Law & Society REVIEW

What's So Private about Private Ordering?

Tehila Sagy

Private ordering—i.e., development of extralegal forums and forms of dispute processing by nonhierarchical groups—has preoccupied legal economists for nearly three decades. According to the prevailing analysis, private orders grow in socially-flat market communities without any intervention by the state. This article challenges the received view on two fronts: First, it establishes a causal connection between the development of private orders and a social hierarchy. Second, the article demonstrates that the state often intentionally assumes a proactive role in the creation of these orders. To illustrate this two-pronged theory of private ordering, this article offers a detailed analysis of three well-known cases that have been considered prototypes of private ordering by market communities: the Diamond Dealers Club of New York, the kibbutz in Israel, and ranch owners in Shasta County, California. Finally, the article argues for a need to re-evaluate the feasibility and desirability of private ordering and privatization of law.

Thomas Hobbes (1909) argues that in the absence of government, people do not cooperate voluntarily to provide themselves with public goods. He is specifically concerned that this is the case when it comes to order—that is, security and domestic peace. To him, this concern justifies the state, which he links with the administration of law. Hobbes's view has been challenged by legal pluralists, multiculturalists, libertarians, and utilitarian legal scholars. These approaches suggest that the state does not, or should not, have a monopoly over coercive social control.

I am grateful for the support of the E. David Fischman Scholarship, the John M. Olin Program in Law and Economics at Stanford Law School, the Stanford Center on Conflict and Negotiation, Stanford Law School, the Yonatan Shapira Post-Doctoral Fellowship at Tel Aviv University's Department of Sociology and Anthropology, the Israeli Council for Higher Education, and The Sacher Institute, and the Lady Davis Foundation. For their helpful comments, I wish to thank Lisa Bernstein, Josh Cohen, Mariano Florentino Cuellar, Hanoch Dagan, Yoav Dotan, David Enoch, Tali Fisher, Barbara Fried, Lawrence Friedman, Alon Harel, Adam S. Hofri-Winogradow (who suggested the title), Nicole Janisiewicz, Ofer Malcai, Barak Medina, Ariel Porat, Re'em Segev, Ronen Shamir, Ido Yoav, Eyal Zamir, the editors of Law & Society Review, the three referees, who improved the article considerably. Special gratitude goes to Uri Leibowitz for insightful comments and suggestions. The article also benefited from comments made by the participants in the Public Law and Human Rights Workshop at the Hebrew University Faculty of Law. Please address correspondence to Tehila Sagy, School of Law, University of Leicester, University Road, Leicester, LE1 7RH, UK; e-mail: tsagy@stanford.edu.

Law & Society Review, Volume 45, Number 4 (2011)

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

Over the past three decades, utilitarian and libertarian thinkers have advocated going a step further by fully separating state and law (Benson 1990; Friedman 1973; Osterfeld 1983; Rothbard 1977; Taylor 1976). This approach, sometimes referred to as the privatization-of-law model, revives the old debate around the theoretical-philosophical construct of state of nature, to wit: what happens when law is not centralized in the hands of the political authority? Privatization-of-law theorists suggest that in the absence of state law, "market communities" (Fisher 2008: 488) (defined as aggregates of individuals engaged in voluntary contractual relations) will cooperate spontaneously to achieve law and order.[1] To substantiate their claim regarding the model's desirability and plausibility, these scholars base themselves on private-ordering literature—that is, empirical studies that claim to have identified situations in which market communities provide themselves with law and order without government intervention.

It is my contention, however, that private ordering typically grows from the bottom up in the context of social and economic hierarchies (frequently characterized by multilayered interactions); in addition, a proactive public order, generally in the form of the state, often intentionally contributes to the development of private orders. As I demonstrate below, nation-states deliberately employ various techniques to propel groups to handle their legal problems outside the official legal system. To illustrate this two-pronged theory of private ordering, I offer a detailed analysis of three cases that have been discussed extensively in the private-ordering literature and are generally considered prototypes of private ordering by market communities: the Diamond Dealers Club of New York, the kibbutz in Israel, and ranch owners in Shasta County, California. In each of these cases, a private order was developed by a hierarchical social group. Moreover, the groups in question were not simply excluded from the public legal system but were pushed into submitting themselves to private forms of dispute settlement, which were created by their own elite. I would like to emphasize that while the relationship I identify between private ordering and social hierarchy is of both correlation and causation, I do not preclude the possibility of private ordering by market communities. I do, however, argue that a hierarchical social structure facilitates private ordering, and that my critical analysis of the literature suggests that to date we have no evidence of private orders that were developed by market communities.

[1] Relations between individuals in market communities take the form of both direct association and indirect interaction through intermediary agencies (Fisher 2008: 488). Exit from these communities is easy, and their composition is fluid and dynamic.

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

Four bodies of literature, each representing a separate school of thought, address the phenomenon of nonstate mechanisms for dispute processing. The first, that of private ordering, presents empirical accounts of groups that manage their legal affairs without the state. While most works concerning private orders offer a case-based hypothesis on the conditions that led to the development of the private order they depict (Bernstein 1992; Feldman 2006), some scholars develop a more general, predictive hypothesis regarding the conditions in which private orders grow (Ellickson 1991). Private-ordering scholars are usually legal economists; thus, they tend to explain extralegal ordering in terms of cost-benefit analysis and to assume that groups develop and choose to employ private ordering for reasons of efficiency and welfare maximization. In addition, this school of thought generally considers groups that use private orders as homogenous units, thereby disregarding the distribution of incentives among group members.

