit mostly ignored by legal theorists, revelatory law—a law whose core notion is that “God speak[s] to (or through) a legal person” (id. at 1686)—is a model that has much to say about the self-generation of the common law.

63 See, e.g., Broyde, supra note 61, at 140 ff.; Richman, supra note 24, at 10–3.

64 See, e.g., Broyde, supra note 61, at 14–6, 138–50, 166–71 (and see id. at 10 ff., on the limits rabbinical courts may face with regard to the operation of official law); J. David Bleich & Arthur J. Jacobson, Jewish Legal Tradition, in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW supra, note 20, 281, 292; Note, 6 COLUMBIA J. L. & SOC. PROBL. 49 (1970). Orthodox Jews make up about 10% of the estimated 5.3 million Jewish adults (ages 18 and older) in the United States: PEW RESEARCH CENTRE, AMERICA’S CHANGING RELIGIOUS LANDSCAPE (May 12, 2015), https://www.pewforum.org/2015/08/26/a-portrait-of-american-orthodox-jews/#fn-23679-1.

65 This system of rules, whose consolidated origins date back to the Fourth century of Christian Era, continues to be used today by the Catholic Church. See, e.g., Richard H. Helmholtz, THE SPIRIT OF CLASSICAL CANON LAW 1 (1996) (noting also that large sections of canon law were still in force in 19th century England, and that many canon law rules have taken root in modern English and American law).


67 See Broyde, supra note 61, at 18–9.

68 Friedman & Hayden, supra note 19, at 22. On how to frame sporadic Courts interference with egregious attempts to ostracize someone that violates a congregation’s rules, see Posner, supra note 22, at 215–7.
(c) The case of the Kosher label is interesting because it illuminates how a mechanism initially devised to work at a local scale has evolved to operate also at a global level. Twenty-one states in the U.S. have kosher fraud laws that prohibit the sale of any food product falsely represented as kosher, but they are largely disregarded at both the official and the unofficial level. Instead, the enforcement of Kosher label rules relies on the practices of personal communities, such as families and religious congregations, accomplish most of the goals performed by tort law on the basis of their own rules, choosing their own set of remedies, which include issuances of apology or personal services. Through such rules and remedies, those communities provide a solution to the dispute that is perceived as the most appropriate by the community and the individuals involved. See Bussani & Infantino, supra note 28, at 83–7; LAW AND ETHNIC PLURALITY: SOCIO-LEGAL PERSPECTIVES (Prakash Shah ed., 2007); ETHNIC MINORITIES, THEIR FAMILIES AND THE LAW (John H. Murphy ed., 2000); ROBERT F. COCHRAN JR. & ROBERT M. ACKERMAN, LAW AND COMMUNITY: THE CASE OF TORTS 48–9 (2004).


70 Kosher (also referred to as Kashrut) represents the oldest known “certification” scheme, with its rules and principles derived from the Old Testament, in Leviticus and Deuteronomy (Leviticus 11:1–8, and Deuteronomy 14:4–5). See Stanley J. Shapiro, Marketing of Kosher Meat, 23 JEW. SOC. STUD. 85 (1961). Among the complex web of legal code, the laws of Kashrut include specific rules not only with respect to the types of ingredients permissible for use but also protocols for how those ingredients must be processed. See Shana Starobin & Erika Weinthal, Private Regulation in the Global Economy. The Search for Credible Information in Social and Environmental Global Governance: The Kosher Label, 12 BUS. & POL. 1, 17 (2010).

71 TIMOTHY D. LYTTON, PRIVATE REGULATION IN THE AGE OF INDUSTRIAL FOOD 112–4 (2013), notes that “State regulation of kosher food suffers from several significant limitations. One problem is lax enforcement. … The First Amendment also limits state regulation of kosher food. States’ kosher fraud regulations … have been deemed violating the First Amendment’s Establishment Clause, which prohibits excessive government entanglement in religious matters. Thus many states, to remove reference to ‘orthodox Hebrew religious requirements’ and to require instead disclosure of the supervising rabbinic authority. The shift from specific standards to disclosure has changed the nature of state regulation of kashrus. States that have adopted the disclosure approach no longer provide assurance that food is kosher. They merely demand that food sellers be transparent and that their representations be truthful.” See also
trust through ongoing and active feedback mechanisms grounded on community dialogue,\textsuperscript{72} which not only serve the need of knowing which products meet Kosher standards but also appropriately sanctioning unreliable and false claims of compliance with those standards.\textsuperscript{73} Close-knit\textsuperscript{74} Jewish communities have in place rules that serve indeed as a powerful check on the trustworthiness of other members of the community.\textsuperscript{75} Local Kosher dietary laws are further maintained under the supervision of the local \textit{Vaad Hakashrut} (Council for Kosher Supervision). The \textit{Vaad} is comprised of local rabbinic authorities, who wield the power within the given community to decide which foods are acceptable for consumption and consistent with Kosher law.\textsuperscript{76}

\textsuperscript{72} If Coleman’s often cited account of trust merely equates mutual trust with social capital and defines it in the functional terms of the reduction of transaction costs (JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 91 ff., 175 ff. (1990)), other definitions are grounded on a different line of reasoning. For instance, Gambetta (DIEGO GAMBETTA, TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS 217 (1988)) highlights how trust denotes “a particular level of subjective probability with which an agent assesses that another agent or group of agents will perform a particular action, both before he can monitor such action (or independently of his capacity ever to be able to monitor it) and in a context in which it affects his own action.” On the same foot, BARBARA A. MISZTAL, TRUST IN MODERN SOCIETIES 9, 18 (1996)). Fukuyama argues that trust represents an “expectation that arises within a community of regular, honest and cooperative behavior, based on commonly shared norms, on the part of other members of that community” (FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 26 (1995)). See also Edward L. Glaeser, David I. Laibson, José A. Scheinkman, Christine L. Soutter, Measuring Trust, 115 Q. J. Econ. 811–46 (2000); Margaret M. Blair & Lynn A. Stout, Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law, 149 U. PENN. L. REV. 1735–810, esp. at 1745–46 (2001); PIOTR SZTOMPEA, TRUST. A SOCIOLOGICAL THEORY (2000).

\textsuperscript{73} Starobin & Weinthal, supra note 70, at 16. See also Shayna M. Sigman, Kosher without Law: The Role of Nonlegal Sanctions in Overcoming Fraud within the Kosher Food Industry, 31 FLA. ST. U. L. REV. 509 (2004); Note, supra note 64.

\textsuperscript{74} “[A] group is close-knit when informal power is broadly distributed among group members and the information pertinent to informal control circulates easily among them”: ELLICKSON, supra note 12, at 177–8. \textit{Compare} COLEMAN, supra note 72, at 125, 592, 859, 861.

\textsuperscript{75} In the US alone, consumers are spending over $12.5 billion a year on “traditional” kosher food products (SUE FISHKOFF, KOSHER NATION. WHY MORE AND MORE OF AMERICA’S FOOD ANSWERS TO A HIGHER AUTHORITY 4 (2010)).

\textsuperscript{76} Starobin & Weinthal, supra note 70, at 18. The authors further note: “Living in close proximity to one another, interacting frequently, and sharing similar educational backgrounds and customs, members of observant communities are in a position to readily observe one
One could think that in the global food supply chain, the increasing complexity of ingredients and additives in processed foods could make Kosher verification much more difficult, especially as to distinguishing ingredients derived from restricted animals or other sources that would likewise be prohibited. Yet, as a matter of fact, the global system relies on the same set of values and expectations of local religious communities, who share common customs, traditions, and education.\footnote{Starobin & Weinthal, supra note 70, at 22.} As is characteristic of close-knit communities, both locally and globally, information transmits quickly via word of mouth and through internet venues like news alerts, websites, email, social networks, and blogs. Thus, sanctions can readily be imposed on those violating community rules—even over great distances. Simply put, the networks that exist among communities with similar values and beliefs allow for the rapid transfer of information, for control over the compliance with community’s rules, and for sanctioning behaviors that run afoul of the same rules.

Other examples come from different fields, explored by an equally well-known literature:

\( (d) \) In Robert Ellickson’s seminal study of the behavior of ranchers and farmers in Shasta County, California,\footnote{ELLICKSON, supra note 12.} he found that residents in those areas typically look to unofficial rules to determine their entitlements in animal trespass situations. Ranchers who let their cattle stray, although not legally liable under Californian law, are informally liable for trespass damage according to the unofficial customary rules applied by the members of the county’s community. The unofficial rule that a livestock owner should supervise his animals dominates the official rule that a cattleman is not legally liable for unintentional trespasses on unfenced land. When a rancher violates these rules, the injured party may respond by issuing a warning, and by disseminating negative gossip (or even by using force\footnote{However, Ellickson notes that in Shasta County unofficial “remedial norms strictly regulate self-help by calling for the punishment of persons who respond [to transgressions] with excessive force”: ELLICKSON, supra note 12, at 253.}). The contrast between the rules of the State and those of the local community on cattle trespass is resolved by unwritten rules on conflicts of law giving priority to the

\another and, hence, obtain a great deal of information about strict adherence or laxity in behavior" (id.).
unofficial control system over the official one. The law of trespass has no effects on actual trespass rules because in the rural region of Shasta County the State-posed legal layer ends up disciplining a limited portion of conflicts, and a substantial number of disputes do not get into official legal proceedings, being settled informally or otherwise regulated outside the courts.

From the perspective of this paper, the enforcement of commercial contracts is a treasury box for the study of unofficial law.

