

PRIVATE LEGAL SYSTEMS: WHAT CYBERSPACE MIGHT TEACH LEGAL THEORISTS

THOMAS SCHULTZ*

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ABSTRACT

*One of the most pervasive and recurrent issues that legal theory has had to deal with is the very concept of law. And one of the most puzzling questions that cyberspace lawyers have been facing is where and in which form law is to be found on the Internet. This essay seeks to build a bridge between these two issues. The main argument is that, on the Internet and more specifically in the context of eBay (the online marketplace) and with regard to certain aspects of domain names, private spheres of normativity may be found that deserve to be considered as the epitome of private legal systems more so than the *lex mercatoria*. These systems provide fertile ground to test some of the most classical issues regarding the concept of a legal system and thereby to reflect on the essential features of law. This Article is thus a discussion of legal pluralism based on examples provided by the Internet. These particularly revealing examples are used to shed some light on issues such as the distinction between social and legal norms, the autonomy of a legal system, and law's supposed features of supremacy, territorial exclusiveness and comprehensiveness.*

* Senior Research Fellow, Faculty of Law, Geneva University. This Article was written during a postdoctoral research stay at the Lauterpacht Research Centre for International Law, Cambridge University, 2005-2006. The Swiss National Science Foundation and the Holcim Foundation for the Advancement of Academic Work provided support for this research. The author wishes to thank Professor Matthew Kramer for his invaluable guidance in preparing this Article.

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INTRODUCTION

Legal theorists often see the last decade's wealth of reflections on law and the Internet as barely more than a passing intellectual fad, as some young people's agitation that they should and eventually will grow out of, and they feel that the whole idea of a virtual online world is against the natural order of things. Cyberlaw devotees, on the other hand, have a tendency to see their field as so new, so exciting, so revolutionary, and so likely to give them a career, that they are entitled not to bother with many of the classical ways we think about law, and especially the more complicated ways of thinking about it. This is unfortunate because the Internet offers new examples of law's normativity, which may enrich legal theory, while legal theory can look back to centuries of conceptual developments that may help cyberlawyers handle their challenges with shifting power structures and modalities of control. In particular, it would seem relevant, if not critical, for legal theorists to look to the Internet to see how such new fundamental developments in the law may illuminate the way we think of legal systems. It also would seem relevant, if not vital, for those concerned with the governance of cyberspace, who reflect on how Internet activities are, can and should be regulated, to look to classical legal theory to start from fundamental reflections about what law and a legal system are. However, these relationships have hardly been touched upon.

Admittedly, many assertions have already been made about the existence of non-state law on the Internet.¹ Nevertheless, anyone making such a claim – that there is law outside the state – bears the burden of proof of what law might be when it is unconnected with government and where it may then be found.² This burden is not yet

¹ This is in substance the argument of the *lex electronica* being the equivalent for the Internet of the *lex mercatoria*. For more on the concept of the *lex electronica*, though sometimes with a different terminology, see, for example, VINCENT GAUTRAIS, LE CONTRAT ÉLECTRONIQUE INTERNATIONAL ENCADREMENT JURIDIQUE 23 (2002); Matthew R. Burnstein, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75, 102, 108 (1996); William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 219–220 (1996) (mentioning the “separat[ion] of cyberspace into an autonomous jurisdiction”); Henri Farrell, *Hybrid Institutions and the Law: Outlaw Arrangements or Interface Solutions?*, 23 ZEITSCHRIFT FÜR RECHTSOZIOLOGIE 25 (2002); Trotter Hardy, *The Proper Legal Regime for ‘Cyberspace’*, 55 U. PITT. L. REV. 993, 1021 (1994); David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1389 (1996); Gunther Teubner, *Constitutionnalisme sociétal et globalisation: alternatives à la théorie constitutionnelle centrée sur l’Etat*, 39 REVUE JURIDIQUE THÉMIS 435, 454 (2005); Leon Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 U. TORONTO L.J. 265 (2003); Pierre Trudel, *La lex electronica*, in LE DROIT SAISI PAR LA MONDIALISATION 221, 231 (Charles-Albert Morand ed. 2001); Edward J. Valauskas, *Lex Networkia: Understanding the Internet Community*, 1 FIRST MONDAY, no. 4 (1996), available at <http://www.webcitation.org/5O1UFPZ7H>.

² This is the central argument in Simon Roberts, *After Government? On Representing Law Without the State*, 68 MOD. L. REV. 1, 18 (2005) (rejecting the idea of law outside the state because of the difficulty of such a definition).

met, or at least not met fully, by those who have previously made claims of the existence of non-state law on the Internet. This Article, then, seeks to do just this: come up with a workable definition of law for legal systems outside the state, apply this definition to two particular instances of normative systems on the Internet, and see what we can learn from it. Seen from a different perspective, the Article combines a central theme of cyberspace regulation, namely the idea of transnational private orderings, and a central theme of legal theory, which is the question of the identity of a legal system.

In this regard, one of the main findings of the Article is that there exist private systems on the Internet that are much more clearly legal systems than some of the prime examples provided by legal pluralists. The *lex mercatoria* is portrayed by some of the most respected scholars in the field of legal pluralism as “the most successful example of global law without a state,”³ as the epitome of a private legal system. Unfortunately, the *lex mercatoria* is confronted with what appears to be a decisive criticism, insofar as its characterization as a legal system is concerned: it still needs to rely on national courts for enforcement.⁴ As Simon Roberts would say, its “legality is routinely secured from underneath, ‘downwards’ into the state, as it were.”⁵ The *lex mercatoria* can therefore only have the contents that national courts allow it to have.⁶ Assuming that only efficacious rules matter, the final and decisive rule of recognition determining which rules of conduct belong to the *lex mercatoria* is in the hands of national courts, of the public legal system. The situation is different with regard to the legal systems on the Internet that are envisaged here; they rely on their own enforcement structures. Two such systems are considered in this Article, both because of their significance for the regulation of cyberspace and the clarity with which they realize the conditions meant to be demonstrated here: one relates to the Internet Corporation for Assigned Names and Numbers (ICANN) and the regulation of domain names; the other is eBay’s system for regulating electronic transactions.

My hope in examining these two systems is twofold. First, I mean to contribute to our understanding of what private legal systems are, and where and how they may operate. For this purpose, much of this Article will be spent addressing some of the main objections to the recognition of private normative systems as legal systems, as they are raised by the instances considered here. In this respect, much attention will be given to departing as little as possible from the analytic scheme

³ Gunther Teubner, ‘Global Bukowina’: *Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 3 (Gunther Teubner ed., 1997).

⁴ See, e.g., Lawrence M. Friedman, *One World: Notes on the Emerging Legal Order*, in *TRANSNATIONAL LEGAL PROCESSES* 23, 31, 33 (Michael Likosky ed., 2002).

⁵ Roberts, *supra* note 2, at 18.

⁶ See, e.g., 1 CHRISTIAN VON BAR & PETER MANKOWSKI, *INTERNATIONALES PRIVATRECHT* 81 (2d ed. 2003).

commonly used to ground legal positivism (in the sense of its monistic construction of law, as opposed to legal pluralism), in order to remain close to the conception of law we rely on when thinking about law with the public legal system in mind. This is done in order to avoid or at least to minimize one fair concern frequently raised against radical pluralism, which consists of claiming that it is simply not informative enough about the difference between law and social orders.⁷ Second, I hope to explain what the sources of regulation in certain contexts of cyberspace are and to examine what regime concretely determines the rights of people in certain situations, in the sense of describing what normative system will determine the final situation of the parties after a dispute. This will show that, in certain cases, it is not the public legal system, but a private one, that will determine this. To reach this conclusion, this Article follows the idea that sometimes, to answer the question of what the law is on a particular issue, one needs to first answer the question of what law is in general terms.

Labeling specific normative systems as either legal systems or mere social orderings matters because at least two consequences flow from it. The importance of law resides in the fact that its every incarnation carries with it certain qualities that we have come to associate with and expect from that which is jural. First, the label of law implies the recognition of a certain power structure, a structure that includes a high degree of autonomy and regulatory sway on the part of the system qualified as legal. Qualifying a normative order as law elevates it, in certain respects, to a level where it can be compared with state law – the epitome of a legal system – in terms of regulatory power: any instance of law is a regime of effective governance that is, to a large extent, autonomous or self-contained and, for its greatest part, not hierarchically submitted to any other normative system.⁸ As Joseph Raz writes, “There can be human societies which are not governed by law at all. But if a society is subjected to a legal system then that system is the most important institutionalized system to which it is subjected.”⁹ Yet law is not only a question of power. The label of law also triggers certain legitimate expectations with regard to the quality of the governance that a legal system effects. These qualitative expectations derive from the fundamental attributes of the rule of law, which Lon Fuller called the “inner morality of law” – for example, predictability, publicity, non-retroactivity, understandable

⁷ See, e.g., Roberts, *supra* note 2, at 8.

⁸ This feature of law is what the concept of supremacy encapsulates and it is the true issue behind the debate about law’s presence outside the state. To admit that there are legal systems outside the state is to recognize that there are communities in this world that are, with respect to some parts of their activities, not submitted to the state. This fear that such systems would thus escape from the control and guarantees of the state is one fear of classical legal positivism, expressed by Duguit and Kelsen: “There is no other justice than the justice to be found in the positive law of states.” LÉON DUGUIT & HANS KELSEN, *Foreword* to 1 REVUE INTERNATIONALE DE LA THÉORIE DU DROIT 3 (1926-1927).

⁹ JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 154 (1999).

character of the commands, non-contradiction, compliability, steadiness over time, and consistency in the application of norms.¹⁰ As Matthew Kramer suggests, respect for the attributes of the rule of law, which are expressive of a moral-political ideal, guarantees the normative system's adherence to liberal-democratic values.¹¹ These latter consequences that flow from the label of law (the attributes of the rule of law) are a corollary of the former consequences (the recognition of the regulatory power); simply put, the more effectively a normative system regulates, the higher its standards must be. To qualify a given normative system as law matters, thus, because it earmarks the system as having a certain regulatory importance and, consequently, warns us that we should demand certain regulatory standards from such a system.

My Article moves in five parts. I begin with a presentation of the two legal systems on the Internet already mentioned. Then I try to cut to the heart of the issue addressed, which is the distinction between legal systems and mere social orderings; this is done through relying on the work of Norberto Bobbio and Paul Bohannon with regard to the progressive secundarization of norms, people and institutions in a normative system's progressive evolution from social to jural. This progressive evolution then leads me to address the question whether law is itself of a scalar or a dichotomous quality, to determine if a normative system may become increasingly jural, or if it acquires the quality of law and subsequently only becomes more clearly a legal system. After that, I rely on the concepts of prescriptive, adjudicative and enforcement jurisdictional powers as revealing factors of juridicity. The Article then ends by addressing the question whether a normative system that has no claims to comprehensiveness and supremacy, and that lives within and across other legal systems, can still be a legal system. It reaches the conclusion that ICANN and eBay are indeed some of the places on the Internet where normative systems can be found that are so autonomous and formally organized, and that display the essential features of a legal system to such a high degree, that they deserve to acquire the status of archetypes of non-state law.

I. TWO NORMATIVE SYSTEMS ON THE INTERNET

To say that private orderings abound on the Internet is a claim that is neither truly novel nor especially exciting. After all, private orderings abound just as much outside the Internet, and they regulate us in our daily offline activities. Wherever there is a community, there is a private ordering, which means there are norms, in the sense of "standard[s] with which conformity is required and against which people's conduct can be assessed" that form a "touchstone for guiding

¹⁰ See LON FULLER, *THE MORALITY OF LAW* 33–41 (rev. ed. 1969).

¹¹ See MATTHEW H. KRAMER, *OBJECTIVITY AND THE RULE OF LAW* 102 (2007) [*hereinafter* KRAMER, *OBJECTIVITY*].

and appraising human conduct”.¹² The place I work at, the house I live in, the bar I have drinks at, the academic communities I am part of, my family, my group of friends, etc., all have formed rules that I have prudential, and sometimes moral, reasons to obey. Just the same, online communities (people gathering on the Internet with shared interests to engage in the same or closely related activity) frequently have their own rules, which may lead, in case of violation, to social, economic and technological sanctions.¹³ I could endure criticism or slating, disparagement or ostracism. I may be prevented from participating in certain profitable deals normally concluded within this online community. And technological code, which is an unavoidable element of the feasibility of activities on the Internet, may be used as a sanction against me, for instance by denying me access to a given website, database or other information system.¹⁴ In sum, cyberspaces (in the plural) frequently have their own private rules. This, as I have suggested, is neither very controversial nor particularly surprising.

What may be less obvious is the observation that, in some situations, such private orderings acquire a remarkable degree of formal organization. It is precisely this formal organization that allows them, as I will contend in the balance of this Article, to become legal systems. Hence, the purpose of the present section is to describe the organization – the general structure and functioning – of two such normative systems. The first one relates to certain types of domain names; the second one is eBay.

