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.

Fides sanctissimum humani pectoris bonum est, nulla necessitate ad fallendum cogitur, nullo corrumpitur praemio

(Loyalty is the holiest good in the human heart; it is forced into betrayal by no constraint, and it is bribed by no rewards)

—Seneca, *Moral Letters to Lucilius*, Letter 88, paragraph 29

I. INTRODUCTION

Loyalty is a broad notion, and possibly the most incisive way of capturing its essence comes from the above Seneca's quote.[1] But the focus of this paper is on loyalty to the law and, more precisely, on the kind of law one is loyal to.[2]

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[1] Not far away from Seneca's definition is the one present in the Merriam-Webster Dictionary (https://www.merriam-webster.com/dictionary/loyalty), according to which loyalty "implies a faithfulness that is steadfast in the face of any temptation to renounce, desert, or betray." Out of the sparse literature on the notion of loyalty, mostly philosophical, *see* in general JOSIAH ROYCE, THE PHILOSOPHY OF LOYALTY (1908); HERBERT A. BLOCH, THE CONCEPT OF OUR CHANGING LOYALTIES: AN INTRODUCTORY STUDY INTO THE NATURE OF THE SOCIAL INDIVIDUAL (1934); HAROLD GUETZKOW, MULTIPLE LOYALTIES (1955); MORTON GRODZINS, THE LOYAL AND THE DISLOYAL: SOCIAL BOUNDARIES OF PATRIOTISM AND TREASON (1956); John Ladd, *Loyalty*, *in* THE ENCYCLOPEDIA OF PHILOSOPHY V (Paul Edwards ed., 1967); Milton Konvitz, *Loyalty*, *in* ENCYCLOPEDIA OF THE HISTORY OF IDEAS III (Philip P. Wiener ed., 1973).

[2] Still on the theoretical side of the debate, but more interesting from the perspective of this paper, *see* Andrew Oldenquist, *Loyalties*, 79 J. PHIL. 173 (1982); MARCIA BARON, THE MORAL STATUS OF LOYALTY (1984); Philip Pettit, *The Paradox of Loyalty*, 25 AM. PHIL. Q. 163 (1988); ALASDAIR MACINTYRE, IS PATRIOTISM A VIRTUE? (LINDLEY LECTURE 1984) (1984); R.T. Allen, *When Loyalty No Harm Meant*, 43 REV. METAPHYSICS 281 (1989); Edward R. Ewin, *Loyalty and Virtues*, 42 PHIL. Q. 403 (1992); Michael K. McChrystal, *Lawyers and Loyalty*, 33 WILLIAM & MARY L. REV. 367 (1992); A.T. Nuyen, *The Value of Loyalty*, 28 PHIL. PAPERS 25 (1999); WILLIAM J. BENNETT, VIRTUES OF FRIENDSHIP AND LOYALTY (2004); JAMES CONNOR, THE SOCIOLOGY OF LOYALTY (2007); SIMON KELLER, THE LIMITS OF LOYALTY (2007); ERIC FELTEN, LOYALTY: THE VEXING VIRTUE (2012); TONY JOLLIMORE, ON LOYALTY (2012); LOYALTY (Sanford V. Levinson, Joel Parker, & Paul Woodruff eds., 2013); JOHN KLEINIG, LOYALTY AND LOYALTIES: THE CONTOURS OF A PROBLEMATIC VIRTUE (2014). But see also MICHAEL WALZER, OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP (1970); ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSE TO DECLINE IN FIRMS,

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.[3] 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[4] 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,[5] in the last two hundred years the Western positivist attitude[6] has been

ORGANIZATIONS AND STATES (1970), and, especially, GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS (1993).

3 In the wake of a long (albeit not born within the common law) tradition, I take "State" as the political organization of society and of the institutions of government, discounting the fact that in the United States the term State also refers to political units, not sovereign themselves, but subject to the authority of the larger federal union.

4 On the non-Western legal experiences, *see infra* note 29.

5 Limiting the references to English-writing literature, one can see, e.g., Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 SO. ECON. J. 644 (1989); AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE (2006); Avner Greif, Paul Milgrom & Barry R. Weingast, *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 J. POL. ECON. 745 (1994); Paul Milgrom, Douglass C. North & Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Medieval Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1 (1990); LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW (1983). See also the refinements brought to the mainstream narrations of the role and functioning of the *lex mercatoria* by Charles Jr. Donahue, *Benvenuto Stracca's De Mercatura: Was There a Lex Mercatoria in Sixteenth Century Italy*, *in* FROM LEX MERCATORIA TO COMMERCIAL LAW 69–120 (Vito Pergiovanni ed., 2005).

6 Positivism may be seen as "the jurisprudence which asserts that the only rules governing social life are those which are positively enacted according to a correct procedure. The validity of rules in positivism stems not from their content but from their correct legislation according to the procedure. […] Positivism regards right as the ability to compel legal subjects (one would hardly call them persons) to do or refrain from doing specific actions. Similarly, duty is subjection to this ability. The source of the ability is invariably said to be a superpersonal agency, called 'sovereign,' a hypostatization of the procedure" (Arthur J. Jacobson, *Hegel's Legal Plenum*, 10 CARDOZO L. REV. 877, 883–4 (1989)). *See also* Arthur J. Jacobson, *The Idolatry of Rules: Writing Law According to Moses, with Reference to Other Jurisprudences*, 11 CARDOZO L. REV. 1079, 1125–32 (1990). *See also* Margaret Davies, *The Politics of Defining Law*, *in* THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY 159 (Peter Cane ed., 2010):

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

"[P]ositivism is a self-fulfilling prophecy or ideology which so influences behaviour that it has become true. But that does not mean that positivism covers the field as far as understanding law is concerned; there are also alternative readings of law and many practices which compromise the positivist boundaries." For a learned account of how legal positivism has been a misunderstood and underappreciated perspective throughout 20th century American legal thought, and for the argument that a theory of legal positivism should take moral principles seriously while avoiding the pitfalls of natural law, ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998). For the various strands of legal positivism, as discussed in the transnational debate, Michelle Cumyn, *The Structure of Stateless Law*, *in* STATELESS LAW. EVOLVING BOUNDARIES OF A DISCIPLINE 71 (Helge Dedek & Shauna Van Praagh eds., 2015).

7 Gillian K. Hadfield & Barry R. Weingast, *Microfoundations of the Rule of Law*, 17 ANN. REV. POL. SCIENCE 21 (2014) ("indeed, the organized state with a monopoly over the legitimate exercise of force is a relatively recent phenomenon": *id.* at 31); Helge Dedek, *Stating Boundaries: The Law, Disciplined*, *in* STATELESS LAW, *supra* note 6, at 9; PAOLO GROSSI, A HISTORY OF EUROPEAN LAW 1 ff., 19 ff., 39–83 (2010); Mauro Bussani, *A Pluralist Approach to Mixed Jurisdictions*, 6 J. COMP. L. 161, 163 (2011).