(c) Stewart Macaulay’s work on Wisconsin businessmen argues that their desire to maintain a future relationship leads them to fully rely

80 Not all disputes, however, are amenable to resolution at the local unofficial level, not even in settings like Shasta County. In controversies over scarce water resources, for instance, the stakes tend to be high and the relevant technical issues complex. For these reasons (they are well known in the “tragedy of the commons” discourse and related debate: the obvious reference is to Garrett Hardin, The Tragedy of the Commons, 162 SCIENCE 1243 (1968); for further specifications and refinements of the same theory, compare, among many others, Michael Heller, The Tragedy of Anticommons: Property in Transition from Marx to Markets, 111 HARV. L. REV. 621 (1998); James M. Buchanan & Yong J. Yoon, Symmetric Tragedies: Commons and Anticommons, 43 J. L. & ECON. 1 (2000); Sven Vanneste, Alain Van Hiel, Francesco Parisi & Ben Depoorter, From Tragedy to "Disaster": Welfare Effects of Commons and Anticommons Dilemmas, 26 INT’L REV. L. & ECON. 104 (2006)), the official legal system has a comparative advantage over local communities as an agent of social control. In case of differences over water use, therefore, the unwritten rules that determine the legal layer controlling the controversy drive the disputants out of the unofficial system, and permit the parties to assert their formal legal rights and entitlements in courts (ELICKSON, supra note 12, at 240, 257).

81 Robert C. Ellickson, Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County, 38 STANFORD L. REV. 623, 685–6 (1986); see also David M. Engel, Legal Pluralism in an American Community: Perspectives on a Civil Trial Court, 5 AM. BAR FOUND. RES. J. 425, 437 ff. (1980) (discussing a system of customary law involving oral contractual agreements among farmers in a middle-sized rural county in Illinois); DONALD D. LANDON, COUNTRY LAWYERS. THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE (1990) (arguing that local ties in rural communities lead to increased emphasis on dispute resolution through informal negotiation rather than adversarial litigation).

Barak D. Richman, Norms and Law: Putting the Horse Before the Cart, 62 DUKE L. J. 739, 746 (2012), notes that—in contrast to what the Coase theorem would predict (Ronald H. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1, 44 (1960)), i.e., that once legal entitlements are clearly defined, parties will bargain for a socially efficient outcome)—Shasta County ranchers reject “the county’s substantive property law and in its place articulated alternative substantive rules. To enforce these alternative rules, ranchers established an informal network of gossip and social sanctions, so violators of the community’s norms and customs suffered from scorn and exclusion.” Central to this framework are “substantive rules and extralegal enforcement mechanisms that are wholly outside the parameters of the state” (id.). These frameworks replace state-sponsored legal coercion to bring about social order and are an alternative to, not an extension of, formal legal sanctions” (id. at 747).
on unofficial rules and methods of resolving disputes. The study underlines how businessmen depend on each other, and how they live and work in networks of continuing relationships. If they were to lodge a law suit or stick up for abstract “rights,” it would then be disruptive; it might rip apart these valuable relationships. Therefore, they both tend to avoid or sidestep official contract law and shy away from suing each other, and this is so even when they have a good case according to the law as expressed in treatises and court decisions. They abide by their own law, a set of rules, practices, and conceptions of honor and fairness that may even be more subtle and sophisticated than official contract law.

(f) Lisa Bernstein showed that the cotton industry has almost entirely opted out of the official legal system, especially as far as contract enforcement is concerned. Contracts between merchants or between merchants and mills are subject to arbitration in one of several merchant tribunals, and most Cotton-industry associations require members to accept the obligation to defer disputes with other members to arbitration as a condition of membership. Cotton industry arbitral tribunals decide an average of four cases a year. To be sure, the awards of arbitration tribunals can be enforced by seeking an entry of judgment in court. However, this is rarely necessary; failure to comply with an arbitration award is grounds for expulsion from the associations.

83 Macaulay, supra note 82, at 65.
84 FRIEDMAN & HAYDEN, supra note 19, at 143.
85 Macaulay, supra note 82, at 61–5.
86 For a (geographically) wider research on the relationships between automobile manufacturers and dealers, see STEWART MACAULAY, LAW AND THE BALANCE OF POWER. THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS (1966).
87 The U.S. cotton industry accounts for more than $21 billion in products and services annually, generating more than 125,000 jobs in the industry sectors from farm to textile mill. See United States Department of Agriculture Economic Research Service, https://www.ers.usda.gov/topics/crops/cotton-wool (last update: November 21, 2018).
89 Bernstein, supra note 88, at 1762.
90 Id. at 1737.
Transactors, who are suspended or expelled, may suffer so much reputational harm that they will be unable to remain in business. This system has endured since the mid-1800s, surviving widespread social change, years of extreme price volatility, and substantial changes in the background official legal regime.91

(g) Another example of how the same kind of law (i.e., of unofficial mold) can control professional activities is given by the diamond industry.92 In this field, one of the world’s largest trading centers is the New York Diamond Dealers Club (DDC).93 Diamond merchants reliably fulfill contractual obligations without the threat of state intervention, and this reliability in turn enables these merchants to credibly commit to fulfilling executory obligations. While activities conducted by members of the DDC fall under the jurisdiction of New York courts, DDC bylaws provide that any member that attempts to adjudicate his case in state courts will be fined or suspended from the club.94 The DDC’s own arbitration system, to which any member may resort if he has a claim arising out of, or related to, the diamond business, effectively supplants the option of seeking redress from a state court. Around 150 disputes per year are submitted to the DDC arbitration system, and an estimated 85% of these disputes are settled during the mandatory pre-arbitration conciliation procedure.95 Arbitral decisions are enforceable in state courts, but such appeals very rarely occur.96 The industry has a strong preference for the voluntary resolution of disputes, outside any adjudication mechanism run by third parties. This should come as no surprise. In an industry based on repeat

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91 Id. at 1725.
92 The global diamond sales (half of which are in the U.S.) amounted in 2013 to $72 billion: RICHMAN, supra note 24, at 19, 41.
93 Lisa Bernstein, Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. LEG. STUD. 115, 119 (1992). The same observations made in the text on the DDC apply to the other diamond trading centers in and outside the West, insofar as they are dominated by small ethnic minorities with close community ties—such as the community of ultra-Orthodox Jews in Antwerp, Belgium or that of the Jains of Palanpur (a religious minority from a village in Northern Gujarat) in Mumbai, India. See Barak D. Richman, How Community Institutions Create Economic Advantage: Jewish Diamond Merchant in New York, 31 L. & SOC. INQUIRY 383, 410–2 (2006); RICHMAN, supra note 24, at 115 ff. (see also at 148–66, on the recent rise of diverse ethnic communities as global players in the diamonds’ market and on the parallel weakening of Orthodox Jews’ hold on the industry).
94 RICHMAN, supra note 24, at 44–8.
95 Bernstein, supra note 93, at 127, 153.
96 Richman, supra note 93, at 395.
transactions among members of small, professionally (if not ethnically) homogeneous groups,97 where dissemination of information about reputation is rapid and low-cost, the enforcement of private settlements is backed by reputational sanctions.98 Therefore, under the threat of social ostracism, intra-industry disputes are usually resolved cooperatively and with no need to have recourse (even) to an intra-community arbitration mechanism.99

(h) Still, Lisa Bernstein explored the grain and feed market.100 The NGFA (National Grain and Feed Association) consists of more than 1,000 companies and provides services for grain, feed, and related commercial businesses. Its members handle more than 70 percent of all U.S. grains and oilseeds utilized in domestic and export markets.101 As a condition of membership in the Association, members must agree to submit all disputes with other members to the Association’s arbitration system. The association began arbitrating disputes among members in 1896 and has been publishing written arbitration opinions since 1902.102 A member that refuses to submit to arbitration or fails to comply with an arbitration award rendered against him may, in addition to having his actions reported in the NGFA newsletter, be suspended or expelled from the Association.103

Reputation bonds are, once more, strong enough in the relevant market to ensure that an obligation will be performed because of “concern for relationships, trust, honor and decency,” or of fear of non-official legal sanctions such as reputational damage or termination of a beneficial relationship.104 This is another example of a relationship-preserving dispute-resolution unofficial legal regime. As Lisa Bernstein notes, “ensuring that extralegal agreements remain extralegal is particularly valuable in grain and feed markets, making NGFA’s

97 More generally, on the (limited) secular judicial review of co-religionist commercial disputes, see BROYDE, supra note 61, at 58–67, 154–6.
99 Bernstein, supra note 93, at 133, 135–43.
101 See www.ngfa.org.
102 The Arbitration Decisions—beginning with case n. 1400 from year 1946—are available online: https://www.ngfa.org/decisionsmain/). See also Bernstein, supra note 100, at 1771–72.
103 Bernstein, supra note 100, at 1772.
104 Id. at 1788.
Should one look at the global orders that affect U.S. legal landscape, one could detect at least two fields of interest in the direction taken by the present analysis: the online legal environment and—to the extent I will make clear—the legal regulation of finance.

(i) The online environment, and especially the social media circuits display governance measures applied through the internal actions of the private and commercial actors which operate the relevant digital services. While official laws govern some issues only, through privacy and IP laws, social media are largely, and at least by proxy, governed: by the terms and conditions set up both explicitly (in the contracts) and by design by the digital providers; as well as by the unofficial rules daily developed, challenged, and refined by web administrators, community members, and digital users. The legitimacy of this governance lies in the ideal of self-determination and self-regulation, and these virtual worlds create their own law, which is almost never enforced through official legal channels. Although internal rules most of the time operate against the background of state law, providers of digital services enjoy an all but boundless power in deciding whether, when, and how to enforce these rules within their respective communities.

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105 Id. at 1820.
110 Nicolas Suzor, Order Supported by Law: The Enforcement of Rules in Online Communities, 63 MERCER L. REV. 523, 530 (2012). To say it in icastic terms, "Facebook defines
compliance with these unilaterally determined, top-down rules is ensured not only by the design of the platforms themselves, but also through a vast array of sanctions—ranging from a simple reprimand to suspension, from the removal of contents to the cancellation of the subscriber’s account—that service providers might apply to participants they find to be in breach. What ought to be stressed is that, in all these communities, providers’ wide discretion in drafting and enforcing their own rules “occurs within and informs a continuous discourse about community understandings of what is proper and just, and providers are often in a continual struggle to shape the expectations of the community … Control over the code gives providers enormous power not only to define what is permissible within the community, but also what is possible.”