A. Domain Names

Domain names, such as nytimes.com, are the identifying names for Internet addresses. They are the identifying names, and not the addresses themselves, because the latter are made up of numbers, called IP addresses. When a domain name is entered into a Web browser (such as Internet Explorer, Netscape or Firefox), the browser obtains the corresponding IP addresses from a database and then connects to the corresponding server, on which the contents of the website in question are hosted. Without this conversion of the domain name into the IP address, the browser will not be able to access the website. This conversion database, insofar as it relates to generic and international domain names,¹⁵ as well as certain national domain names,¹⁶ was first controlled by a single man, Jon Postel, one of the

¹² MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM 80 (1999) [*hereinafter* KRAMER, IN DEFENSE].

¹³ *See, e.g.*, PAUL VIRILIO, THE INFORMATION BOMB 99–125 (2000).

¹⁴ *See, e.g.*, LAWRENCE LESSIG, CODE 340–345 (2d ed. 2006).

¹⁵ More precisely, the domain names concerned are those ending in biz, .com, .info, .name, .net, .org, .aero, .coop, .jobs, .travel and .museum, which represent the majority of domain names in the world.

fathers of the Internet itself. He regulated the attribution of domain names in an informal manner, on the basis of “rough consensus,” in global accordance with the Internet community’s general understandings of how this regulation should be accomplished. Due to the increasing complexity and quantitative importance of the management of the domain name system, it was later transferred to a private non-profit corporation based in California, called the Internet Corporation for Assigned Names and Numbers (ICANN).¹⁷

In 1999, ICANN introduced a specific dispute resolution mechanism, applicable to all the domain names it controls: the Uniform Domain Name Dispute Resolution Policy (UDRP). The main objective of the UDRP was to fight cybersquatting, which is in essence the practice of registering a domain name very similar to a trademark for the purpose of subsequently offering it to the trademark holder at an extortionary price. The UDRP sought to introduce a low-cost, effective and simple procedure for disputes between trademark holders and domain name holders.

On the basis of the UDRP, a trademark owner may challenge a purportedly infringing domain name, wherever her trademark is registered. To obtain the transfer of the domain name or its cancellation, the trademark holder must file a complaint with one of four ICANN-approved institutions.¹⁸ In addition, the trademark holder must show that certain conditions contained in the UDRP itself are met, namely that the domain name is identical or confusingly similar to the complainant’s trademark; that the domain name holder has no rights or legitimate interests in the domain name; and that the domain name was registered and is used in bad faith.¹⁹

If the complainant demonstrates that these conditions are met, the dispute resolution panel in principle will order the domain name to be either transferred to the complainant or, in exceptional cases, cancelled. This decision is implemented through technological means by the registrar – the firm approved by ICANN that contracts with clients to register domain names in a central database - of the domain name in question. To implement the decision, the registrar changes the association between the domain name and the IP address, which prevents the domain name from being resolved into the original IP address. Instead of connecting to the server containing the contents of the website of the respondent, all web browsers then connect to the server hosting the complainant’s website. The respondent’s website

¹⁶ For example, those ending in .ve (Venezuela), .pr (Puerto Rico), .gt (Guatemala), .tv (Tuvalu), etc.

¹⁷ See, e.g., JACK L. GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? 33–46, 168–171 (2006).

¹⁸ These four institutions are the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO); the National Arbitration Forum (NAF); the Institute for Dispute Resolution of the Center for Public Resources (CPR); and the Asian Domain Name Dispute Resolution Center (ADNDRC).

¹⁹ See UDRP, Para. 4(a); see also UDRP RULES, Para. 3(b)(ix).

effectively becomes invisible. In order to be able to change this association in ICANN's database, the registrar must have been approved by ICANN. Only on one condition is the decision in application of the UDRP not implemented by the registrar: the respondent must show, within ten days after the UDRP decision is handed down, that he has commenced a lawsuit in certain jurisdictions.²⁰ This, however, is an exceptional occurrence: it is estimated to occur in less than one percent of all cases.²¹ In almost all cases, disputes submitted to the UDRP are resolved by an ICANN-approved panel applying rules contained in the ICANN-adopted UDRP, and the decision is enforced by an ICANN-approved domain-name registrar.

B. *eBay*

Founded in 1995, eBay is an online marketplace displaying several tens of millions of items for sale at any given time, worldwide. Sales take place between two eBay members; eBay itself only provides the venue for trading. On any given day, several million transactions are completed through eBay, mainly in the form of auctions, making it one of the most vibrant successes of the Internet. Nevertheless, through force of circumstances, a certain proportion of these transactions started to give rise to disputes. This would happen in any context in which transactions are concluded. But on the Internet, this poses a particular challenge. On the one hand, the parties involved are remote and anonymous traders who in principle engage only in one-shot transactions; this makes control through word of mouth – spreading the word about poor business practices – radically less efficient, if at all possible.²² On the other hand, the average value of transactions on online auction sites is low (typically below \$100²³), while the costs of dispute resolution typically are higher than for offline transactions of the same amount, for reasons related to geographic distances, jurisdictional ambiguity, the need for translation, and other similar factors. This had the effect of making the costs of

²⁰ See UDRP, Para. 4(k).

²¹ In December 2007, The informal listing maintained by the World Intellectual Property's Arbitration and Mediation Center contained 32 known cases where a UDRP decision had been followed by a court procedure, out of over 12,000 cases handled by the Center. See statistics available at <http://www.wipo.int/amc/en/domains/challenged/index.html> and <http://www.wipo.int/amc/en/domains/statistics/cases.jsp>. On the paucity of court cases, see also Nicholas Smith & Erik Wilbers, *The UDRP: Design Elements of an Effective ADR Mechanism*, 15 AM. REV. INT'L ARB. 215, 228 (2004).

²² See, e.g., David P. Baron, *Private Ordering on the Internet: The eBay Community of Traders*, 4 BUS. & POL. 245 (2002).

²³ See, e.g., Calum MacDonald, *Online Auction Sites Add Billions to Web Sales*, THE HERALD, Aug. 1, 2006, reporting figures from the Association for Payment Clearing Services.

access to justice prohibitive and leaving the parties with no practicable options of dispute resolution.²⁴ A way of building trust in transactions had to be found.

In the beginning, a loose social order emerged spontaneously, with members establishing vague standards of conduct, commenting on each other's behavior by email and on bulletin boards, and socially excluding those members who were found to be repeatedly non-compliant. Soon a group of six members called *The Posse* formed, which attributed itself the task of policing the marketplace through close monitoring and by authoritatively damaging the reputation of those who violated the informal norms that had developed.²⁵ However, as the eBay community grew, this loose ordering no longer seemed to be sufficient. eBay had to find a more effective solution, one that would be more predictable and thus more formalized. This was achieved in several steps, by addressing precisely three aspects of the problem. First, eBay proceeded to gradually introduce eBay user policies, which grew increasingly dense, detailed and formalized. Second, eBay introduced a reputation management system. Third, it put in place a dispute resolution mechanism.

The eBay user policies, the norms of conduct formulated by eBay, meanwhile have become a well-developed set of rules that regulate a large variety of behavior on the marketplace. They are updated regularly and completed on the basis of new commonly observed practices of eBay members.²⁶ The emergence or change of such practices is established either by a global observation of behavior on the marketplace or by direct discussion with selected representatives of the eBay "civil society" (its community of traders), some of these representatives being nominated directly by the community itself.²⁷ In a process akin to the codification of custom, the eBay user policies reproduce – or "positivize" in the sense of posited norms – closely observed member habits, which themselves express spontaneous social rules.

The reputation management system, introduced in 1996, operates on a very simple basis. The first element of the system is the establishment of a link between the online profile of an eBay member and her real identity. This is achieved by a thorough identity check (based on different factors, including certain credit card details) at the stage of the creation of the online profile, combined with a clear marking of those members who subsequently have changed their member names. The second element is that, after the conclusion of

²⁴ See, e.g., GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, ONLINE DISPUTE RESOLUTION: CHALLENGES FOR CONTEMPORARY JUSTICE 70–72 (2004).

²⁵ See, e.g., Baron, *supra* note 22, at 246–247.

²⁶ See, e.g., Graf-Peter Calliess, *Transnational Consumer Law: Co-Regulation of B2C E-Commerce*, in RESPONSIBLE BUSINESS (Olaf Dilling et al. eds., forthcoming 2007).

²⁷ See, e.g., Baron, *supra* note 22, at 9.

each transaction, both parties are encouraged to leave feedback regarding one another's contractual behavior. This feedback, which can be positive, negative or neutral, permanently becomes part of the assessed party's online profile and is displayed to every future potential contractor. Negative feedback can, in principle, only be removed by mutual agreement. This reputation management system allows the creation of a history of transactions by integrating over time the assessments of contracting partners, which is precisely how commercial reputation usually works.

The dispute resolution mechanism, put in place in 1999, is a two-tiered process of computer-assisted negotiation followed by mediation; both stages of the process take place entirely over the Internet. They constitute what is referred to as online dispute resolution. The concrete management of the process is the task of a company, SquareTrade, which provides online dispute resolution services in various contexts, but primarily for eBay. In the first stage of the procedure, the two parties negotiate using an interactive system accessible on the Internet. This system suggests typical issues that the parties may have, and thereby helps them identify and understand their issue, and then recommends typical settlement agreements that statistically are likely to be accepted in the situation described by the parties. It is based on a simple form of artificial intelligence, constantly learning from prior cases to guess what the parties' issues and agreeable solutions are likely to be – IT jargon would call it an expert system. If the system fails to achieve a voluntary resolution of the case, the parties may request the intervention of a mediator, who then replaces the computer in its attempt to bring the parties to an agreement, typically by better articulating their issues and providing acceptable solutions.²⁸

Negotiation, as the ADR movement has shown, does not take place in a legal vacuum; there is always reference to a certain law, or at least to a certain normative order, which the parties believe is relevant in determining their rights and obligations. This is called the effect of the shadow of the law.²⁹ The law's shadow is reinforced when a third party intervenes in the negotiation and reminds the parties, implicitly or explicitly, of their rights and obligations, provided the third party makes reference to the same law or normative order as the parties. This third party can be either the mediator or, in the system considered here, the computer – the parties' aggregated understandings of their rights and obligations are reflected in the issues and solutions suggested by the computer. An interesting question is

²⁸ See, e.g., Steve Abernethy, *Building Large-Scale Online Dispute Resolution and Trustmark Systems*, in ONLINE DISPUTE RESOLUTION: TECHNOLOGY AS THE "FOURTH PARTY" (Ethan Katsh & Daewon Choi eds., 2003), available at <http://www.webcitation.org/5O1HP5FHI>.

²⁹ See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979); Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); see also Pierre Bourdieu, *Les rites comme actes d'institution*, 43 ACTES DE RECHERCHE EN SCIENCES SOCIALES 59 (1982).

then to know under the shadow of which law eBay dispute resolution takes place, as it is not uncommon that the parties reside in different countries. The answer seems to be even more interesting than the question: an empirical study, conducted in 1999, found that it was “eBay law.”³⁰ The norms that eBay members seemed to consider the relevant rules of conduct, the norms whose normativity they seemed to invoke, were the body of eBay user policies – “eBay law” – rather than one or other of the national laws that would have been applicable in court.³¹

Reputation and dispute resolution are linked in several ways at eBay. A party who refuses to participate in the dispute resolution procedure or subsequently to comply with the outcome runs the risk of being given reputation-damaging feedback by the other party. If this negative feedback already has been given, then the dispute resolution procedure offers three ways to remove it: (1) both parties reach a settlement agreement through negotiation and mutually agree to remove the feedback; (2) the case goes to mediation and the parties reach a settlement and comply with its terms, in which case the mediator will instruct eBay to remove the negative feedback; (3) the party that left the negative feedback refuses to participate in the dispute resolution process, in which case the mediator may again instruct eBay to remove the negative feedback.

Another type of link between dispute resolution and reputation at eBay is the icon that traders can display on their offerings. This icon, generically called a trustmark, testifies to the fact that the trader displaying it has pledged to submit to the dispute resolution process, and in the past has shown to comply with this pledge, thereby adding to the reputation of its holder. This has a significant economic importance: when an eBay trader displays this trustmark, the number of bids placed for each of his items typically will increase by fifteen percent and the average selling price by twenty percent.³² If a trustmark holder refuses to participate in the dispute resolution procedure or refuses to comply with the outcome, she will be sanctioned by the removal of the icon.