8 *See*, *e.g.*, Marc Hertogh, *What Is Non-State law? Mapping the Other Hemisphere of the Legal World*, *in International Governance and Law. State Regulation and Non-State Law* 11 (Hanneke van Schooten & Jonathan Verschuuren eds., 2008), who notes that in Google Scholar "the number of references to 'non-state law' has increased dramatically, from less than fifteen-hundred in 1985-1995 to well over fifteen-thousand in 1995-2005."

9 With regard to the international legal spheres, see W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION (1992); Fleur Johns, Non-Legality in International Law: Unruly Law (2013); Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551 (emphasizing how without coercive enforcement, reciprocal fairness generates high levels of performance and underlining how "[a] wide array of international arrangements induce cooperation without invoking external coercion to induce compliance. … In a wide range of instances, compliance occurs without the operation of any formal third-party enforcement mechanism": *id.* at 582–3); INFORMAL INTERNATIONAL LAWMAKING (Joost Pauwelyn, Ramses Wessel & Jan Wouters eds., 2012); THE NATURE OF CUSTOMARY LAW: LEGAL, HISTORICAL AND PHILOSOPHICAL PERSPECTIVES (Amanda Perreau-Saussine & James B. Murphy eds., 2007); DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 117 ff. (2010); Jan Wouters & Linda Hamid, *Custom and Informal International Lawmaking*, *in* CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 332 ff. (Curtis A. Bradley ed., 2016). On the more general level of international law theory, focusing on the role epistemic communities and transnational networks of both public and private actors have in promoting compliance with official and unofficial regulatory regimes, see, e.g., ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION (2000). On the relationship between non-State law and the methods and principles adopted in conflict of laws theory, Ralf Michaels, *The Re-State-Ment of Non-State Law: The State, Choice of Law, and the*

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.[10] Law and society scholars inquire into the social structures that induce compliance,[11] law and economics scholars examine non-State law rules

Challenge from Global Legal Pluralism, 51 WAYNE L. REV. 1209 (2005). For a parallel between the rules of *Lex Mercatoria* and the rules of *Lex Sportiva* – i.e., the transnational law produced by sports organizations – and arguing that the latter acquire binding force by the coercive power of sports authorities and are in no need of any formal act of a sovereign state, Marios Papaloukas, *Lex Sportiva and Lex Mercatoria*, 10 INT'L SPORTS L. REV. 197 (2013); Boris Kolev, *Lex sportiva and Lex Mercatoria*, 1/2 INT'L SPORTS L.J. 57 (2008). But see also LLOYD FREEBURN, REGULATING INTERNATIONAL SPORT POWER, AUTHORITY, AND LEGITIMACY (2018), and the contributions gathered in LEX SPORTIVA: WHAT IS SPORTS LAW? (Robert C.R. Siekmann & Janwillem Soek eds., 2012); HANDBOOK ON INTERNATIONAL SPORTS LAW (James A.R. Nafziger & Stephen F. Ross eds., 2011). On the pluralistic legal dimension the international art market lives by, see Francesca Fiorentini, *New Challenges for the Global Art Market: The Enforcement of Cultural Property Law in International Trade*, *in* PROPERTY LAW PERSPECTIVES III 189–215 (Ann Apers, Sofie Bouly, Ellen Dewitte & Dorothy Gruyaert eds., 2014); Francesca Fiorentini, *A Legal Pluralist Approach to International Trade in Cultural Objects*, *in* HANDBOOK ON THE LAW OF CULTURAL HERITAGE AND INTERNATIONAL TRADE 589–621 (James A.R. Nafziger & Robert Kirkwood Paterson eds., 2014).

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).

10 *See* also Margaret Davies, *Legal Pluralism*, *in* 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").

11 *See*, *e.g.*, LAW, SOCIETY AND COMMUNITY. SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL (Richard Nobles & David Schiff eds., 2014). Cotterrell (Roger Cotterrell, *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,[12] law and psychology scholars scrutinize the motivations that ground loyalty to non-State and State laws,[13] and all (should) profit from the long trodden path of legal anthropologists and from their findings on the cross-cultural features of social ordering,[14] 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.[15]

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,[16] 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 recognise 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).

14 Among the many, JAMES GEORGE FRAZER, FOLKLORE IN THE OLD TESTAMENT: STUDIES IN COMPARATIVE RELIGION, LEGEND AND LAW, II, part II, ch. VI (1918); BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926); CLAUDE LÉVI-STRAUSS, LES STRUCTURES ÉLÉMENTAIRES DE LA PARENTÉ (2d ed. 1967); LEOPOLD J. POSPISIL, ANTHROPOLOGY OF LAW. A COMPARATIVE THEORY (1971); Jacques Vanderlinden, *Return to Legal Pluralism*, 28 J. LEG. PLUR. 149–57 (1989); Franz von Benda-Beckmann, *Who Is Afraid of Legal Pluralism?*, 47 J. LEG. PLUR. 37–83 (2006); Gordon R. Woodman, *Legal Pluralism and the Search for Justice*, 40 J. AFRICAN L. 152–67 (1996).

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 pluralism[18]—even though the analysis carried on in the following

well, so it would be wise to grant it the jurisprudential respect it deserves." *See also* David Ibbetson, *Custom in medieval law*, *in* THE NATURE OF CUSTOMARY LAW, *supra* note 9, at 151–75; LEOPOLD J. POSPISIL, THE ETHNOLOGY OF LAW 63–5 (2d ed. 1978); Emily Kadens, *Custom's Past*, *in* CUSTOM'S FUTURE, *supra* note 9, at 11–33 (from the 12th to the the 17th century); and Lon L. Fuller, *The Law's Precarious Hold on Life*, 3 GA. L. REV. 530 (1968–69), who criticizes mainstream jurisprudence for what he called "a grotesque caricature of what customary law really means in the lives of those who govern themselves by it" (*id.* at 538).

17 *See infra* Section 6.

18 In a vast literature (only occasionally focused on the inner dynamics of Western legal experiences), foundational studies can be found (in English) in John Griffiths, *What is Legal Pluralism?*, 24 J. LEG. PLUR. 50 (1986); Sally E. Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869–96 (1988); Vanderlinden, *supra* note 14; von Benda-Beckmann, *supra* note 14; Woodman, *supra* note 14. Most interesting from our perspective, Davies, *supra* note 10, at 804. On the relationship between legal pluralism and legal globalism, Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375 (2007); William Twining, *Normative and Legal Pluralism: A Global Perspective*, 20 DUKE J. COMP. & INT'L L. 473 (2010); BOAVENTURA DE SOUSA SANTOS, TOWARDS A NEW LEGAL COMMON SENSE (2d ed. 2002); Roger Cotterrell, *A Concept of Law for Global Legal Pluralism?*, *in* CONCEPTS OF LAW: COMPARATIVE, JURISPRUDENTIAL AND SOCIAL SCIENCE PERSPECTIVES 193–208 (Sean P. Donlan & Lukas H. Urscheler eds., 2014); Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, *in* GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1996); EMMANUEL MELISSARIS, UBIQUITOUS LAW: LEGAL THEORY AND THE SPACE FOR LEGAL PLURALISM (2009); Paul Schiff Berman, *From Legal Pluralism to Global Legal Pluralism*, *in* LAW, SOCIETY AND COMMUNITY, *supra* note 11, at 255–71. For some theoretical analysis, Jeremy Waldron, *Legal Pluralism and the Contrast Between Hart's Jurisprudence and Fuller's*, *in* THE HART-FULLER DEBATE, *supra* note 6, at 135; Michel Rosenfeld, *Rethinking constitutional ordering in an era of legal and ideological pluralism*, 6 I•CON 415–55 (2008). For a critical appraisal of the ideological features affecting the debate, Franz von Benda-Beckmann, *Citizens, Strangers and Indigenous Peoples: Conceptual Politics and Legal Pluralism*, *in* NATURAL RESOURCES, ENVIRONMENT AND LEGAL PLURALISM. 9 YEARBOOK LAW & ANTHROPOLOGY 1–42 (Franz von Benda-Beckmann, Keebet von Benda-Beckmann & Andreas J. Hoekema eds., 1997) [hereinafter von Benda-Beckmann, *Citizens*]; Franz von Benda-Beckmann, *The Dynamics of Change and Continuity in Plural Legal Orders*, 53/54 J. LEG. PLUR. 1–44 (2006); David Kennedy, *One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, 31 NYU REV. L. & SOC. CHANGE 641 (2007). For the view that sees pluralism as a constant reminder of