Moreover, within each of these communities, the enforcement of unofficial self-created rules and sanctions does not necessarily need to involve the direct agency of the provider. Rules are continuously enforced and adapted by community members and users through their day-to-day activities within the platforms, reinforcing understandings of acceptable behavior. The application of sanctions is

who we are, Amazon defines what we want, and Google defines what we think”: George Dyson, Turing’s Cathedral: The Origins of the Digital Universe 308 (2012).

111 Suzor, supra note 110, at 531.

112 Id. at 533. One of the most prominent examples of these communities is given by Facebook, currently the Internet’s largest social network. Facebook maintains an appearance of democracy by seeking advice from its members on questions of governance, requiring for instance users to vote on proposed changes to its terms of service and holding online forums to solicit views on future policies. But in practice Facebook unilaterally decides which content should be highlighted and which should be removed according to its own policies—policies that are not necessarily transparent and that do not necessarily align with existing domestic or international standards. This two-faced policy is grounded on Facebook’s self-perception as a closed community of users, built on trust between Facebook and its users. See Uriel Haran, Doron Teichman & Yuval Feldman, Formal and Social Enforcement in Response to Individual Versus Corporate Transgressions, 13 J. EMP. LEG. STUD. 786 (2016); Kate Klonick, The New Governors; A.E. Waldman, Privacy, Sharing, and Trust: The Facebook Study, 67 CASE W. RES. L. REV. 193 (2016); Taina Bucher, The friendship assemblage: Investigating programmed sociality on Facebook, 14.6 TELEVISION & NEW MEDIA 479-93 (2013); James Grimmelmann, Saving Facebook, 94 IOWA L. REV. 1137 (2009); Michael J. Madison, Social Software, Groups, and Governance, 2006 Mich. St. L. Rev. 153 (2006). For a normative approach to private regulation of the internet sphere, see, e.g., DIMITRIOS KOOKIADIS, RECONSTITUTING INTERNET NORMATIVITY: THE ROLE OF STATE, PRIVATE ACTORS, GLOBAL ONLINE COMMUNITY IN THE PRODUCTION OF LEGAL NORMS 83 (2015). On the impact blockchain technology may have on the shaping of new legal layers aloof from state law, see John Henry Clippinger & David Bollier, The Rise of Digital Common Law An Argument for Trust Frameworks: Digital Common Law and Digital Forms of Governance, ID3 (2012), at https://blog.p2pfoundation.net/essay-of-the-
often entrusted to community members and users’ flags and/or administered by service providers’ staffers, who combine the function of legislators, judges, and executive officials.113

(l) As to finance, let me start with the bottom line: “hard law institutions and instruments play a very limited role in the regulation of finance, especially at the global multilateral level.”114 At the global multilateral level, the International Monetary Fund (IMF) and World Bank do not generally create regulatory standards.115 The World Trade

day-trust-frameworks-and-the-rise-of-digital-common-law/2013/07/01 (outlining the rise of a “digital common law”, that is to say, “a bottom-up, voluntary, user-driven system that establishes context-specific norms for governing a given online community/market”). See also Aaron Wright & Primavera De Filippi, Decentralized Blockchain Technology and the Rise of Lex Cryptographia (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2580664, according to whom blockchain technology “could make it easier for citizens to create custom legal systems, where people are free to choose and to implement their own rules within their own techno-legal frameworks. As such, the blockchain could support and facilitate the deployment of a decentralized alternative to the current legal system—a new digital common law—consisting of an interconnected system of rules interacting with one another in a reliable and predictable way, without the need of any third party institution to enforce these rules” (id. at 40–1 (footnotes omitted)). The same authors underline a parallel between lex mercatoria and lex informatica (that is, the “set of rules spontaneously and independently elaborated by an international community of Internet users, which constitutes today an alternative normative system consisting of a particular set of rules and customary norms arising directly from the limitations imposed by the design of the infrastructures subtending the network” (id. at 46). Indeed, lex informatica might be viewed “as a natural extension of Lex Mercatoria, a complementary toolkit for the regulation of online transactions through the establishment of technical norms, in addition to contractual rules. Just like Lex Mercatoria, Lex Informatica ultimately relies on self-regulation: it is a system of customary rules (or standards) and technical norms elaborated by online users for internal use by community members. The system operates transnationally, across borders, independent of national boundaries and domestic laws” (id. at 46–7 (footnotes omitted)).


Organization’s only commitment that touches on financial services, the General Agreement on Trade and Services (GATS), relates to the treatment of foreign investment by national authorities and does not so much coordinate specific regulatory actions as define the limits of regulatory authority—only the European Union set up what is commonly viewed as supervisory authority in financial services, though its influence is only regional. International financial law is the product of a regulatory division of labor through which semi-private/public-bodies (such as the International Accounting Standards Board, the International Swaps and Derivatives Association, the International Capital Market Association, the International Federation of Accountants, the International Organization of Securities Commissions, the Financial Stability Board, the International Association of Insurance Supervisors), official authorities, and big market actors interact cooperatively with one another. This interplay issues “best practices,” “reports,” “guidelines,” memoranda of understanding, and participants take on commitments that have non-official legal effect, are not binding as a matter of international law, and yet have a powerful regulatory effect on public and private choices across the globe. International financial regulation is indeed “buttressed by a range of reputational, institutional, and market disciplines that render it more coercive than traditional theories of international law predict.”

Anne-Marie Slaughter has described the international financial system as consisting

principles and guidelines are recognized as premises of financial regulatory developments. As to the activities carried out by the World Bank in the same context, see Hassane Cissé, Alternatives to “Hard” Law in International Financial Regulation: The Experience of the World Bank, 106 PROC. ANN. MEETING AM. SOC’Y INT’L L. 320–3 (2012).

116 Brummer, supra note 114, at 627.


118 Chris Brummer, How International Financial Law Works (and How It Doesn’t), 99 GEO. L. J. 257, 284 (2011). The same author underlines how international financial regulation “defies a number of common and indeed foundational assumptions regarding the operation and compliance pull of informal legal obligations … international financial law weakens, and arguably dispels, the general criticism of soft international law as inherently less coercive—and by consequence, less credible—than hard international law … Reputational costs can still be high, even where agreements are informal” (id. at 305).
of “networks” fostering collective problem-solving and innovation through interactions of regulatory peers.\textsuperscript{119} Key to the success of networks is indeed that decision-making is (not vested in the hands of uninformed political elites, but is) “guided by a stable of skilled technocrats who develop shared expectations and trust allowing them to dispense with time-consuming treaties and formal international organizations. Regulators instead execute and rely on less formal instruments that permit them to make rapid responses that keep pace with rapidly evolving financial markets.”\textsuperscript{120} Again, that the agreements are not binding under official law does not detract from the fact that they “are often made with great solemnity.”\textsuperscript{121} The interplay with the background of official law(s) is certainly deeper in the financial community than in the examples illustrated above. But what should be noted is that in the former, absent any geographical, ethnic, or religious ties, one can find a widespread professional commitment and the deep belief to take part in a community of insiders, sharing common knowledge, technicalities, and overall purposes—many regulators “share the same academic and professional experiences, develop deep relationships and a sense of community that help guide the coordination process.”\textsuperscript{122} All this makes the members of this community comply with their own rules, which are considered as the lodestar of their daily professional practices.\textsuperscript{123}

\textsuperscript{119} Anne-Marie Slaughter, \textit{Governing the Global Economy through Government Networks}, \textit{in The Role of Law in International Politics}, Essays in International Law 177, 202 (Michael Byers ed., 2000); compare Riles, \textit{supra} note 114, at 621–2.

\textsuperscript{120} Brummer, \textit{supra} note 114, at 634.


\textsuperscript{123} On the opportunities offered to the financial market and the challenges posed to regulators by the blockchain technology, see, e.g., Philipp Paech, \textit{The Governance of Blockchain Financial Networks}, 80 Mod. L. Rev. 1073–110 (2017); Wright & De Filippi, \textit{supra} note 112.
V. EFFICIENCY, LOYALTY, IDENTITY

Many other field studies—concerning ethnic communities,124 “intentional”125 communities, communities of neighborhoods,126 of


125 “The Fellowship for Intentional Community,” a U.S. nonprofit organization, reporting the existence of more than 1100 such communities in the U.S. only, adopts the following definition of intentional community (www.ic.org/the-fellowship-for-intentional-community): “A group of people who live together or share common facilities and who regularly associate with each other on the basis of explicit common values.” See also Benjamin D. Zablocki, The Joyful Community: An Account of the Bruderhof, A Communal Movement Now in Its Third Generation (1971); Benjamin D. Zablocki, Alienation and Charisma: A Study of Contemporary American Communites (1980); Bary Shenker, Intentional Communities. Ideology and Alienation in Communal Societies (1986; repub. 2011).

126 A field study on a suburban setting of the north-eastern coast of the U.S. (M. P. Baumgartner, Law and the Middle Class: Evidence from a Suburban Town, 9 L. & HUM. BEHAVIOR 3 (1985)) shows these results: a) most grievances have to do with unruly or offensive animals, noise, noxious odors, unsightly or bothersome vegetation (such as untended hedges or weeds), and unsupervised and annoying children (id. at 7); b) recourse to official law to settle or solve these disputes is very low (id. at 10). For other studies on conflict in discreet American communities, see, e.g., Carol J. Greenhouse, Barbara Yngvesson & David M. Engell, Law and Community In Three American Towns (1994); Sally Engle Merry, Going to Court: Strategies of Dispute Management in an American Urban Neighborhood, 13 LAW & SOC’Y REV. 891 (1979).
roller-derby girls,\textsuperscript{127} of stand-up comedians,\textsuperscript{128} the tattoo industry,\textsuperscript{129} as well as employment relationships\textsuperscript{130}—bear out that unofficial law finds

\textsuperscript{127} An analysis of the governance of nicknames used by “roller derby girls” unearthed a pattern similar to those introduced with the other field studies. See David Fagundes, Subcultural Change and Dynamic Norms: Revisiting Roller Derby’s Master Roster, in Creativity without Law. Challenging the Assumptions of Intellectual Property 142 ff. (Kate Darling & Aaron Perzanowski eds., 2017); David Fagundes, Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms, 90 Tex. L. Rev. 1093 (2012) [hereinafter “Talk Derby to Me”]. Although a roller derby skater could conceivably invoke trademark law to remedy another’s infringement of her skating pseudonym, skaters’ rules funnel inter-skater disputes to the self-appointed managers of a private roster of skating nicknames. When resolving disputes among themselves, Fagundes states that the derby skaters “have a particularly strong aversion to law and lawyers” (Fagunder, Talk Derby to Me, supra in this note, at 1138). But when a skater has a dispute with an outsider, such as a moviemaker who has appropriated a roller-derby nickname, skaters’ own rules permit the skater to invoke trademark law (id. at 1129–31).