Now, it does not seem to be a mark of naïveté to see the presence of a certain normative order in the two contexts examined here. However, the question that consequently must be answered, and which too frequently is forgotten, is whether they are mere social orderings (which would be a rather unexciting claim) or whether they can be

³⁰ See Ethan Katsh et al., *E-Commerce, E-Dispute, and E-Dispute Resolution: In the Shadow of “eBay Law”*, 15 OHIO ST. J. DISP. RESOL. 705, 728 (2000).

³¹ See also Ethan Katsh, *Adding Trust Systems to Transaction Systems: The Role of Online Dispute Resolution*, UNECE Forum on Online Dispute Resolution, at http://www.ombuds.org/un/unece_june2002.doc (May 2002), at 4 (considering that such a phenomenon is due to the fact that recourse to national courts is an unrealistic option).

³² Figures provided by the CEO of the dispute resolution program in an interview reported in KAUFMANN-KOHLER & SCHULTZ, *supra* note 24, at 328.

characterized as true legal systems. Before we move on to my contention on this point, however, we still need to clarify certain central questions. The first of them is the difference between social orderings and legal systems, which is the topic of the following section.

II. LEGAL SYSTEMS OR MERE SOCIAL ORDERINGS? THE CRITERION OF SECONDARITY

Having thus identified two normative orders that seem particularly autonomous from the public legal system, the question that follows is whether these orders can be characterized as jural or not - whether they constitute private legal orders or simply other forms of normative orders.

Before the question is addressed, it may be worthwhile to consider that law is a noetic unity; it is a concept not represented by anything except our ideas about it.³³ Hence the definition of law seems, even more than other definitions, to be chiefly, if not exclusively, grounded in conventions among scholars. As a conventional definition, what determines its quality (in other words whether a specific definition should be retained or not) may be held to be how it succeeds in the tests of fertility (what it is able to explain), congruency (how many facets of the phenomenon it takes into consideration), and rhetoric (whether it generally seems useful and thus convincing to the scholars working with the concept).³⁴ Brutally simplifying, one may thus contend that what matters is to rely on a workable definition of law, one that will yield concrete and worthwhile results when applied in the study of a given subject and that hopefully would strike one as sound and reasonable.

In addition, in the task of identifying a workable definition of law for the analysis of private normative orderings on the Internet, one may proceed from the premise that the Internet is a field of evolving normativity. Hence it seems appropriate to refer to studies of *emerging* normativity - theories that contain a temporal dimension in their conceptualization of law and hence offer an explanation on how and when emerging norms acquire a legal nature.

Finally, the approach chosen here is to focus on the structural aspects of law as a legal system, instead of on certain specific characteristics of norms considered in isolation, the latter of which Norberto Bobbio considered to amount to "looking at the tree and not the forest."³⁵

³³ See, e.g., Paul Bohannon, *The Differing Realms of the Law*, 67 AM. ANTHROPOLOGIST 33 (1965).

³⁴ See, e.g., François Ost, *Science du droit*, in DICTIONNAIRE ENCYCLOPÉDIQUE DE SOCIOLOGIE ET DE THÉORIE DU DROIT 540 (André-Jean Arnaud ed., 1993).

³⁵ NORBERTO BOBBIO, *TEORIA DELL'ORDINAMENTO GIURIDICO* 7 (1960).

The first part of an answer to this quest for a workable definition that includes a temporal element may lie in the concept of secondarity.³⁶ This concept focuses on the distinction between a social normative order and a legal order; it is based on the idea that normative orders sometimes evolve and follow a series of identifiable steps, from a relatively loose array of norms of conduct to a formalized system of rules roughly akin to the public legal system. In the process, as certain social norms become legal norms, the social normative system is transformed into a legal order.³⁷

As the name suggests, the concept of secondarity is about secondary rules, as opposed to primary rules. The starting point of the theory is Hart's tenet that an essential element of the distinction between a legal system and other normative systems is the fact that a legal system results from a combination of primary rules of conduct and secondary rules that regulate the recognition, change and adjudication of the primary rules.³⁸ Other normative orderings typically only have primary rules of conduct. In social orderings, for instance, there are no rules that attribute to certain people or institutions the powers to decide which are the existing social rules, to change them, and to decide when they have been violated and what the reaction should be. When that changes, the social ordering in question may become a legal system. This takes place through secundarization of the norms, as well as of the institutions and of the people, of the normative system. To clarify how this evolution takes place, the following starts by presenting the ideas of two of the scholars behind the concept of secondarity: Norberto Bobbio and Paul Bohannan.

Among the prolific work of Norberto Bobbio is an article in which he examined at length various relationships that may exist between primary and secondary norms.³⁹ One of his observations is that the very semantics of the word secondarity suggest a chronological order. Primary rules of conduct come first and they are, in certain cases, later followed by the meta-level of secondary norms – rules on other rules, that is adjectival law as opposed to substantive law. The emergence of secondary rules, if it occurs, is not anodyne. It testifies, not as a symptom but rather as an integral part of the phenomenon, that a normative system evolves from what Bobbio calls a “primitive or pre-jural ordering composed only of primary norms”⁴⁰

³⁶ For an introduction, see FRANÇOIS OST & MICHEL VAN DE KERCHOVE, *DE LA PYRAMIDE AU RÉSEAU?* 368–71 (2002).

³⁷ On legal norms emerging from social norms, see JULIUS STONE, *SOCIAL DIMENSION OF LAW AND JUSTICE* (1966); *see also* MICHEL VAN DE KERCHOVE & FRANÇOIS OST, *LEGAL SYSTEM BETWEEN ORDER AND DISORDER* 110 (Iain Stewart trans., 1994).

³⁸ H.L.A. HART, *THE CONCEPT OF LAW* 90 (2d ed. 1994).

³⁹ *See* Norberto Bobbio, *Ancora sulle norme primarie e norme secondarie*, 59 *RIVISTA DI FILOSOFIA* 35 (1968).

⁴⁰ *Id.* at 39.

to become first a simple system, then a semi-complex one and finally a complex normative system, of which the legal system is a typical instance. These stages of evolution are defined as follows: A simple system is one composed essentially of primary norms, but also containing at least some sort of basic rule of recognition that identifies the norm belonging together; without this element of cohesion, the word “system” would indeed not be proper. Semi-complex systems have, in addition, either rules of creation (or change) or of sanction (or adjudication), but not both. Complex systems are those including all these different types of norms, that is primary rules as well as the three categories of secondary rules identified by Hart; it is a system where rules regulating conduct are themselves regulated comprehensively by other norms.

What drives this evolution from loose orderings of rules of conduct to complex normative systems is the pursuit of what Bobbio calls a state of dynamic equilibrium. Such an equilibrium is achieved through secondary rules guaranteeing the conservation and transformation of the primary rules.⁴¹ Conservation means in this case the avoidance of violations of primary rules at a rate that would threaten the entire system with dissolution by inefficacy. Positively, it means attaining a high level of efficacy through clear, predictable and effective sanctions. Diffuse and spontaneous social blame is replaced by an institutionalized and formally regulated system of responses to violations of rules of conduct. Guaranteeing transformation of primary rules means overcoming the relative stasis and eventual desuetude inherent to slow customary adjustments operating by repeated practice over long periods.⁴² Quicker and more flexible transformations of the primary rules are made possible by the institutionalization of the creation of norms, that is, by the introduction of a formal mechanism for the elaboration and change of rules. This allows, on the one hand, increased adaptation to social changes and, on the other hand, deliberate impulses of social change by the pro-active introduction of new primary rules. Again, the difference between a simple system of rules, corresponding to a “primitive” society such as the one presumed by the theory of the state of nature, and a complex normative system, whose epitome is probably the modern state, is the introduction of secondary rules - the transition from one layer to two layers of rules.⁴³

The introduction of secondary rules is accompanied by the development of specific institutions. According to Bobbio, what characterizes a simple normative system is the fact that specific institutions for the conservation and transformation of the system are missing. The subsequent development towards a more complex system is dependent on the development of clearly identified judicial and

⁴¹ See *id.* at 47–51.

⁴² See, e.g., HART, *supra* note 38, at 90; OST & VAN DE KERCHOVE, *supra* note 36, at 368.

⁴³ See, e.g., Bobbio, *supra* note 39, at 46; HART, *supra* note 38, at 89.

legislative powers.⁴⁴ The judicial power, Bobbio maintains, typically appears first. Judges have at that stage a double role: responding to sanctions (conservation) and creating the rules they will apply (transformation). In a second step, judges are joined by a parliament or another specifically legislative institution. The emergence of secondary rules goes hand in hand with the evolution of these formal institutions: the rules attribute certain powers to specific institutions, which in return give effect to these rules by responding formally to a violation of a primary rule or by creating a new rule following a pre-defined procedure. Secondary rules have no efficacy without formal institutions, and formal institutions cannot exist without well-developed secondary rules.⁴⁵

Further clarification on the concept of secondarity, and more specifically on the role of institutions, can be found in the work of Paul Bohannan. The author's main contribution to this theory is his notion of "double institutionalization" or "reinstitutionalization."⁴⁶ To understand what this notion means, one must first acknowledge the coexistence within a single social field of social norms and legal norms. The development of a legal system does not do away with the social normative order underlying it.⁴⁷ Metaphorically, one may view the emergence of a legal system as taking place in a way similar to biological cell reproduction: the social normative system creates progressively a new normative system, which is built initially from the same material but subsequently develops on its own. A legal system is in this sense an offspring of a social normative system, progressively detaching itself from its "parental" system. After this detachment, the legal system becomes, as François Ost and Michel van de Kerchove put it, a "specialized system of engendering and sanction of legal rules" that is "superposed and detached from the underlying social system, to the point of giving the illusion of operating in isolation, in autopoietic fashion, with strings no longer attached to the basic social underpinnings."⁴⁸

This autopoiesis, however, is never attained completely. Eugen Ehrlich, among many others, states that a legal system is never closed entirely to its normative environment.⁴⁹ And it is precisely on the

⁴⁴ See, e.g., Bobbio, *supra* note 39, at 51.

⁴⁵ Cf. SANTI ROMANO, *L'ORDINAMENTO GIURIDICO* (1917) (arguing that a legal system is composed of, on the one hand, primary rules of conduct and, on the other hand, institutions).

⁴⁶ See Bohannan, *supra* note 33, at 34–37.

⁴⁷ See, e.g., GEORGES GURVITCH, *ÉLÉMENTS DE SOCIOLOGIE JURIDIQUE* 185–186 (1949) (1942); VAN DE KERCHOVE & OST, *supra* note 37, at 110; Jacques Chevallier, *L'ordre juridique*, in *LE DROIT EN PROCÈS* 7, 21 (Jacques Chevallier et al. eds., 1983).

⁴⁸ OST & VAN DE KERCHOVE, *supra* note 36, at 369.

⁴⁹ See, e.g., EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (1913) (discussing his concept of "living law").

interaction between the underlying social normative system and the legal system that Bohannan's focus lies. He explains that this interaction takes the form of a double institutionalization: norms are first instituted informally in the social system and then, if they are to become legal, reinstitutionalized in the legal institutions. The "salient difference," Bohannan argues, between social and legal norms is that "law is specifically recreated, by agents of society, in a narrower and recognizable context – that is, in the context of the institutions that are legal in character and, to some degree at least, discrete from all others."⁵⁰ Social norms are reinstitutionalized or restated "in such a way that they can be 'applied' by an institution designed (or, at least, utilized) specifically for that purpose."⁵¹ Primary (social) norms are restated in accordance with secondary rules and thereby acquire their jural character. The institutions now follow a "regularized way to interfere."⁵²

The general picture these developments leave us with is the following: the concept of secondarity pushes the view that the progression from social to legal norms relies on a phenomenon of duplication or secondarization of norms, people and institutions. Here are these three components explained:

(1) Secondarity of norms: as soon as a group of people is formed, norms will emerge – as the slightly but decisively amended maxim goes: *Ubi societas, ibi regula*.⁵³ At first, the norms will be purely substantive as they regulate conduct. Then, in a second stage, adjectival law or procedural rules will develop, which grant certain people certain powers.

2) Secondarity of people: by being granted these powers, the people concerned become agents of their group, and thus now have two roles – they are members of the group and agents of the group.

3) Secondarity of institutions: informal institutions (such as Councils of the elders) are replaced by formal institutions (such as parliaments and courts), which are regulated by the procedural rules and manned by the people to whom the special powers have been given.

I have so far remained silent on a crucial question: if secondarity explains the progression from merely social to legal, where should the line be drawn? Or is there no such threshold, in the sense that the concept of law is obtained by degree? Can it be that a normative order may be more or less law and thus simply progressively becomes law, and the actual transition from social to legal is nothing more than a

⁵⁰ Bohannan, *supra* note 33, at 34.

⁵¹ *Id.* at 36.

⁵² *Id.* at 35.