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.[19] Grounded on the reservoir of comparative law knowledge and findings[20] (which, we will see, do not necessarily suit expectations and postulates of mainstream domestic legal culture), 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").

20 *See*, *e.g.*, H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW *passim* and 72 ff. (5th ed. 2014); Teemu Ruskola, *The East Asian Legal Tradition*, *in* THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 257, 260 ff. (Mauro Bussani & Ugo Mattei eds., 2012); *Stefan Vogenauer*, *Sources of Law and Legal Method in Comparative Law*, *in* OXFORD HANDBOOK OF COMPARATIVE LAW 869, 877 ff. (Matthias Reimann & Reinhard Zimmermann eds., 2006).

unbiased[21]) meaning of the set of rules that a group, a community, or a society[22] 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.[23]

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,[24] nor into the public law realm,

21 A "definition or concept of law is not prescriptively innocent. A definition of law is itself a type of normative ordering of social facts or 'reality' and carries with it political and ethical consequences": Davies, *supra* note 6, at 159.

22 According to ERIC A. POSNER, LAW AND SOCIAL NORMS 212–3 (2000), "a community consists of a group of people, most of whom (1) have solidarity, and (2) have enjoyed relationships with each other that have substantial temporal continuity extending into the past and are expected to continue into the future. Solidarity … can arise even between strangers who are thrown together for a brief period of time, like passengers in a lifeboat. What distinguishes such a group from a community is that people in a community share a common past and expect a lengthy common future." On the same wavelength, MICHAEL TAYLOR, COMMUNITY, ANARCHY AND LIBERTY (1982). Etzioni adopts a notion of community that combines two features, first a web of "relationships among a group of individuals, relationships that often crisscross and reinforce one another (rather than merely one-on-one or chainlike individual relationships), and second, a measure of commitment to a set of shared values, norms, and meanings, and a shared history and identity—in short, to a particular culture": AMITAI ETZIONI, THE NEW GOLDEN RULE 127 (1996). On this subject, the classical reference obviously is to FERDINAN TOENNIES, GEMEINSCHAFT UND GESELLSCHAFT (1st ed. 1887, transl. as COMMUNITY AND SOCIETY (1957)). According to Toennies, *Gemeinschaft* refers to groups based on feelings of togetherness and on mutual bonds, *Gesellschaft* refers to groups that are sustained by their being instrumental for members' individual aims and goals and are characterized by individualism and impersonal connections between people.

23 *See also* John Griffiths, *What is sociology of law? (On law, rules, social control and sociology)*, 49 J. LEG. PLUR. 93, 109, 112 (2017).

24 To be sure these circuits offer an example of legal orders outside the official law (see POSNER, *supra* note 22, at 90–103; BARAK D. RICHMAN, STATELESS COMMERCE: THE DIAMOND NETWORK AND THE PERSISTENCE OF RELATIONAL EXCHANGE 113–5 (2017); SCHAUER, *supra* note 19, at 136–7; *see also generally* DIEGO GAMBETTA, THE SICILIAN MAFIA (1993); Avner Greif & Eugene Kandel, *Contract Enforcement Institutions: Historical Perspective and Current Status in Russia*, *in* ECONOMIC TRANSITION IN EASTERN EUROPE AND RUSSIA: REALITIES OF REFORM (Edward P. Lazear ed., 1995); Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41 (2000); as to piracy, PETER T. LEESON, THE INVISIBLE HOOK: THE HIDDEN ECONOMICS OF PIRATES 58–70 (2009), discussing the pirate code as a system of self-governance maintained by extralegal force and reputation enforcement systems). Yet, the fact that these circuits pursue objectives forbidden by official laws of every country (and are deemed as repellent by anyone

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.[25] 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.[26] 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[27]

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).

26 Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 823 (1993).

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.

(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.

A selected bibliography (in English language) of European field studies is bound to emphasize researches on family, and ethnic and religious communities: Kim Lecoyer & Caroline Simon, *The Multicultural Family in Conflict: Legal and Socio-Anthropological Perspectives on Child Residency*, 47 J. LEG. PLUR. 190–207 (2015); MUSLIM FAMILY LAW IN WESTERN COURTS (Elisa Giunchi ed., 2014); LATIF TAŞ, LEGAL PLURALISM IN ACTION: DISPUTE RESOLUTION AND THE KURDISH PEACE COMMITTEE (2014); Latif Taş, *Kurdish 'Unofficial' Family Law in the Gurbet*, *in* FAMILY, RELIGION AND LAW: CULTURAL ENCOUNTERS IN EUROPE 209–35 (Prakash Shah, Marie-Claire Foblets & Mathias Rohe eds., 2014); Prakash Shah, *In Pursuit of the Pagans: Muslim Law in the English Context*, 45 J. LEG. PLUR. 58–75 (2013); LEGAL PRACTICE AND CULTURAL DIVERSITY (Ralph Grillo *et al.* eds., 2009); Wibo M. van Rossum, *Religious Courts Alongside Secular State Courts: The Case of the Turkish Alevis*, 2 L., SOC. JUSTICE & GLOB. DEV. J. 1–17 (2008); SUSAN DRUMMOND, MAPPING MARRIAGE LAW IN SPANISH GITANO COMMUNITIES (2006); IHSAN YILMAZ, MUSLIM LAWS, POLITICS AND SOCIETY IN MODERN NATION STATES: DYNAMIC LEGAL PLURALISMS IN ENGLAND, TURKEY AND PAKISTAN (2005); Martti Grönfors, *Institutional Non-Marriage in the Finnish Roma Community and Its Relationship to Roma Traditional Law*, *in* GYPSY LAW. ROMANI LEGAL TRADITIONS AND CULTURE 149–69 (Walter O. Weyrauch ed., 2001); Ihsan Yilmaz, *Muslim Law in Britain: Reflections in the Socio-legal Sphere and Differential Legal Treatment*, 20 J. MUSLIM MINORITY AFF. 353–60 (2000); DAVID PEARL & WERNER MENSKI, MUSLIM FAMILY LAW (1998); MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW. STATE, LAW, AND FAMILY IN THE WESTERN EUROPE (1989); DAVID PEARL, FAMILY LAW AND THE IMMIGRANT COMMUNITIES (1986). On rural communities, one may see Jovana Dikovic, *Gleaning: Old Name, New Practice*, 48 J. LEG. PLUR. 302–21 (2016); Julio L. Ruffini, *Disputing over Livestock in Sardinia*, *in* THE DISPUTING PROCESS: LAW IN TEN SOCIETIES 209–46 (Laura Nader & Harry F. Todd eds., 1978); Harry F. Todd, *Litigious Marginals: Character and Disputing in a Bavarian Village*, *in* THE DISPUTING PROCESS: LAW IN TEN SOCIETIES 86–121 (Laura Nader & Harry F. Todd eds., 1978). On property law issues, LUCY FINCHETT-MADDOCK, PROTEST, PROPERTY AND THE COMMONS: PERFORMANCES OF LAW AND RESISTANCE (2016); Lucy Finchett-Maddock, *Finding Space for Resistance through Legal Pluralism: The Hidden Legality of the UK Social Centre Movement*, 42 J. LEG. PLUR. 31–52 (2010); on an unofficial regime of intellectual property governance, Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCIENCE 187–201 (2008).