\textsuperscript{128} See Dotan Oliar & Christopher J. Sprigman, There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy, 94 Va. L. Rev. 1787 (2008): “there are perhaps 3000 working comedians in the United States (exact numbers are not available)” and they refer to their own colleagues “as members of a ‘tribe’”: id. at 1816). Once again, unofficial rules substitute for intellectual property law. Rules elaborated in this professional milieu govern a wide array of issues that generally parallel those ordered by copyright law, namely authorship, ownership, fair use and other exceptions to ownership (id. at 1791). Using the unofficial system, comedians are able to assert ownership of jokes, regulate their use, impose sanctions on transgressors, and maintain substantial incentives to invest in new material. The authors underline that there are “few lawsuits asserting copyright infringement in jokes—and none we could find involving disputes between stand-up comics—and there is also little evidence of threatened litigation or settlements” (id. at 1798). Indeed, what regulates the activity of stand-up comedians is an unofficial property regime driven by a set of enforceable community rules (id. at 1812). The major rule that governs the conduct of stand-up comedians is the prohibition of joke stealing. When it occurs, the aggrieved comedian may impose upon the wrongdoer different types of informal sanctions: attacks on reputation, refusal to deal, refuse to appear on the same bill with a known joke thief (refusal that can be enforced also by that comedian’s friends and allies, such as club owners, agents, managers) (id. at 1817–19). See also Christopher J. Sprigman, Conclusion: Some Positive Thoughts about IP’s Negative Space, in Creativity without Law, supra note 127, at 242, 258–61.

\textsuperscript{129} See Aaron Perzanowski, Owning the Body: Creative Norms in the Tattoo Industry, in Creativity without Law, supra note 127, at 89 ff.


\textsuperscript{130} From our perspective, useful insights into the jagged field of employer-employee relationships may be found in Elizabeth Anderson, Private Government. How
its way through social and economic groups and represents the controlling factor of their activities and of their disputes. In all these groups and the ones surveyed in the previous section, people recognize their own rules as binding, and the latter apply also to the disputes arising within the scope of groups’ self-determined laws—without having recourse to the official circuit of adjudication.

While the lawyers’ legal debate has largely ignored these results, they are often assessed and explained by law and economics scholars as

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131 On the so-called spontaneous legal settings, see, e.g., Reisman, supra note 54, at 417, analyzing “physical, distributional queue: that special social organization with its own unique microlegal system in which people literally ‘stand in line’” (id. at 418). These settings, according to Reisman, “have the complex and significant normative components that are characteristic of law in its conventional usage. … It is appropriate to refer to these microsystems as legal systems because, for all of their informality, there is a rule and an attendant set of expectations about proper subjective and objective responses to norm violation, intimating some sort of system for enforcing the norm” (id. at 419). See also Richman, supra note 29, at 2339; Bryan Druzin, Law without the State: The Theory of High Engagement and the Emergence of Spontaneous Legal Order within Commercial Systems, 41 GEO. J. INT’L L. 559 (2010); Bruce L. Benson, Reciprocal Exchange as the Basis for Recognition of Law: Examples from American History, 10 J. LIBERTARIAN STUD. 53 (1991); Benson, supra note 5, at 646 (highlighting how “reciprocal arrangements are the basic source of the recognition of duty to obey law”); Robert D. Cooter, Structural Adjudication and the New Law Merchant: A Model of Decentralised Law, 14 INT’L REV. L. & ECON., 215; Gunther Teubner, Globale Privatregimes: Neo-spatanes Recht und duale Sozialverfassungen in der Weltsellschaft, in ZUR AUTONOMIE DES INDIVIDUUMS: LIBER AMICORUM SPIROS SIMITIS 437 (Dieter Simon & Manfred Weiss eds., 2000) (underlining how unofficial law-makers are able to meet the need of both hierarchical organization and spontaneous evolution).


132 “The sovereigns of commercial life are custom and reputation, not the law” (Posner, supra note 22, at 218); see also Richman, supra note 29, at 2340; Cooter, supra note 131, at 223; Benjamin Klein & Keith B. Leffler, The Role of Market Forces in Assuring Contractual Performance, 89 J. POL. ECON. 615 (1981).

133 Any cooperative club works under incentives which stem from and are compatible with the beliefs and interests pursued by the individuals within the group, constraining her/him to abide by the rules of the group and enforce them against the violator. See Hadfield and Weingast, supra note 7, at 34 ff.; Edward P. Stringham, Private Governance: Creating Order in Economic and Social Life 22–33, 142–4 (2015).
rooted in a utilitarian Weltanschauung. These views—"the law and economics of private ordering"—tend to use economic criteria to justify and explain (and sometimes praise) unofficial self-regulations, emphasizing especially the role of adjudication efficiencies as compared to the official circuits. For instance, Ellickson notes that "to govern their workaday interactions, members of a close-knit group tend to develop informal norms whose content serves to maximize the objective welfare of group members." Bernstein suggests that the benefits of private norms over formal legal rules are that they reduce the cost and delay of obtaining a court judgment, provide a streamlined process for disputing, and facilitate contracting. Dixit acknowledges that long-term relationships are the most common modes of private ordering, but maintains that they usually are self-enforcing because the immediate gains from behaving opportunistically can be offset by future losses, for opportunism may lead to a collapse of the relationship and therefore to lower future payoffs.

134 Perhaps ignoring or neglecting the above studies, “most scholars characterize unofficial legal regimes as pre-law orders that may serve important social and commercial functions but are readily supplanted when reliable public ordering emerges” (Richman, supra note 81, at 749). They acknowledge the importance of social networks in less-developed economies but often regard them as being unimportant in modern advanced economies and therefore ignore them in that context. The basic idea is that as economies become larger and more globalized, such self-governance must eventually give way to official law-based governance. On this attitude, see also supra, Section 2, notes 32–33 and accompanying text.


136 “Scholars of contract law and civil procedure frequently characterize private legal systems with the same language, and as achieving the same efficiency-driven purposes”: Richman, supra note 81, at 756. Borderline with the obvious is then to note that in assessing the efficiency criterion one should always ask “efficient compared to what?”—to the same market in the same area, country, region? to different markets? to the same theory of efficiency as applied to different case studies? to different theories of efficiency? to theories which include different cultural constraints? and so forth and so on.


138 Bernstein, supra note 88, at 1740–42. See also DE SOTO, supra note 29.

139 DIXIT, supra note 39, at 10–1. Williamson acknowledges that unofficial rules and institutions have “mainly spontaneous origins” and “have a lasting grip on the way a society conducts itself” (Oliver E. Williamson, The New Institutional Economics: Taking Stock, Looking Ahead, 38 J. ECON. LIT. 595, at 597 (2000), but assessing the diamonds market the same author notes that “the appearance of trust among diamond dealers is deceptive…. The organization of
Yet, going beyond a limited view about the nature of social and business relationships, others have highlighted how unofficial legal orderings do not arise (or not only) to economize on administrative and transactional costs or to guarantee potential payoffs. These orderings may and do arise out of idiosyncratic circumstances; they aim at objectives peculiar to the specific group and to the bundle of values and beliefs it lives by. Relation-based unofficial law may thus work well in groups, which are connected by extended family relationships, neighborhood structures, economic networks, or socio-linguistic ties because such links facilitate repeated interactions and good communication. Where individuals repeatedly communicate and interact with one another “[they] learn whom to trust . . . [and] develop shared norms and patterns of reciprocity.” These links may serve many purposes. Among other things, these links provide the contacts this market succeeded because it was able to provide cost-effective sanctions more efficiently than rivals” (Oliver E. Williamson, Calculativeness, Trust, and Economic Organization, 36 J. L. ECON. 453, at 471–2 (1993)).

140 See Marc Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4 (1983). See also Posner, supra note 22, at 171–7; compare Feldman, supra note 29, at 352, and TYLER, supra note 13, at 170 ff.

141 Needless to say, any relationship between the value dimension and the official or unofficial rules (including in the latter the "microlaws" analyzed by Reisman—supra note 54) can only be appreciated taking into account the overall context which produces compliance with the rules.

142 Barak Richman underlines that the sheer utilitarian approach "has failed to develop a theory that accounts for private legal systems' other economic attributes. And any such theory would recognize that these other attributes have more predictive power than adjudication efficiencies". Richman, supra note 81, at 757. See also Aaron Perzanowski & Kate Darling, Introduction, in CREATIVITY WITHOUT LAW supra note 127, at 3. According to Yngvesson, “[c]onventional wisdom and much social science research tell us that people who are involved in continuing relations will handle conflict through procedures which emphasize reconciliation and mutually agreed upon decisions. More formal procedures—typically official government or other public tribunals—are avoided, since their use may escalate conflict and endanger the relationship" (Barbara Yngvesson, Re-Examining Continuing Relations and the Law, 1985 WIS. L. REV. 623, 624 (1985)). See also Landon, supra note 81.