⁵³ I thereby oppose the idea of *ubi societas ibi ius stricto sensu*, that wherever there is a society, there is ipso facto law, as defended for instance by Roberto Sacco, *Mute Law*, 43 AM. J. COMP. L. 455 (1995); Giorgio del Vecchio, *Sulla statualità del diritto*, 9 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 1, 19 (1929); and LEOPOLD POSPISIL, ANTHROPOLOGY OF LAW 96 (1971).

rather irrelevant diffuse gray zone? Here we need to put aside, for the time being, the entire question of what a legal system is and if it may be found on its own in cyberspace, to think for a minute about the following question: is law a scalar or a dichotomous property? The debate matters because a scalar notion of law permits a wishy-washy approach to the question of what law is. It would indeed enable us to assert quite easily that even the oddest hypotheses are instances of law: the slightest resemblance with an obvious legal system would be a sufficient reason to believe in the (very limited) juridicity of the normative system under consideration. The importance of law would thus almost completely vanish.

III. THE SCALABILITY IN LAW

Integrated over time, law has a strongly scalable dimension, in the sense that an emerging field of normativity becomes a legal regime incrementally. The evolution from a social normative system to a legal system takes place progressively; there are many intermediate stages between a typical social ordering and a full-blown legal system. Hence it is at least theoretically possible to measure the extent of the progression of a normative system from social ordering to a full-blown legal system, or the degree of its proximity to a particularly vibrant legal system. The question this raises is whether the property of being law (or of being a legal system, which is one and the same question in the approach chosen here) can itself be obtained to varying degrees, that is whether it is scalar or not. Can a legal system be more jural than another? The alternative is that what is obtained by degree is only the *clarity* of the status of the legal system. As I will show below, legal systems can differ in their degree of *clarity*, but once a system is a legal system, it cannot be more or less a legal system than another legal system.

As Dworkin noted, there are certain concepts to which scalability attaches, and certain to which it does not.⁵⁴ For example, baldness comes by degrees: one can be bald to a greater or lesser extent. Speed is another example: objects move more quickly or less quickly. Other concepts are not matters of degrees. A house for instance cannot be more a house than another. It cannot be a house to a greater or lesser degree. A chair, also, is a chair or it is not, but one chair cannot be twice as much a chair as another one. It can however, as Wittgenstein observed, be more or less clearly a chair.⁵⁵

Another seemingly germane point is that at least some constituent elements of law are scalar, in the sense that they can be satisfied to varying degrees. As Raz writes, “The general traits which mark a system as a legal one are several and each of them admits, in

⁵⁴ See Ronald Dworkin, *Philosophy, Morality, and Law – Observations Prompted by Professor Fuller’s Novel Claim*, 113 U. PA. L. REV. 668, 677 (1965).

⁵⁵ See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS - APHORISMS* (1953).

principle, of various degrees.”⁵⁶ This seems true for a great variety of conceptions of law, be these conceptions centered on elements such as the presence of sanctions, unity, autonomy, the Fullerian principles of legality⁵⁷ or the concept of secondarity. All of these cardinal elements are scalar: sanctions can be more or less effective and thus present; a normative system is marked by more or less unity or autonomy;⁵⁸ the Fullerian principles of legality are all gradual;⁵⁹ and the concept of secondarity, as we have seen above, clearly functions by degrees.

Yet it is not because some of the constituent elements of a concept are scalable that the concept itself is scalable. To hold the contrary view would mean, to use Dworkin’s words, that “whether something is a novel, or a room, or an army is always a question of degree, because size is one of the criteria of each.”⁶⁰ One page of fictional narrative is clearly not a novel, but rather a novella or a short story. At fifty pages, it seems unclear whether we should grant it this quality. At 200 pages, all doubt is quieted. But it would seem very wrong to say that *Great Expectations* is a novel to a greater extent than *Hard Times*. It would also be quite amusing to think of Alexander the Great’s army on the plains of Gaugamela to be an army to a lesser extent than Darius’s.

Another point is even though people can succeed in making law to various degrees, or fail to do so entirely, law itself, once made, is not scalar. The purposeful enterprise of doing *X* is not necessarily equitable with *X* itself. I mean this as an objection to Fuller, who claims that “[t]o speak of a legal system as an ‘enterprise’ implies that it may be carried on with varying degrees of success. This would mean that the existence of a legal system is a matter of degree.”⁶¹ He argues that law is like education, in the sense that if you asked if education

⁵⁶ RAZ, *supra* note 9, at 150.

⁵⁷ These principles, termed in a negative way, are (1) “every issue [being] decided on an ad hoc basis”; (2) “failure to publicize”; (3) “abuse of retroactive legislation”; (4) “failure to make rules understandable”; (5) “enactment of contradictory rules”; (6) enactment of rules that “require conduct beyond the powers of the affected party”; (7) “introducing such frequent changes in the rules that the subject cannot orient his action by them”; and (8) “a failure of congruence between the rules as announced and their actual administration.” FULLER, *supra* note 10, at 122.

⁵⁸ See, e.g., MIREILLE DELMAS-MARTY, GLOBAL LAW: A TRIPLE CHALLENGE 74 (2003) VAN DE KERCHOVE & OST, *supra* note 37, at 135–142.

⁵⁹ “In no legal system is each of the [Fullerian] eight principles ever perfectly fulfilled. Perfect compliance with each of them is a will-o’-the-wisp and is in any event unnecessary for the existence of a legal regime. Although conformity with the precepts of legality is essential for the existence of any such regime, the conformity only needs to meet or exceed a threshold level; that threshold level for each of the precepts is quite high, but if falls some way short of perfection. (Such a threshold level, incidentally, cannot be specified precisely . . .).” KRAMER, OBJECTIVITY, *supra* note 11, at 105.

⁶⁰ Dworkin, *supra* note 54, at 678.

⁶¹ FULLER, *supra* note 10, at 122.

existed in a given country, the answer would hardly be yes or no but rather a description of the achievements in this respect.⁶² So it would be for law, Fuller contends, which necessarily would be appreciated as a “performance falling between zero and a theoretical perfection.”⁶³ In my view, the addressee of the question about education necessarily would speak of achievements because the obvious answer to the question is “yes.” It is so obviously “yes” that the question necessarily would be reinterpreted as being directed to how good the education system is, which is different entirely. The dichotomous question about the presence of education can only fairly be asked, in its true meaning, to a chimpanzee specialist, for instance, to enquire about the presence of an educational system in ape communities. Under such circumstances, the answer to the question may very well be “yes” or “no,” or some other reply expressing degrees of clarity. In this latter situation, the question would be about *X* itself, whereas in the situation envisaged by Fuller, the question is about the purposeful enterprise of doing *X*.

Another distinction must be made in this context. If we contrast the education system of the United States and a Saharan tribe, we may well conclude that *there is more* education in the United States, but it does not mean that *it is more* education. The American system of education can be more thorough than the other one, but its educational nature may be expected to be the same. Let me explain this with a more intuitive example: the differences in musical achievement between Britney Spears and Ludwig van Beethoven are quite clear to most people, but we would be wrong to say that the 9th Symphony is more music than *Oops! I Did It Again*. Shakespeare’s opuses are not more plays than Feydeau’s. Marius Petipa’s ballets are not more ballets than Maurice Béjart’s. If one can quite clearly be more or less successful in the purposeful enterprise of doing anything, this does not mean that the object of the enterprise is scalar itself. The purposeful enterprise of creating law may be more or less successful, but this does not mean that the result is more or less jural.

A purported scalar nature of law may not be derived from the gradualness of the evolution of normative systems, either. Gradualness of evolution does not necessarily entail scalability of the underlying property. It is true that the developmental approach of law I have adopted here posits, first, that a normative system evolves gradually over time to become a legal system and, second, that once it is a legal system, it continues to evolve to form “developed and . . . less highly developed legal systems,” as Paul Bohannon would say.⁶⁴ Intuitively, one might be tempted to think that the only approach consistent with such a developmental view is one that acknowledges the scalability of the underlying concept. However, in this case intuition may advise

⁶² *Id.* at 122-23.

⁶³ *Id.* at 123.

⁶⁴ Bohannon, *supra* note 33, at 37.

wrongly, as I hope the following examples make clear. For instance, the physical phenomenon of water becoming water vapor is gradual: the thermal motion of water molecules increases, gradually, up to the point where the kinetic energy overcomes the surface tension and molecules evaporate. Regardless, this does not imply that the concepts of water or water vapor are obtained by degrees. Even though the transition from one state to the other has a scalable component (speed), each of the two states are non-scalar. The evolution reaches a threshold and then the difference in degree becomes a difference in kind. Over the threshold, the continued evolution to a more or less highly developed state does not, either, imply the scalar character of the underlying concept. A muscle can be more or less developed, it can achieve its functions to a higher or a lesser degree, but this does not mean that we may speak in such cases of something that is more or less of a muscle. As Matthew Kramer argues, over the threshold of juridicity, a legal system may admit of various degrees not of juridicity, but of “clarity,” “straightforwardness,” “robustness” or “vibrancy,” which determine how “full blown” it is.⁶⁵

It seems possible to consider that there is such a thing as an epitome of a legal system. This epitome of a legal system is meant to represent what typically is understood as a legal system from a legal pluralist’s point of view, a legal system *par excellence*, a paradigmatic example. A public legal system of a modern state, so long as it does not have any particular flaw such as non-conformity to one or several of Fuller’s principles of legality,⁶⁶ would be an example of the epitome of a legal system since few would deny its jural character.⁶⁷ The epitome is not, though, an ideal of perfection that is never attained in reality, such as a geometrical figure existing only in abstraction.⁶⁸ From a pluralist’s point of view, the public legal system is a priori the legal system that it most clearly a legal system; it is what would be used as a paradigmatic example of what a legal system is; it would a priori immediately be recognized as jural by the community of jurists. Such a contention may be quite unexciting to those who are concerned primarily with the comparison between different public legal systems, either real or hypothetical, but it is of importance for an investigation of the jural character of private legal systems, and how they compare or contrast with the original model constituted by the ordinary public legal system.

⁶⁵ KRAMER, IN DEFENSE, *supra* note 12, at 97; KRAMER, OBJECTIVITY, *supra* note 11, at 105, 107–109, 122.

⁶⁶ See *supra* note 57.

⁶⁷ The argument about the public legal system of the modern state being the epitome of a legal system (though without reference to Fuller’s principles of legality) is made, for example, by ANDREÏ MARMOR, POSITIVE LAW & OBJECTIVE VALUES 39–42 (2001).

⁶⁸ See, for example, Nigel E. Simmonds, *Straightforwardly False: The Collapse of Kramer’s Legal Positivism*, 63 CAMBRIDGE L.J. 98, 118–119 (2004); and the comments thereupon in KRAMER, OBJECTIVITY, *supra* note 11, at 105–109.

Nevertheless, to consider that an epitome of a given object exists does not necessarily imply that the object itself is of a scalar nature. Even if we can assess the difference between the epitome and the examined instance of an object to varying degrees, even if we can intellectually measure or at least assess the distance between any given instance of a concept and its most typical instance, this does not mean that the concept is scalar itself. An apple can be more or less like the archetype of an apple (the paradigmatic example that we would describe to someone who would not know what an apple is) but this does not mean that an apple can be an apple to a greater or a lesser extent. A woman and a man are not more or less of that nature depending on their differences with respect to those represented on the Pioneer plaque – the pictorial messages from mankind on board unmanned spacecrafts Pioneer 10 and 11 representing what a woman and a man typically look like. Even if a given person looks half man and half woman, his or her appearance being halfway between a typical man and a typical woman, the person would still be either one or the other, however unclear it is to which one he or she belongs. Hence, if a normative system is quite different in its aspect to an ordinary public legal system, it does not follow that it is less jural, that it is a legal system to a lesser degree. However, it may follow that it is *less clearly* a legal system, or it may be the case that it is not a legal system at all.

The preceding paragraphs are not meant to imply that a clear threshold distinguishes social normative systems from legal systems. On the contrary, it seems that it is not possible to position such a threshold precisely. It seems that it is merely a “rough and shifting minimum” as Ronald Dworkin would say,⁶⁹ or an “unspecifiable threshold” as Matthew Kramer puts it.⁷⁰ The boundaries of juridicity, these authors contend in essence, are unspecifiable, and I would tend to agree. Where I seem not to be able to agree with Dworkin is when he considers that, within this zone of unspecifiability, juridicity is scalar, while outside it, it is not.⁷¹ Indeed, it seems odd to consider that law is, at certain stages of its development, a scalar property and, at other stages, a non-scalar property. The degree of development of a concept’s instantiation does not change the nature of the concept.

Although we may not specify this threshold, what we may do is measure or at least assess how near or far a given normative system is from the epitome of a legal system: an ordinary public legal system of the modern state. The nearer it is, the more clearly it will be law or, at

⁶⁹ Dworkin, *supra* note 54, at 678.