II. "INFORMAL NORMS" AND "LEGAL RULES": DENIAL AND ACCOMMODATION

A conventional (and all-Western[28]) dividing line between norms[29] 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 Rochegude, *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. Esquirol, *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 Halakhah and Sharī'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 (Masaij 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. Kritzer, 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).

[29] The distinction between norms and behavioral regularities may in turn be found in that 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 OEUVRE 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

(2000); CRISTINA BICCHIERI, THE GRAMMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS (2006); JON ELSTER, THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER (1989); Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095 (1986); EDNA ULLMAN-MARGALIT, THE EMERGENCE OF NORMS (1977); and the works cited *supra*, note 18.

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, B. 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.

30 Hadfield & Weingast, *supra* note 7, at 21, 28 ff., 32; JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 107 (2d ed. 2009).

31 *See*, among the many, Marcel Fafchamps, *The Enforcement of Commercial Contracts in Ghana*, 24 WORLD DEV. 427–48 (1996); John McMillan & Christopher Woodruff, *Dispute Prevention without Courts in Vietnam*, 15 J. L. EC. & ORG. 637–58 (1999); John McMillan & Christopher Woodruff, *The Central Role of Entrepreneurs in Transition Economies*, 16 J. EC. PERSPECTIVES 153–70 (2002).

framework.[32] In other terms, one could say, the mainstream legal debate places the cart of legal monotheism before the horse of its historical meaning.[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.[34] "Formal" usually means something "pertaining or following established procedural rules, customs and practices,"[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."[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[37] and non-State law. The latter too—as is known and we will see[38]—may rely on the absence of formality, on loose formalities, or on sophisticated formalized infrastructures.

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

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.

34 Richman, *supra* note 24, at 11. *See also* Elizabeth A. Hoffmann, *Dispute Resolution in a Worker Cooperative: Formal Procedures and Procedural Justice*, 39 LAW & SOC'Y REV. 51 (2005); Susan M. Olson & Albert W. Dzur, *Revisiting Informal Justice: Restorative Justice and Democratic Professionalism*, 38 L. & SOC'Y REV. 139 (2004).

35 BLACK'S LAW DICTIONARY (1991) ad vocem. *See also* Arthur J. Jacobson, *The Other Path of the Law*, 103 YALE L. J. 2213, 2217–19 (1994).

36 Robert S. Summers, *How Law Is Formal and Why It Matters*, 82 CORNELL L. REV. 1165, 1166 (1997).

37 Robert S. Summers, *The Formal Character of Law*, 51 CAMBRIDGE L. J. 242, 255 ff. (1992).

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.": *id.* at 17–8. "Stateless" (instead of "lawless" as used by AVINASH 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.

41 Roderick A. Macdonald, *Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism*, 15 ARIZ. J. INT'L & COMP. L. 69, 72–4 (1998); but see also ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION (1991).

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."[43] 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,[44] and both may be easily fixed through more appropriate doctrines or through an intervention of State law itself.[45]

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.[46]

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").

43 Macdonald, *supra* note 41, at 73.

44 *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, SURDETERMINATION, EFFECTIVITÉ 12–23 (Guy Rocher *et al.* eds., 1998).

45 Hadfield & Weingast, *supra* note 7, at 32.

46 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.[47] It may even reflect narrow and parochial concerns, be based on hierarchical relations, and its coerciveness may be harsh[48] and discriminatory.[49] 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.

49 *See also* John McMillan & Christopher Woodruff, *Private Order Under Dysfunctional Public Order*, 98 MICH. L. REV. 2421, 2423, 2454–8 (2000); RICHMAN, *supra* note 24, at 74; POSNER, *supra* note 22, at 203 ff., 214, 221; Last Stone, *supra* note 26, at 871; MARK S. WEINER, THE RULE OF THE CLAN: WHAT AN ANCIENT FORM OF SOCIAL ORGANIZATION REVEALS ABOUT THE FUTURE OF INDIVIDUAL FREEDOM esp. 200 ff. (2013). On how also mutual trust can be fraudulently exploited, see e.g. Lisa M. Fairfax, *"With Friends Like These …": Toward a More Efficacious Response to Affinity-Based Securities and Investment Fraud*, 36 GA. L. REV. 63 (2001).

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[50]—needs to be tested against a widespread phenomenon crisscrossing all societies, Western or otherwise.[51] 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.[52] Indeed, as Michael Reisman,[53] Lawrence Friedman[54] (and many others,[55] besides the comparativists[56])

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 I 33–8 (Guenther 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 EWICK & 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[57] has rules and tries to enforce them.[58] 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 743–4). 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. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY 166 (2001)).

56 *See supra*, note 20.

57 On how the size of the groups might affect the efficiency of their business pattern, see Robert D. Cooter & Janet T. Landa, *Personal Versus Impersonal Trade: The Size of Trading Groups and Contract Law*, 4 INT'L REV. L. & ECON. 15 (1984); McMillan & Woodruff, *supra* note 49, at 2425–9. On the advantages of smaller group size, see also DIXIT, *supra* note 39, at 65–76; Robert Axelrod & Douglas Dion, *The Further Evolution of Cooperation*, 242 SCIENCE 1385–90 (December 9, 1988); Per Molander, *Prevalence of Free Riding*, 36 J. CONFLICT RES. 756–71, at 766–68 (1992). In some experimental multi-person games, however, the level of cooperation has proved not to depend much on the number of players (David Sally, *Conversation and Cooperation in Social Dilemmas: A Meta-Analysis of Experiments from 1958*

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.[59]

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

to 1992, 7 RATION. & SOC'Y 58–92, esp. at 77 (1995)). Cotterrell, *supra* note 11, at 12, argues that "communal networks can be big or small: as small as the relationship between two contracting parties; as large as a nation, or a transnational community of religious believers such as the members of the world-wide Catholic Church. … we can claim that all law including state law arises in such networks, because the national political society is itself a (complex) example of such a network." See also findings surveyed in the next section, whereby it is shown how irrelevant the size of the concerned group may be in assessing the legal dimension it lives by.