143 ELINOR OSTROM, GOVERNING THE COMMONS 184 (1990). See also TYLER, supra note 13, at 173 (“people value identification with social groups. Such groups provide a source of resources, self-knowledge, self-identification, and social rewards. As a result, people join and take part in many social and work-related groups ... Through these involvements people identify with groups and with their relationship to them, and group members become important determinants of individual attitudes and behaviors ... group behavior cannot be explained simply by reference to self-interest and requires the assumption that group identification is a value of and of itself”).
and information networks, as well as repositories of rules and sanctions, through which concerned people may certainly pursue utilitarian tasks, but on which they may also build reputations and ground identities.\textsuperscript{144} Perseverance in a community, to which a person has become intrinsically committed, may be and oftentimes becomes a matter of his or her identity.

To be sure, individual identities are spread over different layers of affiliation (dictated, as we saw it, by religion, family, professional and economic choices, food view, membership in a community, etc.),\textsuperscript{145} and each of these connections can overlap and be entwined with one or several of the other connections.\textsuperscript{146} These loyalties—even if not always and with different timings\textsuperscript{147}—can be modified and reshaped by social constraints and individual contingencies.\textsuperscript{148} These loyalties may be over

\textsuperscript{144} Bederman, \textit{supra} note 9, at 90 (“group identity will often counsel like-minded individuals in common lines of business to prescribe their own rules of conduct, if for no other reason than to avoid having unwanted norms thrust upon them by outsiders … This demands that there be common (and tailor-made) rules for the formation, construction, and enforcement of particular contracts”).

\textsuperscript{145} “We typically find ourselves in a set of intersecting circles of loyal commitment. In the United States and indeed in virtually every modern culture, we are members of multiple groups that demand our loyalties. A typical American is a member not only of a family but of an ethnic group, a profession or trade, a particular firm, a church or religious community, the alumni circles of high school and university, and perhaps an amateur athletic team or the fan club of a local hockey or basketball team. Add to this list the special loyalties of veterans and the politically active, and you generate a picture of the typical American caught in the intersection of at least a half dozen circles of loyal attachment” (Fletcher, \textit{supra} note 2, at 155). See also Phillip Selznick (with the collaboration of Philippe Nonet & Howard M. Vollmer), \textit{Law, Society, and Industrial Justice} 271–3 (1969); Bernard Gert, \textit{Loyalty and Morality}, in \textit{NOMOS LIV. LOYALTY} 3, 6 ff. (Sanford V. Levinson, Joel Parker & Paul Woodruff eds., 2013). More generally, Amartya Sen, \textit{Identity and Value. The Illusion of Destiny} (2006); \textit{Identities, Affiliations, and Allegiances} (Seyla Benhabib, Ian Shapiro & Danilo Petranovic eds., 2007); Martha C. Nussbaum, \textit{Women and Human Development: The Capabilities Approach} (2001).

\textsuperscript{146} “The complexities of law cannot be reduced to a single formula. … the law is not simply something in the realm of ideas: for the ideas are applied in and to social practice, and are enforced by authority. We therefore need to study not merely the ideas of the ‘specialists’, how they identify and develop their bodies of ideas, but also the relationship between the ‘ideas’ and the ‘authorities’, and the relationship between the community and those it regards as authorities” (Michael Lobban, \textit{Sociology, History and the ‘Internal’ Study of Law}, in \textit{Law, Society and Community} supra note 11, at 39, 53).

\textsuperscript{147} On personal identity over time see generally Derek Parfit, \textit{Reasons and Persons} esp. Part Three, Chapters 10 to 14, 199 ff. (1984).

\textsuperscript{148} This is one of the reasons why one can criticize the utilitarian approach that sees unofficial law as ill-suited to pursue short-term strategies (as opposed to the benefits it might
time remodeled within the group through the different comparisons that, in practice, the person makes or is induced to make between his/her own preferences, the interests, and the values at stake. They may be dependent on the context, the intensity of membership, or on the interests pursued in the given social and economic settings. Yet, albeit mobile and having a varying range of action, these affiliations express needs, orient the choices of individuals and groups, demand or postulate representativeness, make people abide by rules respectful of their identities, and circulate information about those needs and choices and about the expected representations and rules. Of all this an easy to detect and a paradigmatic expression may be found in close-knit communities, to which loyalty is integral, but many other relationships and associations seek to encourage loyalty as an aspect of affiliation or membership: religious congregations and families expect it, organizations often demand it (and countries do the same). Loyalty obligations may then be considered as products of our sociality, of the

bring to repeated players engaged in long-term strategies whose returns may be maximized within the concerned community). See Richman, supra note 24, at 148, 151 ff. and id. for the references to the debate. To business entities or private individuals, short-term strategies may be conducive to membership in a community abiding by unofficial law without putting into question either unofficial rules themselves or the different (long- or short-term) strategies pursued by the same entity/individual in different settings or in different time frames.

149 See also Posner, supra note 22, at 8, 213. The above is relevant also to evaluate whether any assessment or analysis of loyalty claims is based on pieces of identities thrust into one’s past or is it the output of the dynamism of life experience and therefore exposed to change over time.

150 “Thus we can speak of state law, religious law, or of traditional law, when state, religion, or tradition refer to the ultimate basis on which the validity of the legal conceptions is grounded and which unifies the set of sources of valid law. Of course, legal systems vary in the degree to which the validity and sources of law have become subjects of theorizing and systematization … legal phenomena not only consist of general rules, concepts, principles and procedures that are external to social practices and institutions. They are also embodied in social relationships and decisions …. It is obvious that, however detailed in its further definition, the concept of law cannot be more than an umbrella concept, an abstract cover term for a large variety of social phenomena of legal character”: von Benda-Beckmann, Citizens, supra note 18, at 8. See also Dan Danielsen & Karen Engle, Introduction, in AFTER IDENTITY. A READER IN LAW AND CULTURE xiii (Dan Danielsen & Karen Engle (eds., 1995)).

151 The “imperfectly achieved systems of law within a labor union or a university may often cut more deeply into the life of a man than any court judgement ever likely to be rendered against him” (FULLER, supra note 19, at 129).

self-realizing significance of bonds that come to be constitutive of pieces of our identity.\footnote{153}

This is why, on the top of different utilitarian reasons, general notions of reciprocal fairness and cooperation, mutual trust, common values, expectations, and beliefs may and actually do motivate participants in these groups. The legal upshot is the compliance with sets of rules that are grounded on the credibility of each one’s commitments to her self-interest and/or self-perceived identity as a member of a personal, business, professional community, or of a defined sociodemographic group, with which one shares what matters in the given life setting.\footnote{154} Abiding by their own law allows people to be loyal to their notions of honor and to their views of what they are and are doing, and assures them that they will preserve the opportunity to engage in future transactions, maintain a trustworthy reputation, and remain in good community standing with no (or very limited) need to resort to official law devices.\footnote{155}

VI. LAW OF STRANGERS

Bearing in mind all this it becomes possible both to shorten the distance that may keep us from understanding the legal dimensions our societies live by and to clear the dust of rhetoric about the legal monotheism wherefrom we customarily observe the legal world.

\footnote{153}{"The bedrock idea in group loyalty is not relationship but membership … Membership makes one an insider; it confers identity within a matrix of relationships … Membership crystallizes in two stages: entry and identification. … Whether entry is voluntary or involuntary, it has an objectified form, an institutional shell. … Without doing more, one remains a member of the group that treats one as a member" (FLETCHER, supra note 2, at 33–4). See also RICHMAN, supra note 24, at 60. On the relationship between identity and unofficial rules, in the economic theories, see AKERLOF & KRANTON, supra note 49.}

\footnote{154}{"Persons obey laws because they fear not obeying them, or because obeying laws pleases them for some other reason. They can disobey laws and still consider themselves rational … persons fulfill duties out of love, not because they wish to be rational" (Jacobson, supra note 6, at 892).}

\footnote{155}{Richman, supra note 93, at 393–4, 409; BIEDERMAN, supra note 9, passim and at 179 f. See also Bernstein, supra note 88, at 1762 (“one of the more important ways that cotton industry institutions create value is by providing a social and institutional transactional framework that effectively constrains opportunism and promotes commercial cooperation in its shadow”). Indeed, “social and reputational sanctions, are usually sufficient to induce merchants to promptly comply with arbitration decisions” (id. at 1738).}
Official (private) law and its adjudication circuits appear to be law and circuits designed to control relationships and disputes between strangers, i.e., people who (may know or not know each other, but) do not share the same group identity, do not pursue the same interests, don’t necessarily trust each other, or not enough to be certain that one’s own values, beliefs, and priorities might be plainly understood and shared by the others. To put it the other way around, a stranger—for the purposes of the present analysis—is not one who (albeit far away geographically and/or unbound by familiar, religious, or ethnic ties) is and feels herself part of a given group and is willing to abide by the latter’s law.

In principle, between strangers there is no steady certainty of a common meaning to be given to things, qualities, behaviors, and expectations, and this is precisely why any society, which comprises different communities carrying on diverging values, interests, and objectives, needs official law and third party impartial enforcement regimes. We need official law because several independent systems of

156 According to POSNER, supra note 22, at 150, “parties to a contract are rarely strangers to each other. In almost all contracts, one party or both parties care deeply about their reputations.” This is a notion that is contradicted by the same author when he illustrates how parties (not strangers one to the other, in his terms) cannot solve a simple problem of interpretation of “course of dealing” between them (id. at 165–6)—which is what indeed occurs between strangers, while between members of the communities surveyed in this paper would not. Further, it is debatable to identify reputation as a driving factor of social behavior (as Eric A. Posner does across the whole book) and at the same time consider it as independent from the actual setting in which it operates. To say the very least, there certainly is a “reputation” to be gained and consumed within specific groups, and a “reputation” to be gained and consumed in the world at large.