⁷⁰ “Above an unspecifiable threshold of conformity with Fuller’s principles of legality, any system of governance amounts to a legal system. To be sure, there can exist borderline cases of territories in which the rule of law is neither determinately present nor determinately absent, and there can also exist territories in which the rule of law is present in some respects and absent in other respects.” KRAMER, OBJECTIVITY, *supra* note 11, at 107.

⁷¹ Dworkin, *supra* note 54, at 678.

the least, the more likely it will be that it has passed the threshold of juridicity. I do not mean that a certain similarity to the public legal system is a necessary condition, but rather I see it as a *sufficient* condition for a normative system to be law, or at least likely to be law.

IV. JURISDICTIONAL POWERS

In the preceding section, we have seen that law may best be considered a dichotomous property that is obtained in varying degrees of clarity. What remains to be expounded upon is what properly can be called a legal system. In other words, where should the line should be drawn between legal systems and mere social normative systems? The following sets forth what I hope to be a workable test that, if satisfied, constitutes a sufficient – though not necessary – condition to be law.⁷² The test relies on jurisdiction powers: if a given normative system has its own autonomous jurisdiction to prescribe, adjudicate and enforce, then it constitutes a legal system in its own right. The following explains why, and then applies the test to the two normative systems on the Internet identified in the foregoing.

A. *Prescription, Adjudication and Enforcement: Three Complementary Rules of Recognition*

We have seen, through the prism of the concept of secondarity, that for a norm to be a legal norm, to be transformed from a social norm into a legal norm, it needs to be restated (or “reinstitutionalized”) in the formal institutions of the legal system, by the officials or agents of the legal system. This means, in the words of Paul Bohannon, that the norms must be “restated in such a way that they can be ‘applied’ by an institution designed (or, at least, utilized) specifically for that purpose.”⁷³

Using terminology that might be more telling, the restatement of a norm means the passage of the test set by a secondary rule of recognition. Restatement amounts to recognition – note that we sometimes speak of the “adoption” of a rule. A social norm becomes legal if it is endorsed (restated, reinstitutionalized, recognized) by an institution of the legal system and such endorsement occurs according to the applicable rule of recognition. To apply a rule of recognition is to verify if a norm that does not yet belong to the system should be taken over into the system by operation of its restatement in institutions “designed specifically for that purpose.”

These institutions may not, and frequently do not, act in perfect harmony. Dissension normally exists between different officials of a

⁷² To determine juridicity on such a basis might thus produce false negatives, but it should admit of only very few false positives, which is what matters for the present study.

⁷³ Bohannon, *supra* note 33, at 36.

single legal system. When such dissension concerns the production of law, this means that the law-ascertaining behavior of different officials may not make reference to exactly the same rules.⁷⁴ When we use Hart's phrase "the Rule of Recognition," we actually speak of *rules* of recognition, in the plural, of an "overarching array" of rules.⁷⁵ They are plural not only in the sense that one rule cannot govern all facets of the validation of a norm as law, but also in the sense that different legal authorities apply different rules of recognition.⁷⁶ What is declared to be law – to be legally valid – by the legislative branch is for instance not necessarily recognized by the judiciary. In other words, the institutions of a legal system do not restate norms at exactly the same conditions. In contrast to Hart's view that there is only one rule of recognition, Raz suggests that "there are various rules of recognition . . . each addressed to a different kind of officials."⁷⁷ The degree of variance among these rules of recognition is limited, but such variance nonetheless typically exists.⁷⁸

One consequence of such a plurality of rules of recognition is that a given norm may be restated, and thus attributed juridicity, by a higher or lower number of institutions or officials within a single system.⁷⁹ The juridicity of a norm typically is clearer if it is recognized by a higher number of officials. If all the conditions of all officials are met, the norm in question most clearly will be law, as the integration of the norm into the system will have taken place to the greatest extent. There are different levels of completeness in the reinstitutionalization (or the restatement or recognition).

This reinstitutionalization takes place at three main stages: the formulation of the norm, its application, and its enforcement. The reinstitutionalization of a norm is most complete (and consequently the norm in question is jural to the highest degree of clarity allowed by the system) when the norm passes the tests set by the three slightly differing rules of recognition corresponding to these different stages. A norm that passes these three tests is most clearly law. The realization

⁷⁴ See, e.g., Matthew H. Kramer, *Of Final Things: Morality as One of The Ultimate Determinants of Legal Validity*, 24 L. & PHIL. 47, 50 (2005).

⁷⁵ See, e.g., *id.* at 49, 51.

⁷⁶ See, e.g., JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 200 (2d ed. 1980).

⁷⁷ *Id.*

⁷⁸ Matthew Kramer made a very clear point in his observation that a "bewilderingly higgledy-piggledy array of contrary signals and interventions" – fundamental and highly recurrent contradictions between jural officials – would simply not be law. KRAMER, IN DEFENSE, *supra* note 12, at 142–146. Fundamental and repeated contradictions among officials would indeed defeat the "principle of unity binding different elements together so as to make them into a system." VAN DE KERCHOVE & OST, *supra* note 37, at 135.

⁷⁹ See e.g., Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 634–637 (1986) (arguing that amendments to the U.S. Constitution are subject to multiple rules of recognition).

of those three conditions is not a necessary condition, but a sufficient condition. Here is what I mean. First, a norm needs to be formulated; it may be enacted or reinstitutionalized by dint of the praetorian power of the judiciary, through case-law. As an example, the prohibition of smoking develops as a social rule, and different facets of it have been reinstitutionalized in the legal system by enactment of anti-smoking laws. Second, the norm then needs to be applied in the adjudication of concrete cases, otherwise it will have the character of a paper rule. Admittedly, when the norm is formulated by the judiciary itself, it may be difficult to distinguish these two stages of reinstitutionalization in practice, but they can nonetheless be distinguished analytically. In my example of smoking, this means that the anti-smoking laws effectively are applied in court. Finally, the norm needs to be enforced in practice, otherwise it will again have the character of a paper rule, but less so than if it is not even applied in court. In my example of smoking, this means, for instance, that the police intervene to actually prohibit smoking.

These three main stages of reinstitutionalization, one may add, constitute what John Locke saw as the three principal reasons for a community to leave the state of nature and form what came to be called, more than a century after Locke, a *Rechtsstaat* (a government subject to the rule of law). Locke writes that, in the state of nature, “[t]here wants an established, settled, known law, received and allowed . . . a known and indifferent judge . . . [and] power to back and support the sentence when right, and to give it due execution.”⁸⁰

In order to make possible the occurrence of these acts of reinstitutionalization (and to achieve the Lockean goals of a community leaving the state of nature), the normative system needs institutions that have these powers of formulation, application and enforcement. These institutions make possible the reinstitutionalization of norms, which means – to use an extreme image – to tear the legal system away from the underlying social system in order to achieve the duplication of the normative system that lies at the heart of the concept of secondarity. This is also to say that the legal system, by virtue of these institutions, acquires a level of autonomy from the underpinning social system. Considered no longer from a vertical angle (in which the legal system hovers over the social system, so to speak) but from a horizontal one, the institutions mentioned here also are necessary to implement the system’s own rules of recognition so as to be autonomous from other legal systems.

This criterion of autonomy from other legal systems is expressed by François Ost and Michel van de Kerchove when they write that “the minimal condition on which a legal system possesses an identity *in relation to another* is that it is composed not only of rules of behavior, but also of a rule of recognition *peculiar to it* and making it possible for it to identify those rules as its own.”⁸¹ Yet it is not hard to see why

⁸⁰ JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT §§ 124–126 (1690).

⁸¹ VAN DE KERCHOVE & OST, *supra* note 37, at 141 (emphasis added).

it is not sufficient for a legal system to be equipped simply with secondary rules of recognition. In addition, these rules of recognition must be efficacious, so that the legal system may effectively decide upon its borders. It must effectively be able, in the words of Hans Kelsen, to “regulat[e] its own creation and application,”⁸² to reach what others have called the “faculty of self-organization,”⁸³ without which one may not speak properly of a system of norms of its own.⁸⁴ The operations of the rules of recognition can only be efficacious – there can only be self-organization or autonomy – if the legal system in question has its own institution to implement them.⁸⁵

In other words, for the tests of recognition implied by the acts of formulation, application and enforcement to take place, the normative system needs institutions that have these powers of formulation, application and enforcement.

If a normative system possesses the institutions in question here, which provide for system-specific formulation, application and enforcement of norms, then it means that the system has prescriptive, adjudicative and enforcement jurisdiction. I mean jurisdiction here in the sense of a power,⁸⁶ rather than a right or an authority as is commonly used⁸⁷ in international law when states are granted these rights.⁸⁸ Jurisdiction is here an issue of efficacy: the normative system shows its capacity to formulate, apply and enforce its norms.

Now reverse the argument. If one can establish that a given normative system has prescriptive, adjudicative and enforcement jurisdiction, that it has institutions that adopt rules, apply those rules in their own dispute resolution mechanisms and enforce them, then this testifies to the fact that the system has institutions that allow it to be autonomous from other systems. It shows that the system has the

⁸² HANS KELSEN, *PURE THEORY OF LAW* 71 (1967). It may be recalled that this is an essential characteristic of law in Kelsen’s approach.

⁸³ 2 CHARLES ROUSSEAU, *DROIT INTERNATIONAL PUBLIC* ¶ 204, at 407 (1974).

⁸⁴ *See, e.g.*, VAN DE KERCHOVE & OST, *supra* note 37, at 139–42.

⁸⁵ On a side note, one may point out that the famous quote by Oliver Wendell Holmes is essentially a question relating to the efficacy of rules of recognition. When he writes that “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law,” it may be understood to mean that the only rule of recognition that is really efficacious is the rule used by the courts. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

⁸⁶ Robert Wolff defines power as “the ability to compel compliance, either through the use or the threat of force.” ROBERT WOLFF, *IN DEFENSE OF ANARCHISM* 4 (1970). The term “force” must here be taken in a very broad sense, over and above mere physical force and encompassing all means of coercion; this will be clarified later on.

⁸⁷ Authority being understood here as “the right to command, and correlatively, the right to be obeyed.” *Id.*

⁸⁸ *See, e.g.*, Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. YB INT’L L. 145 (1974).

ability to effectively reinstitutionalize norms to the greatest clarity of juridicity. Such a system would thus be able to produce law with a high level of clarity regarding its juridicity and be itself a legal system in a very clear fashion.

When I point to enforcement by a system's own institutions, I mean it in the sense that the norms do not, in order to obtain a reasonable degree of compliance, need to resort to the state's coercive system or to any external apparatus of enforcement. "External" implies here that the apparatus lends its coercive arm on conditions that are not determined by the private normative system. An example would be the enforcement procedure of the public legal system for an arbitral award. The award, in order to gain access to coercive might, must meet the requirements set by the public legal system. This condition of enforcement power is particularly important, on the one hand because of the central role of coercive might in the concept of law – as authors as diverse as Immanuel Kant, John Austin, Rudolf von Jhering, Max Weber, Hans Kelsen and John Rawls have maintained – and, on the other hand, because it is precisely what is lacking in most contemporary allegations of the existence of non-state legal systems.

In the following, I will set out to demonstrate that the normative systems of the Internet that I investigate here (domain names and eBay) have these three dimensions of jurisdiction. The demonstration essentially will consist of showing that these two normative fields produce their own norms, apply them in their own *fora* and enforce them using their own mechanisms.

B. *Prescriptive Jurisdiction*

With regard to ICANN's normative system concerning domain names, its prescriptive jurisdictional power manifests itself in the fact that, in ICANN proceedings, the procedural and substantive applicable law (to speak in terms of conflict of laws) is the UDRP, which has been promulgated by ICANN itself. The UDRP determines both how the procedure is conducted and how the merits of the case are assessed.

Admittedly, the UDRP provides that decisions on the merits of a case shall be in accordance with the UDRP as well as "any rules and principles of law that it deems applicable."⁸⁹ In spite of this, empirical studies suggest that the dominant normative source is, by far, the UDRP itself.⁹⁰ The provisions setting the conditions on which a domain name will be transferred or cancelled are essentially ICANN's own provisions, with only limited and inconsistent reference made to national laws as extra-systemic sources of interpretation for the UDRP. The UDRP fundamentally applies instead of national trademark laws on the matter.

⁸⁹ UDRP RULES, Para. 15(a).

⁹⁰ See, e.g., Thomas H. Webster, *Domain Name Proceedings and International Dispute Resolution*, 2001 BUS. L. INT'L 215, 236.

The mere promulgation of the UDRP by ICANN was already considered, at the time it took place, to be ICANN's "most glaring example of . . . policymaking."⁹¹ Since then, the effects of the UDRP have grown by dint of a progressively stronger doctrine of *de facto stare decisis* – the practice of referring to and following prior decisions even if no express rule requires this to be done.⁹² Such a practice excludes national law even further, as the sources of interpretation tend to become more intra-systemic, they evolve towards confining themselves progressively to prior decisions rendered in application of the UDRP by dispute resolution panels operating under the aegis of ICANN-approved institutions. The normative system also becomes normatively denser, and thus consolidates itself, as precedents become more numerous.