58 FRIEDMAN & HAYDEN, *supra* note 19, at 19; Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L. J. 252, at 270–302 (2011); Michael A. Helfand, *Introduction*, *in* NEGOTIATING STATE AND NON-STATE LAW: THE CHALLENGE OF GLOBAL AND LOCAL LEGAL PLURALISM 1–6 (Michael A. Helfand ed., 2015). 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.

59 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 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.

In the anthropological perspective, among the many, LÉVI-STRAUSS, *supra* note 14; FRAZER, *supra* note 14; LEWIS H. MORGAN, SYSTEMS OF CONSANGUINITY AND AFFINITY OF THE HUMAN FAMILY (1871)—direct source of inspiration of FRIEDRICH ENGELS, ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE (1884). On the secular judicial review of co-religionist family law disputes, see MICHAEL J. BROYDE, SHARIA TRIBUNALS, RABBINICAL COURTS, AND CHRISTIAN PANELS 51–8, 151–3 (2017).

(b) Any religion demands loyalty to a body of substantive rules that may be aligned, indifferent to, or even contrasting with official law.[62] 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.[63] For example, Orthodox Jews can bring disputes to a rabbinical court for settlement.[64] The Catholic Church presides over an elaborate system of canon law,[65] and Church courts decide for instance whether a marriage can be annulled.[66] 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.[67] 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.[68] They bind people who voluntarily submit to them.[69]

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. HELMHOLZ, 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).

66 Roughly one-in-five U.S. adults say their primary religious affiliation is with the Catholic Church: AMERICA'S CHANGING RELIGIOUS LANDSCAPE (May 12, 2015), https://www.pewresearch.org/fact-tank/2015/09/14/a-closer-look-at-catholic-america/.

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.[70] 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.[71] 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).

69 *See* FRIEDMAN & HAYDEN, *supra* note 19, at 22 (stressing that these "courts" lean heavily toward compromise, toward restoring harmony, toward reconciliation and voluntary agreement). *See also* Eric A. Posner, *The Legal Regulation of Religious Groups*, 2 LEG. THEORY 33 (1996); Laurence R. Iannaccone, *Sacrifice and Stigma: Reducing Free-Riding in Cults, Communes, and Other Collectives*, 100 J. POL. EC. 271–91 (1992).

On the ADR systems set up in the U.S. within the Protestant Christian communities and the Islamic communities, see BROYDE, *supra* note 61, at 16–8, 198–200, and at 19–21, 174–7, 186–98 respectively. More in general, Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231–305 (2011); Adam S. Hofri-Winogradow, *A Plurality of Discontent: Legal Pluralism, Religious Adjudication and the State*, 26 J. L. & RELIG. 57–89 (2010). For a survey of current tensions between State law and Islamic law in the United States, Joel A. Nichols, *Religion, Family Law, and Competing Norms*, *in* NEGOTIATING STATE AND NON-STATE LAW, supra note 58, 197, 201–5, 207–10.

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,[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.[73] Close-knit[74] Jewish communities have in place rules that serve indeed as a powerful check on the trustworthiness of other members of the community.[75] Local Kosher dietary laws are further maintained under the supervision of the local *Vaad Hakashrut* (Council for Kosher Supervision). The *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.[76]

BROYDE, *supra* note 61, at 65 (once considered the courts' hesitance to address kosher law cases also in view of the constitutional problems this litigation raises, the author argues in favor of faith-based arbitration: *id.* at 64–7).

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 SZTOMPKA, TRUST. A SOCOLOGICAL THEORY (2000).

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.

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. *Compare* COLEMAN, *supra* note 72, at 125, 592, 859, 861.

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)).

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.[77] 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,[78] 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[79]). 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.*).

77 Starobin & Weinthal, *supra* note 70, at 22.

78 ELLICKSON, *supra* note 12.

79 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.

unofficial control system over the official one.[80] The law of trespass has no effects on actual trespass rules because in the rural region of Shasta County the State-posited 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.[81]

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

(e) 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 (ELLICKSON, *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.[82] 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;[83] it might rip apart these valuable relationships.[84] 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.[85] 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.[86]

(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.[87] 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.[88] Cotton industry arbitral tribunals decide an average of four cases a year.[89] 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.[90]

82 Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

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).

88 Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 Mich. L. Rev. 1724, at 1727 (2001). Likewise, most international sales of cotton are governed neither by state-supplied legal rules nor by the Convention on the International Sale of Goods, but rather by the rules of the Liverpool Cotton Association (*id.* at 1724–25).

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

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) c*onsists 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.

98 RENÉE R. SHIELD, DIAMOND STORIES: ENDURING CHANGE ON 47TH STREET 7 (2002).

99 Bernstein, *supra* note 93, at 133, 135–43.

100 Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 44 U. PENN. L. REV. 1765 (1996).

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.

adjudicative approach particularly well-suited to the private adjudication of grain and feed disputes."[105]

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.[106] 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;[107] as well as by the unofficial rules daily developed, challenged, and refined by web administrators, community members, and digital users.[108] The legitimacy of this governance lies in the ideal of self-determination and self-regulation, and these virtual worlds create their own law,[109] 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.[110] Users'

105 *Id.* at 1820.

106 Tal Z. Zarsky, *Social Justice, Social Norms and the Governance of Social Media*, 35 PACE L. REV. 154, 156 (2014).

107 *See* Lawrence Lessig, *Code: and Other Laws of Cyberspace, Version 2.0* (2006); *see also* FRANK PASQUALE, THE BLACK BOX SOCIETY. THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 14–5, 144–65 (2015); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598–670 (2018).

108 Philip A. Wells, *Shrinking the Internet*, 5 NYU J. L. & LIBERTY 531, 572–4 (2010) (on Facebook); Kate Klonick, *Re-shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age*, 75 MD. L. REV. 1029–65 (2016) (on Twitter, Facebook, and YouTube); Amy Kapczynski, *Order without Intellectual Property Law: Open Science in Influenza*, 102 CORNELL L. REV. 1539, 1611–2 (2017) (as to Wikipedia).

109 Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843, 885 (2006); Michaels, *supra* note 9, at 1215; *see also* Gunther Teubner, *Rights of Non-humans? Electronic Agents and Animals as New Actors in Politics and Law*, 33 J. L. & SOC. 497, 506–9 and passim (2006); *Symposium: State of Play*, 49 N.Y.L. SCH. L. REV. 1–352 (2004).

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."[111] 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.[112] 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 KOUKIADIS, 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 contextspecific 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)).

113 Marvin Ammori, *The "New" New York Times: Free Speech Lawyering in the Age of Google and Twitter*, 127 HARV. L. REV. 2259, 2277 (2014); Jeff Rosen, *Who Decides? Civility v. Hate Speech on the Internet*, AM. BAR ASS'N: INSIGHTS ON LAW & SOC'Y (Winter 2013), www.americanbar.org/publications/insights_on_law_andsociety/13/winter_2013/who_decides_civilityvhatespeechontheinternet.html.