Equally debatable, but less relevant to the present analysis is the emphasis placed by Ellickson (e.g., ELLICKSON, supra note 12, at 55, 69–70, 134, 149, 156–7, 164, 168, 179–80, 234–5, 247, 271, 273–5, 284) on the necessity that the social/economic relationship be “continuous” for unofficial law to take root. Suffice it to note that the studies on micro-legal systems carried out by Reisman (see supra, notes 54 and 131) seems converting that requirement in only one of the possible conditions, upon which unofficial law may unfold.

157 Nor is there any certainty that opportunistic behavior can come at low cost: Hadfield & Weingast, supra note 7, at 32; Posner, supra note 22, at 157–60, 213–4. One can further note that strangers too can interact one to the other having recourse to or being entrapped with unofficial rules. See Reisman, supra note 51; Michele Williams, In Whom We Trust: Group Membership as an Affective Context for Trust Development, 26 ACAD. MGMT. REV. 377 (2001) (showing how individuals may tend to trust strangers if they share the same important in-group identity). See also RICHMAN, supra note 24, at 139.

158 A totally different story is how and how much Americans have recourse to legal institutions (lawyers, courts, and other legal actors). On the top of considering, for example,
laws involve perforce ambiguities about the boundaries between them, and State law may remove these ambiguities, supplying systematic means of resolution for the conflicts arising in the different areas.\textsuperscript{159} We need official law to dismantle unjustified privileges, to counter possible distorted strands of multiculturalism,\textsuperscript{160} as well as racial and other forms of discrimination (including those that may take shape when a member of a group ruled by unofficial law is forced to exit from that group). We need official law because we live in societies where a good number of interactions and conflicts occurs between people, who are strangers to each other. As Friedman and Hayden put it, “strangers protect us, as police, or threaten us, as criminals … Strangers teach our children … When we travel by bus or train or plane, our lives are in the hands of strangers. If we fall sick and go to the hospital, strangers cut open our bodies, wash us, nurse us, kill us or cure us. When we die, strangers lower us into the earth.”\textsuperscript{161}

This does not mean, it goes without saying, that there is less scope for us to practice our “strangers-free” ways of life.\textsuperscript{162} Despite our dependence on strangers, we have families, we have friends, and we

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\textsuperscript{161} FRIEDMAN & HAYDEN, \textit{supra} note 19, at 300–1.

\textsuperscript{162} On the contrary, one witnesses “increasing demands for loyalty within smaller and smaller units of group identification. The intense need to belong, the craving for reciprocal attention and devotion, the quest for meaning in group action—all of these ever-present yearnings put pressure on our loyalties. And these pressures, in some contexts, move loyalty from the minimal condition of non-betrayal toward the opposite pole of maximum devotion” (FLETCHER, \textit{supra} note 2, at 60).
have strong personal ties to individuals and groups. All of us spend much of our lives in tiny groups, in our personal sphere. Inside our groups, unofficial law rules.

Discounting the misalignment of available data, one can roughly estimate that the overall value of the domestic markets controlled by unofficial rules of dispute adjudication in (only) some of the fields surveyed in this paper—i.e., kosher food, diamond, cotton—amounts to about 70 billion USD per year. Next, one can consider (taking into account also the substantive side of the legal picture) the number of U.S. households composed of two or more people, that is, over 90 million, and the percentage of U.S. people that rely most on religious teachings and/or beliefs on questions of right or wrong—figures vary, according to the generational cohorts, between 23% and 41%, with an average of 33% of U.S. population.

What are these data about? They are about the fact that if we have lost the experience of an all-encompassing inclusive community, in Marc Galanter’s words, “it is not to a world of arms-length dealings...
with strangers, but in large measure to a world of loosely joined and partly overlapping partial or fragmentary communities. In fact, given that we live in societies made up of minorities (larger or smaller), where common moral bonds across ethnic, religious, and social groups are bound to be looser and looser, the recourse to group/communitarian dimensions is increasing. So too is the role played in the overall legal scenario by unofficial laws grounded on group/community values and interests, and on our appraisal of what we are, and of what we are doing.

VII. INTERSECTIONS

To try to give graphic order to the multifarious legal dimensions we surveyed so far, one can resort to the set theory, according to which—for the purpose of this paper—different sets may be formed from the bodies of law satisfying the defining conditions I mentioned at the beginning of this paper. To these laws, every group or individual can express a degree of loyalty that is a variable of the structure and dynamism of their social, economic, personal identities, and activities. We may have stand-alone sets of laws regulating specific activities and the disputes concerning the application of these laws, or we may have sets of laws intersecting other legal sets. Either because one set relies on a different set to have the former’s own rules supported or

172 “Social norms and legal rules solve similar problems by different means . . . . Like laws, social norms help coordinate social behavior. To the extent that Americans live in the grips of norms of cooperation, which pervasively encourage people to do their share by contributing small amounts of time or labor to projects that can succeed only when a large majority makes such contributions, rights claims do not even arise” (STEPHEN H. HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS. WHY LIBERTY DEPENDS ON TAXES 168–9 (1999)). See also Cass R. Sunstein, On the Expressive Function of Law, 144 U. PENN. L. REV. 2021, 2029–30 (1996).

173 Even Hartian and Dworkinian theories—it has been noted—could be adapted to understand unofficial law dimensions, “the ‘officials’ who play such a major role in Hart’s concept of law may not need to be state officials; and the ‘community’ that creates its own law in Dworkin’s interpretive theory does not need to be understood (as Dworkin understands it) as the political community of a nation state”: Roger Cotterrell, Does Legal Pluralism Need a Concept of Law?, QUEEN MARY UNIVERSITY OF LONDON, SCHOOL OF LAW. LEGAL STUDIES RESEARCH PAPER NO. 46/2010, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550176, 5–6. See also (on Hart) Waldron, supra note 18, at 135, 139; SELZNICK, supra note 145, at 5; Lobban, supra note 146, at 48–9.

174 See supra, Section 1.
enforced by the latter’s rules and apparatuses, or because the intersection takes place out of the different affiliations the members of a group may express in the course of their social experiences. Needless to say, many other forms of interaction can take place, the foregoing being simply a picture taken from the survey carried out in this paper. But what has to be noted is twofold: that the borders between legal sets are mobile over time as are the memberships to the legal sets themselves, and that, considering the movements of law-users between official and unofficial laws, one can grasp the dynamic nature of the legal spaces and of their (usually part-time) inhabitants.

Keeping in mind this dynamic, at the center of the stage one can place the official law adopted by the State and its branches, implemented by trained specialists, taught at the law schools and enforced by state apparatuses and public courts. Around this island, one finds different sets of rules. There are sets of unofficial rules controlling some matters, and the attendant possible disputes arising within the ordinary lives of the groups (families, rural communities, such as those studied by Ellickson and others, and settings such as those analyzed by Reisman and Weyrauch). Other sets of rules are partially different not so much as they are adopted by socially compact groups as because they purportedly exclude (or implicitly consider totally irrelevant) any role of official law and its courts (the latter is the case illustrated by religious and “intentional” communities). A third set is given by unofficial laws intended to solve disputes arising within the groups without having recourse to State law and apparatuses—while substantive rules may directly or indirectly rely on official law (examples come from the

175 Dynamic sets make sometimes law-users be both here and there, in the position assigned and arrayed by their own identity and activity.

176 See supra, Section 4 (d) and the works of Engel and Landon cited at note 81.


178 See supra, respectively, Section 4 (b) and note 125. On the “commerce between co-religionists who intend their transactions to adhere to religious principles or to pursue religious objectives,” see in general Michael A. Helfand & Barak D. Richman, The Challenge of Co-Religionist Commerce, 64 DUKE L. J. 769, at 771 (2015).

179 One could add to the overall picture the large world of trade and private associations not included in the above survey. According to Richman (Richman, supra note 81, at 754), a number of common features typify trade-associations’ private legal systems. First, the dispute solving mechanisms “are highly developed and comprehensive, employing fellow merchants as
studies on Kosher labels, diamonds, cotton, grain, and feed markets, as well as by other business communities, such as those surveyed by Macaulay, the social media and the digital and financial communities.\textsuperscript{180}

All these are unofficial legal frameworks where substantive and/or adjudicatory rules are generated by the concerned community, internalized by the participants, and enforced by diffuse social pressure or ad hoc dispute solving mechanisms.\textsuperscript{181} Of course, all unofficial legal arbitrators, relying on specialized law, and using expedited procedures.” These systems “invoke privately crafted substantive and procedural rules that are tailored to the needs and common concerns of disputing merchants” (\textit{id.}). Second, these dispute solving systems “tend to assume exclusive authority over all industry disputes. Not only do all merchants have access to arbitrators to resolve any dispute with a fellow merchant, merchants are also prohibited from seeking redress in alternative venues, including state-sponsored courts” (\textit{id.}). The same author (RICHMAN, supra note 24, at 79) highlights how trade associations “that function as brokerages, including the New York Stock Exchange, exhibit self-governance traits … many of the same economic traits as stateless commerce, and it is no surprise that stateless features frequently appear in each.” See also Bernstein, supra note 100, at 1805, note 154, for a long list of US trade associations, which recorded their trade rules.

\textsuperscript{180} The world of arbitration and ADR mechanisms also may fall within this set. People who resort to these devices may be part of a business association where contracts include an “ordinary” arbitration clause, or a family trying to set up a divorce agreement (see Scott, supra note 61, at 1923 ff.; Ted Schneyer, \textit{The Organized Bar and the Collaborative Bar Movement: A Study in Professional Change}, 50 ARIZ. L. REV. 289 (2008)). They use arbitration or ADR to have their disputes adjudicated outside the public courts and via the application of rules (that can be official or unofficial) they think better suited to their needs. But they submit their claim to an ADR procedure or enter arbitration agreements with the confidence that the decisions rendered are enforceable or challengeable in State courts. Thus, these mechanisms are built on default rules of official law and, albeit in the background, rely on State-sponsored coercion.