Already in 2002, an empirical analysis showed that UDRP case law was characterized by a clear substantive separateness from national trademark laws, granting trademark owners substantially more protection than national laws do.⁹³ In order to reduce certain inconsistencies among decisions rendered under the UDRP, some commentators have proposed the use of databases and search engines in order to improve access to prior decisions;⁹⁴ this simplified access to precedents would increase the separation between the UDRP and national case law, if only because the need to refer to public legal systems would be greatly reduced.

One may either praise such an evolution, because of its increased predictability, or criticize it, for its decreasing democratic legitimacy as it is moving away from state law, but this is not the purpose of my contention here. I only mean to push for the idea that this normative system is moving, from the point of view of its normative sources, towards increased closure *vis-à-vis* other legal systems, and it is thus acquiring increasing autonomous prescriptive jurisdictional power. From this point of view, ICANN's normative system seems to be moving towards greater clarity of being a legal system.

eBay's prescriptive jurisdictional power manifests itself in its formulation of the eBay user policies. These policies are adopted formally by eBay on the basis of the emerging practices it observes

⁹¹ A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 96 (2000).

⁹² On the concept of *de facto stare decisis*, see Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 937 (1999).

⁹³ See, e.g., ALEXANDRE CRUQUENAIRE, *LE RÈGLEMENT EXTRAJUDICIAIRE DES LITIGES RELATIFS AUX NOMS DE DOMAINE* (2002); MILTON MUELLER, *RULING THE ROOT 231* (2002); Keith Blackman, *The Uniform Domain Name Dispute Resolution Policy: A Cheaper Way to Hijack Domain Names and Suppress Critics*, 15 HARV. J.L. & TECH. 211, 233-236 (2001).

⁹⁴ See, e.g., Ethan Katsh, *Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace*, 10 LEX ELECTRONICA, at 10 (Winter 2006), at <http://www.webcitation.org/5O1Haxjcg>.

within the eBay community. The same policies, with some minor alterations, are applicable throughout eBay's entire marketplace, in all countries from which it is accessible. They are, in other words, transnationally applicable. Conversely, the substance of the provisions that would be applicable if an eBay dispute was brought to court – among which are mandatory consumer protection laws that cannot legally be contracted out of – varies from one national law to another. An almost inevitable consequence thereof is that, in some cases, the same dispute will receive different treatment when resolved in a forum referring only to eBay policies and in a court applying mandatory provisions of a national law.⁹⁵ This is not meant to imply that eBay is cut off completely from the public legal system. Evidence to the contrary is for instance adduced by the fact that eBay proscribes from its listings items that have been banned by certain governments or that violate intellectual property laws in certain countries.

Hence, both ICANN and eBay's normative systems appear to be equipped with institutions that possess autonomous powers of rule formulation, that is institutions that permit the formulation of rules specifically for these systems. In other words, they seem to have their own jurisdictions to prescribe, which is the first element that characterizes them as legal systems. The next section examines the second such element, namely the presence of institutions able to apply these rules autonomously for these systems. This is the question about adjudicative jurisdiction.

C. Adjudicative Jurisdiction

The power of adjudicative jurisdiction of ICANN's normative system resides in the four dispute resolution institutions that ICANN has accredited, which apply the UDRP. As has been said above, a trademark owner who wishes to challenge a domain name may start UDRP proceedings by filing a complaint with one of these institutions. The institution to which the complaint has been referred then appoints a dispute resolution panel, which resolves the dispute by handing down a decision applying the UDRP. The respondent (the domain-name holder) cannot refuse the jurisdiction of the selected institution. This is so because of a contractual structure that forces any party wishing to register a domain name falling under the competence of ICANN to subscribe to a certain dispute resolution agreement.⁹⁶ ICANN includes, in all contracts with registrars by which it grants them access to its database resolving domain names into IP addresses, a clause stipulating that contracts between those registrars and registrants (people wishing to register domain names) must contain a given third-party beneficiary clause. The registrars are forced to enter into this accreditation contract with ICANN if they want to be technically able to register names. The third-party clause obliges the

⁹⁵ See Calliess, *supra* note 26 (examining such differences between German law and the eBay policies).

⁹⁶ See *supra* text accompanying notes 15 and 16.

domain-name holder to submit to the UDRP procedure if any person, anywhere, initiates such a procedure alleging that his trademark is infringed by the domain name. By agreeing to this clause, the domain-name holder grants the registrar with whom she has registered her domain name the right to transfer or cancel the name in accordance with the decision of the dispute resolution panel. This contractual construction has the effect of making it impossible to hold a domain name falling under the competence of ICANN without submitting to the jurisdiction of dispute resolution institutions that are themselves submitted to ICANN.⁹⁷

Admittedly, the UDRP does not legally qualify as arbitration. Whereas arbitral proceedings produce awards that have a binding character similar to that of a court decision and are recognized and enforced by courts with only very limited possibilities of opposition, UDRP decisions are not given any weight, or at least any binding character, by courts.⁹⁸ It would not be an over-simplification to say that, for the purposes of court proceedings, a UDRP procedure has simply no relevant juridical existence. Still, it would be wrong to consider for that reason that the four ICANN-approved institutions applying the UDRP cannot represent the system's adjudicative jurisdiction. If it had been possible to appeal UDRP decisions in national courts so that they review the way the UDRP is interpreted, one may have argued that the rule of recognition of ICANN's normative system were submitted to the rule of recognition of the relevant public legal system and that it were not autonomous. However, the reality is that courts never tell UDRP panels how the UDRP should be interpreted. The public trademark regime and the private ICANN system simply run in parallel, each of them applying their own set of primary rules.

In the case of a conflict between a UDRP decision and a court decision on the same matter, the latter has precedence. This is so simply because ICANN, as a corporation, is compelled by the public legal system to comply with the relevant court decision. Here again, this should not be a basis to deny ICANN's adjudicative power, be it only for the reason that such conflicts occur only in situations that statistically are exceptional (less than one percent of cases).⁹⁹ In any event, it is not the determination of the substance of ICANN's normative system that is submitted to the public legal system. The question here is only a matter of the general efficacy of the system. In the case of a conflict with the public legal system (which, again, occurs almost never), ICANN's system simply is not efficacious. However, this is unrelated to the determination of what ICANN's system effectively recognizes to be its normative contents at the stage

⁹⁷ See, e.g., MUELLER, *supra* note 93, at 13; Froomkin, *supra* note 91, at 49, 97.

⁹⁸ See, e.g., KAUFMANN-KOHLER & SCHULTZ, *supra* note 24, at 38-39, with further references.

⁹⁹ The precise figure seems to be somewhere between 0.5 and 1 percent: see Thornburg, *supra* note 21, at 224.

of adjudication. ICANN's rule of recognition applied by its adjudicative bodies remains intact. ICANN's normative system still regulates its own creation and application, even if the end result is not enforced on the odd occasion.

eBay's jurisdictional power is constituted by its online dispute resolution mechanism, which I have discussed above. It may be recalled that the parties' submission to this mechanism is ensured by the threat of damage to their reputation. If a party refuses to participate, he is likely to be given negative feedback, which will attach to his profile, or, if the negative feedback has already been given, he will lose his best chance to have it removed. In addition, if the party in question displays the dispute resolution icon, which increases her competitiveness as a seller, her refusal to participate in the dispute resolution procedure will lead to the removal of the trustmark. This will harm her reputation, as the trustmark testifies to the fact that the seller previously has agreed to participate in all dispute resolution procedures initiated against her, which is itself a form of reputation.

Admittedly, this jurisdictional power is not very highly developed, since the dispute resolution process consists of mediation and computer-assisted negotiation. These processes are not, strictly speaking, adjudicative. A third party does not resolve the dispute by authoritatively applying rules in the process of rendering a final and binding disposition. Still, this does not mean that this dispute resolution procedure is not the place where eBay's rules come to be applied. The application of rules need not take place in an authoritative way in order to be effective; rules need not be thrust upon their addressees in order to take effect. Law's normativity may also simply follow from what Marc Galanter calls information transfer,¹⁰⁰ which in essence is the communication of the substance of primary rules, accompanied by repeated reminders thereof. Such a creation of legal awareness, if met with a certain degree of orientation according to those rules on the part of the addressees, amounts to a form of application of law. This is precisely what the phenomenon of negotiating in the shadow of the law is about. It is "regulation accomplished by the flow of information rather than directly by authoritative decision."¹⁰¹ Moreover, we have seen that the law whose shadow the parties seem to negotiate is the body of eBay's own user policies, which emerge from the eBay community and have been reinstitutionalized, to use Paul Bohannon's vocabulary, by eBay itself.

In addition, one may surmise that eBay's dispute resolution system will evolve to become a properly adjudicative mechanism. Two elements allow such a conjecture. The first consists of certain unofficial statements to this effect by staff members, accompanied by an *en passant* reference to arbitration on the website of SquareTrade,

¹⁰⁰ Marc Galanter, *The Legal Malaise: Or, Justice Observed*, 19 L. & SOC. REV. 537, 545 (1985).

¹⁰¹ *Id.*

the company that provides eBay's dispute resolution services.¹⁰² Second, we have witnessed an evolution on eBay from a loose and spontaneous practice of norm enforcement by *The Posse* (the group of six people who attributed themselves the function of policing the marketplace) to a relatively sophisticated and formalized system of dispute resolution. Legal anthropology suggests that, after such an evolution, the development of a properly adjudicative means of dispute resolution may be an expected next step.¹⁰³

In sum, both ICANN and eBay's normative systems appear to be equipped with institutions able to apply, directly or indirectly, the systems' norms in an autonomous manner. Hence, they seem to have their own jurisdictions to adjudicate, which is the second element that qualifies them as legal systems. The next section examines the third such element, namely the presence of institutions able to enforce these rules independently from any other legal system.

D. Enforcement Jurisdiction

Enforcement jurisdiction, in the sense of a normative system having the power to enforce its norms itself, is what is lacking in most orderings that usually are asserted to be legal systems, such as the *lex mercatoria*. My assertion is that the two legal systems explored in this Article have this missing element, which thus makes them legal systems to a particularly high degree of clarity in comparison to most other private legal systems. This enforcement jurisdiction flows from the fact that these systems do not need to resort to the coercive apparatus of the state, unlike the *lex mercatoria*. They are equipped with what may be called self-enforcement mechanisms.

The main role of the coercive apparatus of the state is to create prudential reasons to obey the law. Prudential reasons for action are opposed to moral reasons for action, in that the former, and not the latter, are interest dependent.¹⁰⁴ People act in a certain way for prudential reasons if they believe that it is in their interest to do so, that they would be better off, for reasons that do not include having a good or bad conscience, which is precisely a moral question. People act in a certain way for moral reasons if they believe it is morally correct to act in such a way. To achieve compliance based on prudential reasons – as opposed to compliance because of the moral adequacy of the norms – a normative system must in principle create interest-dependent reasons to be obeyed. Such reasons typically are created by the threat of a

¹⁰² SquareTrade's Seal Member Agreement, Para. 2(1), available at <http://www.webcitation.org/501HeahL3>, provides that "Dispute resolution services provided by SquareTrade consist of direct negotiation, mediation and arbitration."

¹⁰³ See JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 15 (1983); Lawrence M. Friedmann, *Courts Over Time: A Survey of Theories and Research*, in EMPIRICAL THEORIES ABOUT COURTS 9, 15–16 (Keith O. Boyum and Lynn Mather eds., 1983).

¹⁰⁴ See, e.g., KRAMER, IN DEFENSE, *supra* note 12, at 81–83; RAZ, *supra* note 9, at 155–156.

sanction, a sanction being understood as the deprivation of some of the normal advantages of a member of the group on the ground that he has violated a norm.¹⁰⁵ In the case of the public legal system, sanctions are made possible primarily by the coercive apparatus of the state.

The sanction of last resort of the coercive apparatus of the state, which consequently corresponds to the most fundamental reason to obey the law, is the use of coercive might, in the sense of physical force, as in forcefully taking away assets or imprisonment. This led to the belief that physical force is an essential element of law, and thus produced the classical legal positivists' monistic construction of law (law as the exclusive product of the modern state¹⁰⁶), because the control of physical force ultimately rests in the hands of the state.¹⁰⁷

However, the threat of physical force is not the only interest-dependent reason for compliance that a normative system may create or the only vector of sanctions that norms may rely on.¹⁰⁸ A normative system may rely on any "pattern of incentives that will secure [its] efficacious functioning."¹⁰⁹ Such incentives essentially operate by "altering the prices one has to pay for the performance of actions, [which] supplies a motive for avoiding some actions and doing others."¹¹⁰ These prices may be of very different nature: they may be of a nature that can be controlled by physical force (liberty, possession), but they may also be of a nature that can be controlled by social forces (reputation) or market forces (financial gains and losses). To use a different vocabulary, law can resort to different modalities of constraint.¹¹¹

Law may not only intervene with its coercive sway to supplement a community's failing reputation or a market's failing economic sanctions,¹¹² it may also *create* and *use* social or economic constraints. When is this possible? Matthew Kramer explains that imperatives are "products of the overwhelming superiority . . . of the

¹⁰⁵ See, e.g., John Rawls, *Two Concepts of Rules*, 64 PH. R. 5, 10 (1955) ("[Being] deprived of some of the normal rights of a citizen on the ground he has violated a rule of law.").