114 Chris Brummer, *Why Soft Law Dominates International Finance—And Not Trade*, 13 J. INT'L ECON. L. 623, at 627 (2010); Annalise Riles, *Relations: The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State*, 56 AM. J. COMP. L. 605 (2008); Michael S. Barr, *Who's in Charge of Global Finance?*, 45 GEO. J. INT'L L. 971–1027 (2014).

115 The IMF has been highly involved in post financial crisis reforms, along with the Bank for International Settlements and the Financial Stability Board, setting out principles and guidelines for the global financial regulatory framework. *See, e.g.*, www.fsb.org/wp-content/uploads/r_111027b.pdf; www.fsb.org/wp-content/uploads/Elements-of-Effective-Macroprudential-Policies1.pdf; www.imf.org/external/np/g20/pdf/100109.pdf. These unofficial

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[116]—only the European Union set up what is commonly viewed as supervisory authority in financial services, though its influence is only regional.[117] 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."[118] 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.

117 *See*, *e.g.*, Rachel Epstein & Martin Rhodes, *From governance to government: Banking union, capital markets union and the new EU*, 22 COMP. & CHANGE 205–24 (2018); Niamh Moloney, *European Banking Union: Assessing Its Risks and Resilience*, 51 COMMON MARKET L. REV. 1609–70 (2014); Kern Alexander, *European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism*, 40 EUR. L. REV. 154–87 (2015).

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.[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."[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."[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."[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.[123]

119 Anne-Marie Slaughter, *Governing the Global Economy through Government Networks*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS, ESSAYS IN INTERNATIONAL LAW 177, 202 (Michael Byers ed., 2000); *compare* Riles, *supra* note 114, at 621–2.

120 Brummer, *supra* note 114, at 634.

121 *Id. supra* note 118, at 285; *see also* Riles, *supra* note 114, at 622–3; Jan H. H. Dalhuisen, *Legal Orders and their Manifestation: the Operation of the International Commercial and Financial Legal Order and its Lex Mercatoria*, 24 BERKELEY J. INT'L L. 129 (2006); Julia Black, *Financial Markets*, *in* OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH, 151, 166 FF. (Peter Cane & Herbert M. Kritzer eds., 2010).

122 CHRIS BRUMMER, SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE-MAKING IN THE 21ST CENTURY 68 (2d ed. 2015).

123 On the opportunities offered to the financial market and the challenges posed to regulators by the blockchain technology, see, e.g., Philipp Paech, *The Governance of Blockchain Financial Networks*, 80 MOD. L. REV. 1073–110 (2017); Wright & De Filippi, *supra* note 112.

V. EFFICIENCY, LOYALTY, IDENTITY

Many other field studies—concerning ethnic communities,[124] "intentional"[125] communities, communities of neighborhoods,[126] of

124 Besides the diverse ethnic features that characterize the diamond industry (*see* RICHMAN, *supra* note 24), as to the unofficial law regulating significant slices of ethnic communities in the U.S., see, e.g., Leigh-Wai Doo, *Dispute Settlement in Chinese-American Communities*, 21 AM. J. COMP. L. 627 (1973); Posner, *supra* note 69; Janet T. Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, 10 J. LEG. STUD. 349–62 (1981); Jack Carr & Janet T. Landa, *The Economics of Symbols, Clan Names, and Religion*, 12 J. LEG. STUD. 135–56 (1983); Patricia G. Greene, *A Resource-Based Approach to Ethnic Business Sponsorship: A Consideration of Ismaili-Pakistani Immigrants*, 35 J. SMALL BUS. MGMT. 58 (1997); Roger Waldinger & Howard Aldrich, *Trends in Ethnic Business in the United States*, *in* ETHNIC ENTREPRENEURS: IMMIGRANT BUSINESS IN INDUSTRIAL SOCIETIES 49 (Roger Waldinger *et al.* eds., 1990); IVAN LIGHT & CAROLYN ROSENSTEIN, RACE, ETHNICITY, AND ENTREPRENEURSHIP IN URBAN AMERICA (1995); Eran Razin & Ivan Light, *Ethnic Entrepreneurs in America's Largest Metropolitan Areas*, 33 URB. AFF. REV. 332 (1998).

For an in-depth analysis of U.S. Indian tribes' laws, besides the classic reference to KARL N. LLEWELLYN AND E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941), see Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I)*, 46 AM. J. COMP. L. 287 (1998); *(Part II)*, 46 AM. J. COMP. L. 509 (1998) (with the proviso that "'Indian law' refers to law made for Indians, mostly by federal authorities, and 'tribal law' refers to law made by Indians"—*id.* at 562—, and for the conclusion that informal custom dominates written law in many disputes before and outside tribal courts); Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 AM. J. COMP. L. 29 (2008).

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 COMMUNES (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. ENGEL, 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,[127] of stand-up comedians,[128] the tattoo industry,[129] as well as employment relationships[130]—bear out that unofficial law finds

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).

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.

129 *See* Aaron Perzanowski, *Owning the Body: Creative Norms in the Tattoo Industry*, *in* CREATIVITY WITHOUT LAW, *supra* note 127, at 89 ff.

Out of the growing scholarly literature on unofficial rules-based intellectual property governance, see David Fagundes & Aaron Perzanowski, *Clown Eggs*, 94 NOTRE DAME L. REV. 1313 (2019) (as to the clowning community); MARTA ILJADICA, COPYRIGHT BEYOND LAW: REGULATING CREATIVITY IN THE GRAFFITI SUBCULTURE (2016) (graffiti writers); Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law*, *in* LAW AND MAGIC 123 (Christine A. Corcos ed., 2010); Eden Sarid, *Don't Be a Drag, Just Be a Queen—How Drag Queens Protect Their Intellectual Property Without Law*, 10 FLA. INT'L U. L. REV. 133 (2014).

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[131] and economic groups[132] 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.[133]

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

EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 41–61, 65–70 (2017); on the unofficial rules governing the internal labor markets of non-union firms, see Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913 (1996).

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-spontanes Recht und duale Sozialverfassungen in der Weltgesellschaft*, *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).

More in general, on "spontaneous orders" and their contribution to the development of a "free society", Friedrich A. Hayek, *Freedom, Reason, and Tradition*, 68 ETHICS 229, 234–5 (1958); Friedrich A. Hayek, NOTES ON THE EVOLUTION OF SYSTEMS OF RULES OF CONDUCT (1967), *in* THE COLLECTED WORKS OF F. A. HAYEK, VOLUME 15: THE MARKET AND OTHER ORDERS 284–9 (Bruce Caldwell ed., 2014).

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.[134] These views—"the law and economics of private ordering"[135]—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.[136] 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."[137] 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.[138] 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.[139]

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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.

135 Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. EC. REV. 519, at 520 (1983).

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.

137 ELLICKSON, *supra* note 12, at 283. *See also* McMillan & Woodruff, *supra* note 49. *Compare* Lewis A. Kornhauser, *Are There Cracks in the Foundation of Spontaneous Order?*, 67 NYU L. REV. 647 (1992); Rock & Wachter, *supra* note 130; Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J. L., ECON., & ORG. 5 (1985).