This is a legal framework that is often depicted as operating “in the shadow of the law” (i.e., in the legal space where concerned actors understand and rely on the State law background—the term allegedly comes from Robert Mnookin & Lewis Kornhauser, \textit{Bargaining in the Shadow of the Law: The Case of Divorce}, 88 YALE L. J. 950 (1979)), as opposed to “order without law” settings, where concerned actors abide by their own rules without relying on, or simply ignoring any bright or shadowy official law. A summary of the debate on this specific point can be read in RICHMAN, supra note 24, at 3–10. I do not subscribe to this dichotomy, though, for the very simple fact that it does not fit in my theoretical framework, according to which the absence of official law can by no means suggest the absence of law.

\textsuperscript{181} Galanter, supra note 39, at 18. See also MAX WEBER, \textit{ON LAW IN ECONOMY AND SOCIETY} 18–9 (Max Rheinstein ed., transl. by Max Rheinstein & Edward Shils, 1954), stressing how the typical means of coercion applied by private organizations against refractory members is exclusion from the corporate body and its tangible or intangible advantages. Hadfield & Weingast, supra note 159 at 3, speak of “decentralized collective punishment”, by which they mean “punishments delivered by ordinary individuals—not officials—to penalize rule violations. Such punishments include criticism, social ostracism, commercial boycott,
sets may intersect the central island when official law is seen as best suited to accommodate specific disputes (such as those arising out of scarce resources in rural communities), or whenever the actual or potential recourse to official law may serve as a backstop, or a threat to react against the most serious deviations from the former, or to give solution to “exit from the group” problems. What is to be noted, yet, is that the latter situations (egregious violations of group’s rules, exit issues) are precisely those where one, who departs from unofficial rules, becomes—or is deemed to have become—a “stranger” to the rest of the group. She or he is someone who can no longer be trusted, who is not interested in good standing within the given group, who no longer shares the same platform of beliefs and priorities that made her/him part of the group itself.
To put the foregoing in simple terms: the more strangers, the more official law; the fewer strangers, the less official law. But from one end to the other of the ideal spectrum, there exists a multitude of groups, communities, and networks, whose laws control markets worth dozens of billions of USD and regulate lives, business activities, and disputes of dozens of millions of people, linked by bonds of any sort, by explicit or tacit rules of reciprocity. 186 This is a spectrum where one can find

186 See supra, Section 6 and notes 165–70. Marc Galanter has observed: “[i]n the American setting, litigation tends to be between parties who are strangers. Either they never had a mutually beneficial continuing relationship, as in the typical automobile case, or their relationship—marital, commercial, or organizational—is ruptured. In either case, there is no anticipated future relationship. In the American setting, unlike some others, resort to litigation is viewed as an irreparable breach of the relationship” (Galanter, supra note 140, at 24–5). In Donald Black’s words, “[l]aw varies inversely with other social control” (DONALD BLACK, THE BEHAVIOR OF LAW 107 (1976)). According to Hirschman, the fundamental feature of loyal behavior is “the reluctance to exit in spite of disagreement with the organization of which one is a member”: HIRSCHMAN, supra note 2, at 98.
varying degrees of self-regulation, varying degrees of congruity with the official law, and varying degrees of reliance on the support provided by official institutions and adjudication circuits. They may be also seen as semi-autonomous social fields\textsuperscript{187} that generate rules internally and that are also vulnerable to rules, decisions, and other forces emanating from the official legal world.\textsuperscript{188} But the overall landscape is also marked by the action and interactions of official and unofficial systems of social control.\textsuperscript{189} On the one hand, as we said, the availability of official law and judicial adjudication may impinge on the legal dynamics of communities and networks. On the other hand, the backbone of values and legal cultures that forges unofficial rules and means of dispute resolution may in turn affect the way in which official law is interpreted and administered.\textsuperscript{190} From the latter perspective, the most obvious examples come from how longstanding and widespread commercial practices have shaped official commercial laws, or from how major private and semi-private financial law rule-setters constrain official lawmakers.\textsuperscript{191}

\textsuperscript{187} Resorting to the well-known definition by Falk Moore, supra note 55, at 719.

\textsuperscript{188} Falk Moore, supra note 55, at 744 (“a court or legislature can make custom law. A semi-autonomous social field can make law its custom”). See also SCHAUER, supra note 19, at 144; Bederman, supra note 9, at 176, stressing that custom remains “a popular mechanism for law-making. As transmitted to us within the Western legal tradition—through Roman law, the ius commune, civilian systems, and English common law—customary regimes still retain their inchoate and amorphous character as ‘bottom-up’ law-making.”

\textsuperscript{189} Fuller, supra note 54, at 2 (“[L]aw and its social environment stand in a relation of reciprocal influence; any given form of law will not only act upon but be influenced and shaped by, the established forms of interaction that constitute its social milieu”). See also SCHAUER, supra note 19, at 145 ff., 149 ff.

\textsuperscript{190} Falk Moore, supra note 55, at 744–5 (“The ways in which state-enforceable law affects these processes are often exaggerated and the way in which law is affected by them is often underestimated”). On these phenomena in general, see the observations of Richard L. Abel, Introduction, in THE POLITICS OF INFORMAL JUSTICE: COMPARATIVE STUDIES II 1–13 (Richard L. Abel ed., 1982); Bederman, supra note 9, passim and at 68 ff., 80 ff.; G. Helmke & S. Levitsky, Informal Institutions and Comparative Politics: A Research Agenda, KELLOGG INSTITUTE FOR INTERNATIONAL STUDIES, WORKING PAPER NO. 307 (2003), https://kellogg.nd.edu/documents/1600. According to John Shuhe Li, Relation-based versus Rule-based Governance: An Explanation of the East Asian Miracle and Asian Crisis, 11 REV. INT’L ECON. 651, at note 5 (2003), “[r]elation-based government and rule-based governance represent a theoretical dichotomy. In reality, most governance systems contain elements of the two extreme forms.”

\textsuperscript{191} On the top of the authors quoted supra, notes 16, 114, 121, see Eric Helleiner, Regulating the Regulators. The Emergence and Limits of the Transnational Financial Legal Order, in TRANSNATIONAL LEGAL ORDERS 231, 249 ff. (Terence Halliday & Gregory Shaffer eds., 2015);
VIII. LESSONS

A summary of what can be learnt from the foregoing could run as follows. There are three lessons in order. The first is a general caveat. Notwithstanding the hegemony of official law in the lawyers’ debates, we all live, as main actors or simple bystanders, surrounded by disparate sets of rules of different origin. The low visibility of these unofficial legal sets in the mainstream debate should not obscure the significant effects they can have on social order—and on the efficiency of the concerned markets and dispute-solving mechanisms. To be sure, one of the most serious theoretical difficulties is the dualistic, adversarial, dichotomous either/or way the issue is presented (law/lawlessness, primitive/modern). By contrast, unofficial law does not exist independently of people’s interests, beliefs, and behaviors.
while official rules may not be in one-to-one correspondence with values and priorities of the whole or of the vast majority of the members of the concerned societies. This is why oftentimes official law may be best understood only in light of the unofficial environment that surrounds and deeply affects its acceptance and functioning. On the one hand, as we saw it, unofficial law may rely on and sometimes needs official enforcement of its rules and agreements. On the other hand, the enforcement of official law may rely on and sometimes needs unofficial means of social control to achieve the (official) law purposes. This is not only the case of people intervening to avoid a wrong—a robbing, killing, bribery—out of social (or religious, or otherwise customary) duties perceived as compelling, or of people complying with traffic law absent any chance of having a potential damage caused by the infringement of

196 According to Fletcher, "[t]he state should not force people to betray their commitments to their friends, lovers, family, community, or God" (FLETCHER, supra note 2, at 79; see also at 79–100, 151–75). In Ellickson's view, "[w]hen household participants are intimates enmeshed in a long-lived relationship … formalization usually is a mistake. Attorneys who contribute to the legalization of home relations typically not only waste the fees that their clients pay them, but also debase the quality of life around the hearth" (ELLICKSON, supra note 60, at 135).

197 Referring to its notion of “microlaw” (see supra note 54), Michael Reisman notes that it “warrants study for a number of reasons. It may shed light on how legal systems that are not formally organized operate, and it may provide other insights into general properties and operations of law that may clarify our understanding of conventional legal systems. ... These sorts of inquiries enable the inquirer to assess the effects on people of the aggregate of the legal systems under which they live. When such assessments yield discrepancies between what people want and what they can expect to achieve, macrolegal changes may not be effective” (REISMAN, supra note 53, at 3–4). See also Kornhauser, supra note 137, at 672 ("any understanding of the power and limits of law must include an appreciation of how legal rules interact with informal social norms. ... To the extent that [social norms] demand behaviors contrary to legal norms or provide more appropriate resolutions of disputes, they at least will influence and possibly control the behavior that the law seeks to regulate. Both social scientists seeking to understand individual behavior and policy makers seeking to change it ignore these informal norms at their peril"). Incidentally, this is a lesson in badly need to be learnt by scholars and institutions dealing with the relationships between law and development. See, e.g., LAN CAO, CULTURE IN LAW AND DEVELOPMENT. NURTURING POSITIVE CHANGE (2016); Mauro Bussani, Geopolitics of Legal Reforms and the Role of Comparative Law, in COMPARISONS IN LEGAL DEVELOPMENT. THE IMPACT OF FOREIGN AND INTERNATIONAL LAW ON NATIONAL LEGAL SYSTEMS 235 (Mauro Bussani & Lukas Heckendorf Urscheler eds., 2016); MAURO BUSSANI, EL DERECHO DE OCCIDENTE. GEOPOLÍTICA DE LAS REGLAS GLOBALES 60, 79 ff., 243 ff. (2018). “Unwritten law is layered, just as written law, and can be found any place where a group gathers to pursue common objectives” (Weyrauch, Unwritten Constitutions, supra note 177, at 1212).
the law pursued before a tort law judge. This is also the case, for instance, when the same kind of deep internalization of official law rules by the members of the society makes it possible that the departure from these rules—e.g. a breach of contractual promises or the infringement of trademark or copyright—exposes its author within her/his activity field to a loss of reputation that is perceived or deemed as much more harmful than any possible lawsuit.