¹⁰⁶ See, e.g., NORBERTO BOBBIO, *IL POSITIVISMO GIURIDICO : LEZIONI DI FILOSOFIA DEL DIRITTO* (1961).

¹⁰⁷ See, e.g., BOBBIO, *supra* note 35, at 186; FULLER, *supra* note 10, at 109–110; Kelsen, *supra* note 82, at 333; François Rigaux, *Les situations juridiques individuelles dans un système de relativité générale*, 213 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 1, 31 (1989).

¹⁰⁸ See, e.g., RAZ, *supra* note 9, at 157.

¹⁰⁹ KRAMER, *IN DEFENSE*, *supra* note 12, at 91.

¹¹⁰ Rawls, *supra* note 105, at 107.

¹¹¹ See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662. (1998).

¹¹² See, e.g., MARMOR, *supra* note 67, at 44–45.

addressors over the addressees.”¹¹³ To create such a situation of overwhelming superiority, a normative system (as the addressor) needs to control certain resources that interest its addressees.¹¹⁴ These resources can be, again, liberty or possession, but they can also be reputation or financial advantages, which may be easily controlled by non-state actors.¹¹⁵ In sum, another apparatus, which may be controlled privately, can create prudential reasons to obey a private legal system, thereby playing the same role that the coercive apparatus, through its physical force, plays for the public legal system. This is the first part of what the concept of self-enforcement stands for: a private mechanism that creates, by the threat of a sanction relying on the private control of valuable resources, prudential reasons to comply with the norms of the system to which the self-enforcement mechanism belongs. It is self-enforcement in the sense that the private legal system does not have to rely on the coercive apparatus of the state to secure the enforcement of its norms.

As I have suggested above, prudential reasons typically are created by the threat of a sanction. However, law may also create prudential reasons in another way: by virtue of a modification of the feasibility of certain actions. The feasibility of an action creates prudential reasons for action, or more precisely reasons for abstaining from acting, in the sense that if an action is impossible or very difficult to execute then typically a person has a strong prudential reason to refrain from expending time on efforts to perform it. The feasibility of an action can be influenced, if not determined, by law. Examples would be locked doors that enforce a prohibition from entering into given rooms or narrow bollards enforcing width restriction to prevent lorries from passing through residential areas. In the context of the Internet, the contention has a particular importance. There, technology plays the role of the laws of nature, making possible or impossible certain actions, or more generally making them difficult (and thus less frequent) or easy (and thus more frequent).¹¹⁶ The control of technology, which is available to rule makers and is not used infrequently, allows compliance to be obtained. This is the second part of what self-enforcement stands for: the implementation of norms by direct manipulation of the environment in which certain actions take place, again without recourse to the state’s coercive apparatus.

ICANN’s legal system for domain names uses technology to enforce its norms. Its control of certain technological aspects

¹¹³ KRAMER, IN DEFENSE, *supra* note 12, at 85.

¹¹⁴ On the concept of “resource control” as the basis of constraint, see, for example, THOMAS SCHULTZ, *RÉGULER LE COMMERCE ÉLECTRONIQUE PAR LA RÉOLUTION DES LITIGES EN LIGNE* 327–330 (2005).

¹¹⁵ The resources can also be of another nature, for instance the announcement of a future divine punishment in a theocratic society, as Fuller sketches in FULLER, *supra* note 10, at 109–110.

¹¹⁶ See, e.g., Lessig, *supra* note 14, at 9–28, 120–37.

constitutes its jurisdictional power relating to enforcement. It uses technology to enforce norms that do not have a simple structure of permission/prohibition, but relate to the distribution of resources, namely domain names. As has been mentioned above, a decision rendered under the UDRP, by one of ICANN's accredited dispute resolution institutions, is self-enforced by changing an entry in the database that makes domain names visible on the Internet. This has the result of re-attributing to the prevailing party the resource that the domain name represents. Such a self-enforcement mechanism is made possible by ICANN's control over this database and thus over the visibility of domain names, which is the resource that interests the parties.

In principle, the enforcement by this mechanism can be warded off easily, by initiating proceedings in certain courts, within ten days of the UDRP decision.¹¹⁷ In other words, the domain name holder can decide to opt out of ICANN's legal system – which, it may be recalled, she had been forced to enter to be able to register her domain name. If she decides to do so, ICANN's legal system will give way, it will relinquish its capacity to enforce the decision (transfer or cancel the domain name).¹¹⁸ However, as we have seen in the previous section, this almost never occurs in practice. This appears to be for two main reasons. First, there are the costs of court proceedings, which often will be in disproportion to the value of the domain name, especially because of the likelihood that the dispute will have an international character, which generates additional costs. These costs act as an economic barrier to access the public legal system. Second, the brevity of the time-limit within which the court proceedings must be initiated – ten days – also makes it practically difficult to trigger the intervention of the public legal system.¹¹⁹ The end result is that ICANN's legal system is equipped with its own enforcement mechanism, which effectively intervenes in 99 percent of cases. ICANN virtually always carries out its own enforcement of its norms.

eBay's enforcement power lies in its control of the reputation of its members. If an eBay member refuses to comply with the outcome of eBay's dispute resolution procedure, he will do so at the price of his reputation. He will either be given negative feedback or, if it has already been given, it will not be removed. In addition, he will run the

¹¹⁷ UDRP Para. 4(k). These courts are in principle either the court of the registrar of the domain name or of the domain-name holder.

¹¹⁸ *Id.*, which provides, *in fine*:

“[W]e will not implement the Administrative Panel's decision, and we will take no further action, until we receive (i) evidence satisfactory to us of a resolution between the parties; (ii) evidence satisfactory to us that your lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing your lawsuit or ordering that you do not have the right to continue to use your domain name.”

¹¹⁹ See Blackman, *supra* note 89, at 236; Brenda Sandburg, *ICANN Needs Fine Tuning: Lawyers Mull Pros and Cons of Adding an Appeals Process*, NAT'L L.J., Nov. 6, 2000, at B10; Thornburg, *supra* note 21, at 197.

risk that his dispute resolution trustmark is taken away. These are important factors of his economic well-being, since a damaged reputation, determined by negative feedback and the loss of the trustmark, means a decrease of both the number of potential transactions and the average value of bids placed to conclude the transactions. Usually, a legal system intervenes with its own coercive apparatus in a market because the reputation sanctions it provides do not operate effectively, due to a lack of circulation of information.¹²⁰ In the present case, the legal system intervenes by resolving this information problem, so that reputation sanctions can become operative; it utilizes the market's own constraining apparatus. To express this in the terms used above, the price for an eBay member not to conform to the outcome of the dispute resolution procedure is her standing in the eBay community of traders (social forces), and consequently her capacity of entering into profitable transactions (market forces). That this price is high enough to constitute a real constraint and an effective enforcement mechanism is suggested by the fact that the outcomes of the dispute resolution procedure reportedly are complied with in 98 percent of cases.¹²¹ Here again, the economic barrier to court access is certainly as real as in the context of ICANN's legal system. This closes off eBay's private legal system from the public legal system. It is not that the public legal system does not seek to apply to eBay transactions, but in the vast majority of cases it effectively will not intervene in eBay disputes in spite of itself, because the parties will not initiate court proceedings, which in that kind of dispute is an essential element of the application of the rules of the public legal system.

The current analysis has shown that both ICANN and eBay's normative systems have their own independent institutions that formulate, apply and enforce their rules. Hence, they have their own jurisdictional powers with regard to prescription, adjudication and enforcement. This, in principle, earmarks them as legal systems. Nonetheless, what remains to be done in order to ground their juridicity is to confront them with legal positivism. The importance of this confrontation is that legal positivism is the most restrictive account of law; it acknowledges the least places where law may be found. In other words, it is the most stringent test of juridicity. The following section expounds upon this confrontation, concluding that the test set by legal positivism – that legal systems need to be comprehensive, territorially exclusive and supreme, which all are requirements leading to the usual understanding that positivism admits only of state law – is misplaced and that the examples of non-state law identified in this Article constitute prime opportunities to further crack open such a restrictive approach of law.

¹²⁰ See, e.g., MARMOR, *supra* note 67, at 45.

¹²¹ See Graf-Peter Calliess, *Online Dispute Resolution: Consumer Redress in a Global Marketplace*, 7 GERMAN L.J. 647, 653 (2006).

V. NON-COMPREHENSIVE, NON-EXCLUSIVE AND NON-SUPREME LEGAL SYSTEMS

It is frequently argued that legal systems, in order to be legal systems, must display the features of virtual comprehensiveness of their regulatory scope, of territorial exclusiveness and of supremacy. If one of these features is indeed essential, then the legal systems envisaged in this Article would fail as legal systems. Their regulatory scope is very narrow, they overlap with a large number of national legal systems, and they do not claim supremacy over public legal systems.

The feature of virtual comprehensiveness means that law, in order to be law, must claim authority to intervene in all facets of its addressees' lives. It does not mean that law must actually regulate all aspects of life, it is only about claiming the authority to do so. Joseph Raz, for instance, maintains that legal systems "claim authority to regulate any type of behavior" and that they "do not acknowledge any limitation of the spheres of behavior which they claim authority to regulate;" one element that sets legal systems apart from other normative systems is that the former "claim such an authority [to regulate all forms of behavior], whereas other systems do not claim it."¹²² Matthew Kramer argues that if a normative system does not claim to rule over "virtually all aspects of social and individual life in a given region," if its norms do not "encompass most aspects of human life," then "they do not together constitute a full-blown legal system."¹²³ Indeed, "the regulatory sway of a full-fledged legal system must encompass most aspects of life (even if that regulatory sway is not actively exercised in regard to some aspects)."¹²⁴

Territorial exclusiveness means that there cannot be two legal systems that regulate one and the same portion of territory. There cannot be, the assertion goes, legal systems within or across legal systems: a population cannot be governed by several legal systems at a time. Matthew Kramer, for instance, resists the idea that "two conflicting legal systems reign over a single portion of territory,"¹²⁵ while Hans Kelsen argues that "no one can serve two masters."¹²⁶ This is meant in the sense that "a system of norms can only be valid if the validity of all other systems of norms with the same sphere of validity has been excluded."¹²⁷ This is also known as the monistic conception of law, as opposed to legal pluralism: law only would exist as law in

¹²² RAZ, *supra* note 9, at 150–51.

¹²³ KRAMER, IN DEFENSE, *supra* note 12, at 97.

¹²⁴ *Id.* at 98.

¹²⁵ *Id.* at 96.

¹²⁶ KELSEN, *supra* note 82, at 329.

¹²⁷ HANS KELSEN, GENERAL THEORY OF LAW AND STATE 410 (1949).

the form of a single and all-encompassing system.¹²⁸ With regard to private normative systems, this position leads to the view that

Either the phenomena depicted as forming another body of law are taken into consideration by the overall system, which takes over the whole; or the phenomena of an alleged other body of law remain outside, not integrated into the system . . . and cannot be truly classified as law.¹²⁹

One, and only one, legal system could thus reign over any portion of territory. Non-state law would only be able to exist in stateless territories.

Law's purported claim to supremacy means that each legal system recognizes no higher authority within its sphere of application, that it is the highest normative order with respect to its subject-community and that it "claims authority to regulate the setting up and application of other institutionalized systems by its subject-community."¹³⁰ Law, to be law, would in this approach have to make a claim to reign alone like a Leviathan, with no limits within its territory but self-imposed ones. It would be the "final arbitrator of its own domain."¹³¹

The three features are sometimes claimed to be interdependent. Law's claim to supremacy is sometimes viewed as one side of the coin of which comprehensiveness is the other. The argument is that a normative system would not be able to claim authority to regulate all aspects of life with no external limit without at the same time claiming to be the highest normative order.¹³² Supremacy and comprehensiveness would furthermore directly imply the claim to exclusiveness, to exclude all other legal systems on the same territory. As Joseph Raz writes: "[s]ince all legal systems claim to be supreme with respect to their subject-community, none can acknowledge any claim to supremacy over the same community which may be made by another legal system."¹³³ With law's claim to supremacy, as Hans Kelsen would say, "a monistic construction is inevitable."¹³⁴

These relations of entailment do not seem to be correct. The feature of comprehensiveness may only be understood realistically as

¹²⁸ See, e.g., BOBBIO, *supra* note 35, at 186.