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.[140] 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[141] and beliefs it lives by.[142] 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."[143] 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.[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.),[145] and each of these connections can overlap and be entwined with one or several of the other connections.[146] These loyalties—even if not always and with different timings[147]—can be modified and reshaped by social constraints and individual contingencies.[148] These loyalties may be over

144 BEDERMAN, *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").

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, *supra* note 2, at 155). *See also* PHILIP SELZNICK (with the collaboration of Philippe Nonet & Howard M. Vollmer), LAW, SOCIETY, AND INDUSTRIAL JUSTICE 271–3 (1969); Bernard Gert, *Loyalty and Morality*, *in* NOMOS LIV. LOYALTY 3, 6 ff. (Sanford V. Levinson, Joel Parker & Paul Woodruff eds., 2013). More generally, AMARTYA SEN, IDENTITY AND VALUE. THE ILLUSION OF DESTINY (2006); IDENTITIES, AFFILIATIONS, AND ALLEGIANCES (Seyla Benhabib, Ian Shapiro & Danilo Petranoviç eds., 2007); MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2001).

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, *Sociology, History and the 'Internal' Study of Law*, *in* LAW, SOCIETY AND COMMUNITY *supra* note 11, at 39, 53).

147 On personal identity over time see generally DEREK PARFIT, REASONS AND PERSONS esp. Part Three, Chapters 10 to 14, 199 ff. (1984).

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.[149] 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,[150] make people abide by rules respectful of their identities, and circulate information about those needs and choices and about the expected representations and rules.[151] 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).[152] 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).

152 *See* John Kleinig, *Loyalty*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2017 edition), at https://plato.stanford.edu/archives/win2017/entries/loyalty/; Gert, *supra* note 145, at 7–8.

self-realizing significance of bonds that come to be constitutive of pieces of our identity.[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.[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.[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.

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.

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).

155 Richman, *supra* note 93, at 393–4, 409; BEDERMAN, *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.[156] 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,[157] 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.[158] 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.[159] We need official law to dismantle unjustified privileges, to counter possible distorted strands of multiculturalism,[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, "[s]trangers 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."[161]

This does not mean, it goes without saying, that there is less scope for us to practice our "strangers-free" ways of life.[162] Despite our dependence on strangers, we have families, we have friends, and we

that only 23,668 out of 277,010 civil actions filed in the United States District Courts during the 12-month period from March 31, 2017 to March, 31, 2018, involved private contracts (www.uscourts.gov/federal-judicial-caseload-statistics-2018-tables), one should see at least Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMP. LEG. STUD. 459 (2004); Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STANFORD L. REV. 1339 (1994); Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans*, *in* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS 21 ff. (Samuel Estreicher & Joy Radice eds., 2016), showing much lower than expected (in view of the relentless focus of mainstream literature on State law rules and enforcement) rates of private individuals actually resorting to the official legal system to solve their legal problems.

159 Gillian K. Hadfield & Barry R. Weingast, *Law without the State. Legal Attributes and the Coordination of Decentralized Collective Punishment*, 1 J. L. & COURTS 3, at 30 (2013).

160 Mitra Sharafi, *Justice in Many Rooms since Galanter: De-romanticizing Legal Pluralism through the Cultural Defense*, 71 L. & CONT. PROB. 139 (2008); Waldron, *supra* note 18, at 135, 137, 153–4.

161 FRIEDMAN & HAYDEN, *supra* note 19, at 300–1.

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, *supra* note 2, at 60).

have strong personal ties to individuals and groups.[163] All of us spend much of our lives in tiny groups, in our personal sphere. Inside our groups, unofficial law rules.[164]

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,[165] diamond,[166] cotton[167]—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,[168] 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%,[169] with an average of 33% of U.S. population.[170]

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,[171] "it is not to a world of arms-length dealings

163 Individuals "must regulate their relationships, but they do so by microlegal arrangements … Microlaw is the way individuals in the liberal state provide order in their lives in the private sphere. [This] order is not a legal vacuum; there is no such thing. … for social relationships cannot operate without law" (REISMAN, *supra* note 53, at 16).

164 FRIEDMAN & HAYDEN, *supra* note 19, at 32.

"Consider the major duties that might weigh on the mind of a university professor. On a given day, the most salient of these duties might arise from a household norm obligating the professor to shop for the evening meal, a departmental norm supporting attendance at a faculty meeting, and a promise to a colleague to read the draft of a paper. None of the three duties mentioned is legally enforceable. But they are the stuff of life, or at least much of it": Ellickson, *supra* note 47, at 263–4. *See also* Jacobson, *supra* note 36, at 2237: "Our rights and powers in transactions depend on the experience of living and working outside the legal system, in the informal economy. We are less powerful as persons without it."

165 *See supra* note 75.

166 *See supra* note 92.

167 *See supra* note 87. For the grain and feed sector, the latest data available to the author only refer to the value of production in the U.S. in 2016 and it amounts to about 65,5 billion USD. Data are from the National Agricultural Statistics Service of the United States Department of Agriculture: https://www.nass.usda.gov/Publications/Ag_Statistics/2017/Chapter01.pdf.

168 *See supra*, note 60.

169 *See* https://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/.

170 *See* https://www.pewforum.org/2015/11/03/chapter-1-importance-of-religion-and-religious-beliefs/.

171 Galanter, *supra* note 39, at 17.

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.[172] 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.[173]

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.[174] 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,[175] 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,[176] and settings such as those analyzed by Reisman and Weyrauch[177]). 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[178]). 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[179] (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.

177 Reisman, *supra* note 54; Walter O. Weyrauch, *Unwritten Constitutions, Unwritten Law*, 56 WASH. & LEE L. REV. 1211 (1999) [hereinafter "*Unwritten Constitutions*"]; Walter O. Weyrauch, *The "Basic Law" or "Constitution" of a Small Group*, 27 J. SOC. ISSUES 49 (1971).

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).[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.[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" (*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" (*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.

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, *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, *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.

181 Galanter, *supra* note 39, at 18. See also MAX WEBER, 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.[182] What is to be noted, yet, is that the latter situations (egregious violations of group's rules, exit issues[183]) 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.[184] 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.[185]

reputational degradation, and physical retaliation" (*id.* at 5). According to Richman (Richman, *supra* note 81, at 747, social sanctions "play the role of the marshal, and custom or social norms define the entitlements and constraints that guide parties' conduct." *See also* Richman, *supra* note 93, at 407–8 (discussing private enforcement mechanisms, such as excommunication, utilized by Orthodox Jewish communities involved in the diamond trade); Bernstein, *supra* note 88, at 1776 (recording several examples of noneconomic punishments used in the cotton industry).

182 Macaulay, *supra* note 82, at 62, 65. Williamson notes that external legal enforcement of a contract when a breach occurs is often the last resort rather than the first, and that its more important role is as a backstop or a threat point that underlies the renegotiation of the deal between the parties (*see* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM. FIRMS, MARKETS, RELATIONAL CONTRACTING 164–6, 168 (1985)). *See also* Gillian K. Hadfield & Iva Bozovic, *Scaffolding: Using Formal Contracts to Build Informal Relations in Support of Innovation*, WISC. L. REV. 981 (2016); and *compare* BEDERMAN, *supra* note 9, at 80 ff.