The second lesson concerns the role of State law in the overall legal landscape. We have seen that in most of the legal settings surveyed in this paper State law mainly plays the role of the backstop or of the gatekeeper, controlling the variety of “exit” issues that may arise out of the dissatisfaction of the single participant with the group or vice-versa. Two remarks are then in order. One simply aims to underline the limited room to maneuver available to the State in the fields controlled by unofficial (private) laws. Indeed, besides keeping the gate open to the claims that find their way through the judiciary, besides supplying the overall legal frame to the concerned activities and practices (that may include nudging policies alongside with default and mandatory rules), it is unlikely and hard to imagine that—now, as in the long past that preceded the rise of the almighty legislator—the State could pursue any other effective role. On the contrary, it may be argued that if people

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199 As we have seen supra (Sections 4 and 5), this is what happens with the breach of unofficial laws as well.

200 Thereby administering disputes between those who have become strangers one to the other.

201 See Richard H. Thaler & Cass R. Sunstein, Nudge: Improving Decisions About Health, Wealth and Happiness (2008); Cass R. Sunstein, Why Nudge? The Politics of Libertarian Paternalism (2014). See also Cass R. Sunstein, The Ethics of Influence: Government in the Age of Behavioral Science 37–8, 39 (2016) (“It is true and important that some default rules are a product not of government decrees, but of tradition, customs, spontaneous orders... We might be comfortable with any nudging that reflects ‘customs and habits’ but deeply suspicious of any nudging that displays no reverence for them”).

202 Considering the above multifaceted legal dimensions also means bearing in mind that not all sets of legal rules are like clothes that can stripped off the concerned social body as (and when) desired. To highlight this phenomenon, it would be impossible for France or England to become, respectively a Common Law and a Civil law system overnight. To be sure, not all legal sets have a degree of resistance comparable to that of the civil law tradition in France or the Common Law tradition in England. But the point is that for any legal set strongly embedded in customs, values, and traditions, attempts by political authorities to affect them or to integrate
can be made to act properly because of unofficial law, rather than because of fear of official law’s sanctions, then the desired behavior could be obtained at less cost: “judges, lawyers, courthouses, and the rest of the apparatus of the legal system are expensive. If people conformed to desirable social norms, then these costs could be avoided.”

The second remark goes to the core of the enforcement legal mechanisms at work in our societies. Under official law, exit issues (viz., issues between those who have become strangers one to the other) potentially give rise to claims for money (usually damages for losses, for tainting one’s reputation, for breach of explicit or implied terms of a contract). As is well known, however, not all these potential claims turn themselves in actual claims channeled through a lawsuit. People may be unaware that their claims may give rise to a legal remedy, people may think that their claims are de minimis, or that it is not socially acceptable for them to pursue their interests further. For instance, victims with ongoing social or economic relationships with their

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204 Following the line of reasoning and language introduced by Hirschman (see HIRSCHMAN, supra note 2) to “voice,” as an alternative to “exit” (and implying attempts to improve the relationship through communication of the complaint, or proposal for change), is an option that may lead in the long run (and in families and intentional communities—for the latter, see supra note 125—also in the short run) to a modification of the group’s rules, without necessarily discontinuing individual’s loyalty to the group or paving the way to a legal dispute.

wrongdoers might not be at ease with the idea of vindicating their rights publicly against their counterparts (which may be often the case in the groups surveyed in this paper). People may also be suspicious as to the fairness of the judicial system, or they may lack the resources necessary to fight back.206 Some, however, do complain, typically to the human agency they think is responsible for the losses they incurred. Many of these complaints are satisfied in whole or in part because the concerned human agency straightforwardly assumes responsibility for what happened, issues an apology, and/or voluntarily pays compensation or restores the situation existing prior to the wrong—either personally or through her insurer. In all these cases, the matter may be resolved without ever reaching the courthouse. But if the complaints are not redressed, they become legal disputes that go into the hands of lawyers. Among the disputes that reach these actors, some are abandoned, and some end up in a courtroom—in fact, as is well known, many filed cases result in settlements, and only a small fraction of them reach the trial stage, eventually becoming decided cases.207

Such a picture prompts several considerations,208 but from the perspective of this paper it makes clear that even many claims falling under the umbrella of official law (and of its circuits of adjudication) ultimately remain outside of it. Reasons are manifold, but at least in part they are to be found in the fact that a great number of (official law-grounded) potential claims are caught by unofficial mechanisms of conflict avoidance and dispute settlements, and are administered daily outside of courts, outside the reach of State apparatuses.209 But this also

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208 See, e.g., Bussani & Infantino, supra note 28, at 89–90.

209 Insurance companies alone absorb a substantial fraction of potential tort law controversies, providing routinized and widely available procedures for dealing with compensation problems (see, among many others, Parchomovsky & Stein, supra note 206, at 1352–55; Richard Lewis, Insurance and the Tort System, 25 LEGAL STUD. 85, 88 (2005); Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System—And
prompts one to realize how the set of rules, notions, and procedures that are produced by official legal actors may only provide the starting point of any research about the law in force, the disputes managed and the notions of justice circulating in a society. The rest lies somewhere else, before and beyond the façade of official rules and official adjudication mechanisms.

The final lesson is that overlooking the sets of unofficial laws we leave behind us a piece of the real legal world that survived to our ignorance in the past and will outlive our current disregard. Unofficial law asks lawyers to stop, look, and listen as they approach the boundary of the official legal system. What is enmeshed in unofficial laws are in fact the multi-faceted fabrics of our society, the different existing views of looking at ourselves and the others, the manifold ways of unfolding our loyalties, our identities, and our professional, social, and cultural selves. If we keep looking down on the legal offspring of all this or

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Why Not?, 140 U. PA. L. REV. 1147, 1213 f., 1222 f. (1992). But many cases do not even reach insurance companies. Even when insurance coverage is available, claims may not mature, or disputes may be abandoned or settled (before they enter into any formal level of complaint) according to unofficial rules and mechanisms on how to redress injuries. See the works cited supra note 205.

210 Falk Moore, supra note 55, at 729 (“many of the pressures to conform to “the law” probably emanate from the several social milieu in which an individual participates. The potentiality of state action is often far less immediate than other pressures and inducements”) and at 743 (“The law (in the sense of state enforceable law) is only one of a number of factors that affect the decisions people make, the actions they take and the relationships they have. Consequently, important aspects of the connection between law and social change emerge only if law is inspected in the context of ordinary social life”).

211 “[L]aw belongs to society before it belongs to the state. The modern era had reduced the law by making it a province of the state and it [is] now the time to return it to society’s embrace”: GROSSI, supra note 7, at 141. Should we take unofficial law seriously, we could also question whether we have to start with teaching unofficial law(s) in our Schools. We could do it including the topic in some “Law & …” course, or we could expose our students to the different dimensions of private law in ad hoc courses focused on the nature, inner dynamics, and actual functioning of non-State legal sets. Both ways we would provide students with a reservoir of knowledge that—it may be—is not going to swell their wallet (in the short run) but may certainly enrich their critical approach to the law and its multiple dimensions, as well as allow them to approach global legal phenomena with a less Western-centric naïve attitude.

212 Arthur J. Jacobson, supra note 35, at 2237. See also id.: “Only regulatory law, such as criminal law or administrative regulation, looks over the boundary to transactions on the other side”, the other transactions are treated by the official legal system “over the boundary in a live-and-let-live fashion, as if they were in a legally unregulated condition, and as if the unregulated condition has no effect on its norms”.

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adopting a denial or accommodation strategy,\textsuperscript{213} we miss a cognitive dimension of the law, whose loss, among other things, should urge one to define herself not as lawyer, judge, or legal scholar, but as State-law lawyer, State-law judge, State-law scholar, and nothing more. This is one of the fallouts the battle of definitions about “what is law” carries with itself. Searching, debating, and setting borders functional to institutional arrangements that need to keep clearly separated State law from the rest, has proved successful in the last two/three centuries and is a culturally legitimate attitude. The latter’s matrix should be disclosed, though. It is grounded on a series of (neither transcendental, nor immutable, but) historically construed notions,\textsuperscript{214} and the refusal to acknowledge it acting as the ministers of a legal monotheism reveals nothing but a path-dependent, all-Western-centric, and profitable (also in view of preserving an intellectual and professional status quo)\textsuperscript{215} way of looking at the “law.”

Taking stock of the foregoing also explains why a pluralistic, interdisciplinary perspective on law is much needed in order to seize the ways the laws both reflect and structure human relations. Such a perspective would call into question common views of official and unofficial law, connecting mainstream visions about law within the broader social contexts where laws and justice live,\textsuperscript{216} and unveiling the different kinds of loyalties that underlie and support the choices of official and unofficial law mechanisms and actors. To delve beyond conventional wisdom and to better understand the legal dimension through the cultural, social, and professional frameworks in which the laws operate and are embedded, would be both this perspective’s promise and challenge.

\textsuperscript{213} See supra, Section 2.

\textsuperscript{214} See also Tamanaha, supra note 44 at 213.

\textsuperscript{215} See supra Section 2 and note 46. See also Anthony Ogus, The Economic Basis of Legal Culture: Networks and Monopolization, 22 OX. J. LEG. STUD. 419, 434 (2002) (“To the extent that they have monopolistic power, lawyers can exploit the key features of legal culture to extract rents: the law used can be more formalistic, more complex and more technical than is optimal”, and whether “the monopolistic power of a particular legal culture is sustainable depends on the relative strength of potential competitive forces. These can take the form of alternative cultures becoming available for particular branches of the law, thus partially dismantling the network, or through transfrontier transactions opening up the network to competition from foreign systems”).

\textsuperscript{216} As I said (supra note 59), “law” and “justice” may stay on the same side, but they do not not necessarily originate from the same source.