¹²⁹ JEAN CARBONNIER, *SOCIOLOGIE JURIDIQUE* 213 (1972).

¹³⁰ RAZ, *supra* note 9, at 151.

¹³¹ As explained by Marmor, who does not share the view, in MARMOR, *supra* note 67, at 39–42.

¹³² See, e.g., *id.* at 39.

¹³³ RAZ, *supra* note 9, at 152.

¹³⁴ KELSEN, *supra* note 82, at 333.

virtual comprehensiveness, in the sense not only of the feature being a claim to authority rather than an actual exercise thereof, but also in the sense of it being understood as widely ranging as opposed to all-encompassing. The range of life's facets that law typically claims authority to rule over is very broad, but it sometimes does not cover every facet of life; it is about a very large number of behaviors, but not necessarily all behavior. This is evidenced in federal systems where observation shows two wide-ranging but not all-encompassing co-occurrent legal systems. Certain behaviors are regulated by the federal system, others by the legal systems of the federated entities. The latter do acknowledge limitations, set by the federal legal system, of the spheres of behavior they claim authority to regulate. The systems of the federated entities are not the highest normative orders but they still claim a wide-ranging authority to regulate.

Federal legal systems further show that supremacy and territorial exclusiveness are not essential properties of a legal system. Federated entities typically each operate their own legal system, while being constitutionally subordinate to federal law in conflict with it. Hence, the former are not supreme and make no claim to this effect. As to territorial exclusiveness, the fact that a federal legal system and federated legal systems are co-occurrent on one and the same territory shows that there are instances where this feature is not present. It therefore cannot be an essential feature, as essential features are "present whenever and wherever law exists" and are "invariant in that every legal system is characterized by them."¹³⁵

These observations are further confirmed if we adopt a historical perspective. Lon Fuller reminds us that

Historically dual and triple systems have functioned without serious friction, and when conflict has arisen it has often been solved by some kind of voluntary accommodation. This happened in England when the common law courts began to absorb into their own system many of the rules developed by the courts of the law merchant. . . .¹³⁶

There were, historically, non-exclusive legal systems. Andrei Marmor further recalls that in the Middle Ages "positive law was seen as an exception to customs, traditions, religion, and in general, social practices long in force[, t]hus the law, as a relatively exceptional normative source, could only intervene within the narrow space left open by these other normative sources."¹³⁷ Such legal systems, Marmor explains, "had no . . . claims to supremacy."¹³⁸

¹³⁵ KRAMER, OBJECTIVITY, *supra* note 11, at 102.

¹³⁶ FULLER, *supra* note 10, at 124.

¹³⁷ MARMOR, *supra* note 67, at 40.

¹³⁸ *Id.*

As to the feature of virtual comprehensiveness, I believe that it is a feature not of law but rather of the modern state. The modern conceptions of political sovereignty as they emerged in the wake of Bodin's *Les six livres de la République* (1576), the Peace of Westphalia (1648) and Hobbes's *Leviathan* (1651)¹³⁹ comprised a political claim to the supremacy of the state in order to impose unified and centralized structures over separatism.¹⁴⁰ Originally, nation-states were wrestling with groups headed by feudal lords, the church and local customs. In order to prevail in this opposition, it was necessary to create, and later sustain, that "imagined community" that is the nation.¹⁴¹ The nation-state, as distinguished from the state *tout court*, is in this sense modernity's socially constructed equation between an overarching community and a territory. It is the product of an infeasible link established for political reasons between an "imagined community" and "imagined geographies" (the territory of the state).¹⁴²

In order to create and sustain the nation, the modern state sought to "transcend ethnic, religious and other cleavages in a political construction of ample proportions, guaranteeing at least a certain level of solidarity."¹⁴³ The goal was to achieve a "universalization of collective life"¹⁴⁴ – universal meaning here not cosmopolitan but comprehensive in subject-matter. The purpose was to comprehensively "colonize the lifeworld" of its citizen, as Habermas would say,¹⁴⁵ to penetrate social relations and replace subjectively shared backgrounds with objectively defined structures of social reality¹⁴⁶ based on a unified "virtually universal rationality."¹⁴⁷ One of the instruments used to achieve this was the public legal system of the modern state, which thus had to be "virtually universal" or, in other words, virtually

¹³⁹ See, e.g., MALCOLM N. SHAW, *INTERNATIONAL LAW* 21, 25 (5th ed. 2003).

¹⁴⁰ See, e.g., MARMOR, *supra* note 67, at 40.

¹⁴¹ BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1983). See also FRIEDRICH MEINECKE, *WELTBÜRGERTUM AND NATIONALSTAAT* 124–57 (1915); and JÜRGEN HABERMAS, *THE POSTNATIONAL CONSTELLATION* 62 (2001). On extreme links between territory, ideology and community, see HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 363 (1979). On the nation as a product of modernity, see, for example, ERNEST GELLNER, *NATIONS AND NATIONALISM* (1983).

¹⁴² EDWARD W. SAID, *ORIENTALISM* 54–55 (1978). See also ANTHONY GIDDENS, *THE NATION-STATE AND VIOLENCE* 125 (1985); ROY E.H. MELLOR, *NATION, STATE, AND TERRITORY* (1989).

¹⁴³ OST & VAN DE KERCHOVE, *supra* note 36, at 128.

¹⁴⁴ *Id.* at 128.

¹⁴⁵ 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (1987).

¹⁴⁶ *Id.*

¹⁴⁷ OST & VAN DE KERCHOVE, *supra* note 36, at 127.

comprehensive. The use of law's function of creating and sustaining a unified community partakes of the groundwork of political sovereignty in the modern state. In order to allow sovereignty to be comprehensive, the legal system of the modern state had to be comprehensive as well.

Even if virtual comprehensiveness were a feature of law, it would have to be conceived as being limited in scope by the underlying community's boundaries. Virtual comprehensiveness is best understood as the claim to rule over a very large proportion of those facets of life *that occur within a community*. Admittedly, sociability traditionally was almost exclusively territory based, rooted in proximity.¹⁴⁸ It used to be that groups only would form within geographically determined areas. However, with the development of information technologies, sociability gradually evolved, giving rise with increasing frequency to delocalized communities.¹⁴⁹ They emerged because the means to form communities is communication,¹⁵⁰ and, with the rise of the Internet, communication has become almost entirely independent of geography. This is what Paul Virilio, for instance, calls "social tele-localness."¹⁵¹ It is the idea that, by means of electronic communication, groups increasingly engage in societal relationships, progressively creating bonds that eventually form communities, almost irrespectively of their geographical localization. Ever more frequently, what matters is not the territorial proximity between people but the "selective ties" that members of such "communities of choice," as sociologist Manuel Castells puts it, purposefully develop, such ties being typically based on common affinities, interests and goals.¹⁵² Those communities are no longer proximity based, but subject-matter centered. Their boundaries are no longer dependent on territory, but on specific activities. In such cases, virtual comprehensiveness would mean that the legal system would claim authority to rule over a large proportion of those behaviors that occur in the context of such activities. In such cases, virtual comprehensiveness would be restricted to relatively specific behaviors.

If we accept the idea of *ubi societas, ibi ius* in its conditional form adopted here – that communities, *if* they evolve sufficiently to acquire certain characteristics that we have discussed above, will develop normative systems and then legal systems – then the current development of deterritorialized communities seems at odds with the

¹⁴⁸ See, e.g., MANUEL CASTELLS, *THE INTERNET GALAXY: REFLECTIONS ON INTERNET, BUSINESS, AND SOCIETY* 125-26 (2002).

¹⁴⁹ See, e.g., HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY* (1993); Philip Giordano, *Invoking Law as a Basis for Identity in Cyberspace*, 1998 STAN. TECH. L. REV. 1, 10; Beth S. Noveck, *A Democracy of Groups*, 10 FIRST MONDAY, no. 11 (Nov. 7, 2005), available at <http://www.webcitation.org/5O112GmCD>.

¹⁵⁰ See, e.g., ANDERSON, *supra* note 141, at 5–6, 36–38, 204.

¹⁵¹ VIRILIO, *supra* note 13, at 59.

¹⁵² CASTELLS, *supra* note 148, at 119–25.

idea of virtual comprehensiveness in any other acceptance than the one just sketched. A deterritorialized legal system that regulates only those behaviors that relate to the shared interests or common goals of the community's members is, by definition, non-comprehensive if we give this concept an absolute or universal meaning (a very large number of the facets of life generally speaking as opposed to life within a specific community). This leaves open only one of two solutions: either the model of a legal system is too limiting, or these communities cannot produce legal systems, whatever their level of self-organization, autonomy and overall development. It seems to me that it would be unduly restrictive to deny such communities the capacity to create law on the basis of a model of law that owes much to conceptions of political sovereignty whose goal precisely was to assert and establish exclusive and supreme control over a specific portion of territory.

It must, however, be recognized that a legal system that features the three properties addressed in this section is conceptually closer to the epitomical public legal system of the modern state and therefore is more clearly a legal system than those that do not. The public legal system remains the epitome of a legal system because current legal thinking still is very much marked by modern conceptions of political sovereignty. These conceptions, instantiated on the plane of law, produced the doctrine of classical legal positivism as a monistic conception of law,¹⁵³ and, hence, it has appeared very natural for the last few centuries to treat law as an all-encompassing normative order. It has become all too tempting to think of law as having necessarily the same characteristics as this epitomical instance of law, and thereby to engage in what appears as an inductive fallacy. The public legal system of the modern state simply has been so preponderantly present that it has been obscuring all other possibilities of juridicity. However, it must be kept in mind that the modern state is only a historical creation¹⁵⁴ and that law predated it.¹⁵⁵ Simon Roberts's argument that we have come to deeply associate law with government and that to claim the existence of non-state legal systems would be contrary to the way we now think of law, that it would run afoul of "the durability of old understandings," is convincing and sound but it inherently rejects all attempts at an ontological understanding of what law is.¹⁵⁶

Non-comprehensive, non-exclusive and non-supreme legal systems thus appear perfectly admissible in theory. In practice, some of the best examples of such systems seem to be those identified in this Article: ICANN and eBay's legal orders.

¹⁵³ See, e.g., *id.* at 39.

¹⁵⁴ See, e.g., JOSEPH R. STRAYER, ON THE MEDIEVAL ORIGINS OF THE MODERN STATE (1979).

¹⁵⁵ See, e.g., HAROLD BERMAN, LAW AND REVOLUTION 49–83 (1983); BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE 21–84 (2d ed. 2002).

¹⁵⁶ Roberts, *supra* note 3, *passim*.

CONCLUSION

ICANN and eBay are some of the places on the Internet where autonomous and formally organized normative systems can be found. No doubt there are others, and no doubt they all show more or less flagrant differences with state law. My aim in this Article has been to advertise those two examples as an invitation to seriously consider the recognition of such systems as legal systems.

Such a recognition seeks to serve two purposes. First, it may further the understanding of power structures in a world where state law has a decreased capacity to code power. Law is, among other things, an instrumentality of power. Not to recognize the presence of law in a specific field easily may lead to not fully acknowledging the structures of power prevalent there and hence to not setting appropriate standards of regulatory quality. Second, such a recognition may further the understanding of the regulation of the Internet. In particular, it may help overcome the common misconception that there is such a thing as a global comprehensive governance of cyberspace, with a multitude of actors all contributing to a single spread-out web of normativity, a single global normative soup.¹⁵⁷ Cyberspace is carved up into different spheres of normativity, some of which are connected only remotely to other normative systems. It also may help overcome the opposite misconception that activities carried out over the Internet simply are a slight variation of offline activities, and that conduct is being shaped in the same fashion in both contexts.

More fundamentally, cyberspace is a field of experimentation for legal theory that is particularly alive and responsive. New communities are being formed and new modalities of “governmentality,” as Foucault would say, are being tested there.¹⁵⁸ Law, there, takes on new structures, or maybe recovers some old ones. To echo Lawrence Lessig’s conclusion to his revered article *The Law of the Horse – What Cyberlaw Might Teach*, “[a]t the centre of any lesson about cyberspace is an understanding of the role of law.”¹⁵⁹ Indeed, it is with regard to the modalities of law, and thus with regard to the forms that legal systems can take, that cyberspace may teach its most valuable lessons.

¹⁵⁷ This is in substance the position behind the concept of the *lex electronica*. See *supra* note 1.

¹⁵⁸ Governmentality is, in the essence, the art of government. See, e.g., *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* (Graham Burchell et al. eds., 1991).

¹⁵⁹ Lawrence Lessig, *The Law of the Horse – What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 548 (1999).