183 Laws of any sort may be "more honored in the breach than the observance": William Shakespeare, *Hamlet* (c. 1599), *in* THE COMPLETE WORKS 940 (Alfred Harbage ed., 1969) (act I, scene 4, line 16).

184 *See also* Macaulay, *supra* note 82, at 65.

185 This holds true the other way around as well. When a stranger to a group realizes that she shares with that group the same beliefs, values, goal, priorities, she may want to become member of that group, losing (if and when accepted) her status of stranger to it.

LEGAL SETS GRAPH

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[187] that generate rules internally and that are also vulnerable to rules, decisions, and other forces emanating from the official legal world.[188] But the overall landscape is also marked by the action and interactions of official and unofficial systems of social control.[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.[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 law-makers.[191]

187 Resorting to the well-known definition by Falk Moore, *supra* note 55, at 719.

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."

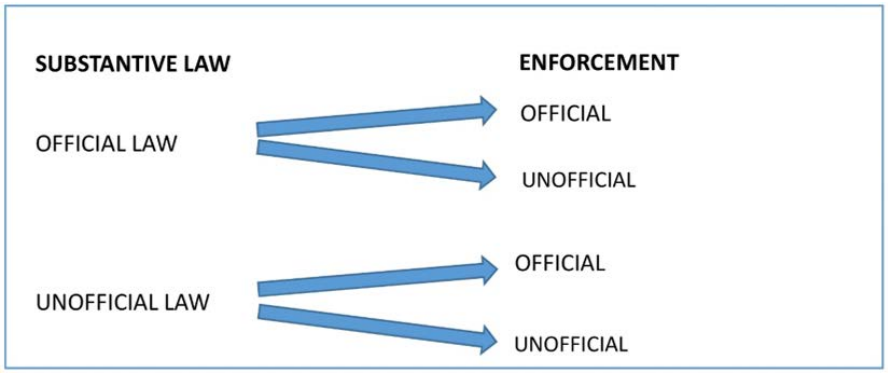
189 Fuller, *supra* note 54, at 2 ("[L]aw and its social environment stand in a relation of reciprocal influence; any given form of law will not only act upon but be influenced and shaped by, the established forms of interaction that constitute its social milieu"). *See also* SCHAUER, *supra* note 19,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

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 governance and rule-based governance represent a theoretical dichotomy. In reality, most governance systems contain elements of the two extreme forms."

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.[192] The low visibility of these unofficial legal sets in the mainstream debate should not obscure the significant effects they can have on social order[193]—and on the efficiency of the concerned markets and dispute-solving mechanisms.[194] 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,[195]



Peter Hägel, *Standard setting for capital movements: Reasserting sovereignty over transnational actors?*, *in* NON-STATE ACTORS AS STANDARD SETTERS 351, 373 f. (Anne Peters, Lucy Koechlin, Till Förster & Gretta Fenner Zinkernagel eds., 2009); Michaels, *supra* note 9, at 1231.

192 "Even in countries with sophisticated legal systems, the law may not work smoothly. … Market participants have some advantages over judges in deciding whether commitments have been fulfilled. First, market participants possess greater expertise than courts in the monitoring of other participants' conduct. Second, their decisions and actions can be more nuanced than the binary decision that a court must make – that of liability or no liability. Third, they can consider information that cannot be introduced in court, such as impressionistic evidence about business trends or judgments about the quality of items sold. They can base their decisions on a firm's behavior over time, on probabilistic patterns that would not be admissible evidence in court" (McMillan & Woodruff, *supra* note 49, at 2425 (footnotes omitted)).

193 Reisman, *supra* note 51, at 178.

194 *See supra*, Section 5, for the debates carried on about this subject.

195 POSNER, *supra* note 22, at 78; David M. Engel, *Law in the Domains of Everyday Life: The Construction of Community and Difference*, *in* LAW IN EVERYDAY LIFE 123, 126 (Austin Sarat & Thomas R. Kearns eds., 1993); Bermann, *supra* note 29, at 33, 40. *See also supra*, Section 7.

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.[196] 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.[197] 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 Heckendorn 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.[198] 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.[199]

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 gate-keeper, controlling the variety of "exit" issues that may arise out of the dissatisfaction of the single participant with the group or vice-versa.[200] 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[201] along 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.[202] On the contrary, it may be argued that if people

198 *See*, *e.g.*, Johannes Feest, *Compliance with Legal Regulations: Observation of Stop Sign Behavior*, 2 L. & SOC'Y REV. 447 (1968); RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW 76 ff. (2015); more generally, SCHAUER, *supra* note 19, at 150.

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."[203]

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).[204] As is well known, however, not all these potential claims turn themselves in actual claims channeled through a lawsuit.[205] 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

them into the "official" legal system can only be successful insofar as the task is carried on by adapting the new rules to the extant ones.

203 Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1791 (2000). *See also* Kenworthey Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, *in* OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 241 (Eyal Zamir & Doron Teichman eds., 2014); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); and the authors cited *supra*, note 197.

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.

205 The Urtext of these analyses, mainly focused on tort law, are the articles of William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631–54, esp. 633–7, 641 (1980–1981) and of Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 543–5 (1980–1981). Among later studies, see Bussani & Infantino, *supra* note 28; Herbert M. Kritzer, Claiming Behavior as Legal Mobilization, *in* OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH, *supra* note 10, at 260; Austin Sarat, *Exploring the Hidden Domains of Civil Justice: "Naming, Blaming, and Claiming" in Popular Culture*, DEPAUL L. REV. 425, 426–8 (2000); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1099–100 (1996); Herbert M. Kritzer, William A. Bogart & Neil Vidmar, *The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States*, 25 LAW & SOC'Y REV. 499, 501 (1991); Herbert M. Kritzer, *Propensity to Sue in England and in the United States of America: Blaming and Claiming in Tort Cases*, 18 J.L. & SOC'Y 400, 401–2 (1991).

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

206 Roderick A. MacDonald, *Access to Civil Justice*, *in* OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH, *supra* note 10, at 492, 510–5; Austin Sarat, *Access to Justice*, 94 HARV. L. REV. 1911, 1916–17 (1981); *see also* Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1352–55 (2012).

207 *See also* David Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, *in* INSIDERS, OUTSIDERS, INJURIES, AND LAW: REVISITING 'THE OVEN BIRD'S SONG' 8 (Mary Nell Trautner ed., 2018); Barbara Yngvesson, *Emulating Sherlock Holmes: The Dog That Didn't Bark, the Victim Who Didn't Sue, and Other Contradictions of the "Hyper-Litigious" Society*, *in* INSIDERS, OUTSIDERS, INJURIES, AND LAW: REVISITING 'THE OVEN BIRD'S SONG' 38 (Mary Nell Trautner ed., 2018).

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.[210] The rest lies somewhere else, before and beyond the façade of official rules and official adjudication mechanisms.[211]

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.[212] 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

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. S*ee* 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".

adopting a denial or accommodation strategy,[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,[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)[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,[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.

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213 *See supra*, Section 2.

214 *See also* Tamanaha, *supra* note 44 at 213.

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").

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.