The second school of thought, the privatization-of-law model, draws on the private-ordering literature to suggest that the decentralization of social ordering to market communities can produce superior legal systems (Stringham 2007). Some privatization-of-law scholars are libertarians, who wish to minimize state intervention in all matters, including legal ones; others are utilitarians, who privilege market logic over all forms of human interaction. Their argument is that the dispersal of all legal functions into the hands of market communities can create a market for law that will ultimately result in efficient, high-quality legal products. The competition among private legal orders, and the ability of law consumers to choose from among them and to abandon unsatisfactory law providers, are at the heart of this suggested reform, which relies on private-ordering literature to demonstrate its feasibility.

In the third body of literature, scholars of multiculturalism engage in a policy-oriented, normative discourse on "the need to recognize and protect the rights of non-ruling groups, especially minorities" (Barzilai 2003: 13). But unlike the attempts by privatization-of-law scholars to separate state and law as a general policy, the multiculturalists suggest that specific cultural groups should have a right to cultural autonomy—and, hence, to at least partial legal autonomy as well. Accordingly, multiculturalists do not promote the complete separation of law and the state; moreover, they view the distribution of law to certain cultural communities not as superior in terms of quality or efficiency but as morally justified.

The fourth body of literature dealing with extralegal ordering is that of legal pluralism. This anthropological framework for researching situations in which several legal systems operate within the same social field (Merry 1988) is descriptive, and generally concerns itself with the syntax of the interrelationships among

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

various legal systems that it identifies in a given social field. In the late 1980s, legal anthropologists began to stress the importance of power and history in their analyses of individual and group choices of dispute resolution mechanisms in situations of legal pluralism (Starr & Collier 1989). It is through this analytical lens that the present article examines the writings of legal economists on the subject of private orders. My critical rereading of the private-ordering literature exposes the theoretical ambiguity and philosophical inconsistency of the first three bodies of literature (that of private ordering, the privatization-of-law model, and multiculturalism). It has also led me to develop a new theory of the conditions in which private orders grow, in particular the variables that can both predict and explain the choices of certain groups to create and utilize private mechanisms for dispute resolution.

The new theory of private ordering presented in this article adds to our understanding of the consequences of the privatization of law in several important ways. First, it calls attention to the stratified, multiplex social structure that gives rise to the decision to employ extralegal mechanisms for dispute processing. My critical reading of the literature suggests that there is a correlation between private orders and hierarchical social structure. Moreover, my theory suggests that there is also a relationship of *causation* between private orders and hierarchies. First, a hierarchical social structure provides power holders with an incentive to create private orders that allow them to sustain norms that preserve the power structure they benefit from. Second, hierarchies provide incentives to lower-ranking group members, who are embedded in this social structure in such a way that they are prevented from dissenting, to use private orders even when their decisions and norms work against their interest. Third, hierarchies enable the formation of a clear normative system. And lastly, hierarchies provide private orders with enforcement capabilities.

Hierarchy locks group members into private ordering and creates a de facto monopoly on the part of the group over the processing of disputes among its members. Thus, there is an inherent tension between the social structure that facilitates private ordering and the ability of group members to choose that order or to exit from it. As a result, private orders—formerly considered to be superior, more efficient providers of law because of the possibility of monitoring their quality through the threat of exit—can no longer be perceived as such. Rather, they are similar to private forms of dispute resolution used by cultural communities.

Second, my theory of private ordering focuses attention on the public order's interest in private ordering. In this new conceptual framework, private orders are understood as a link between social power stemming from intragroup hierarchies and dependence on

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

the one hand, and the power of the state on the other. The integration of these forms of power produces a dual reality of domination (Bourdieu 1977).

On the theoretical level, I posit that two bodies of literature (the privatization-of-law model and the multiculturalist theory) whose adherents have considered fundamentally different—specifically with regard to the type of community they address—seem to be centered on the selfsame phenomenon: hierarchically structured social groups whose rank and file are impelled by their elites to use private forums of dispute resolution. Two conclusions stem from this observation: one, that the literature on the subject of private orders can no longer be used as evidence for the possibility of a free market of law, since association among members of the relevant groups is not choice based and exit is not readily available; and two, that scholars of private ordering and privatization of law should concern themselves with what has generally been the province of multiculturalists—that is, the possibility of increasing access to justice for low-status members of groups that use private mechanisms of dispute resolution.

Last but not least, my new private-ordering theory challenges the multiculturalists' solution to the problem of intragroup oppression. Multiculturalists assume that the state is interested in having a monopoly over the administration of law. They therefore argue in favor of legal multiplicity and the accommodation of group members' rights; in other words, they try to convince the state to give up its monopoly in cases when it is normatively justified. Given their assumption, it seems clear to them that when the state is asked by vulnerable group members to protect them from intragroup oppression or violation of rights, it will be more than willing to take back the reins and reassume control. What multicultural theorists fail to take into account, however, is that the state is often interested in the group's private forms of ordering and will not be willing to retake control when asked to do so by the vulnerable.

Current Theory of Bottom-Up Private Ordering

Before going into detail regarding the new theory of private ordering proposed in this paper, I will first attempt to organize the patchwork of empirical studies regarding extralegal orders into a taxonomy of the five independent variables that contribute to the development of bottom-up private ordering. This classification is based on an aggregate of the most widely cited positions in the literature. As we shall see below, most of the studies focus on one or more of the variables; it should be noted that none of them suggest

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

that *all* the conditions I have identified contribute to the development of private orders.

The first of these variables is a flat social structure from which members can exit. Scholars in the field tend to associate nonhierarchical, decentralized, or even egalitarian social structures with the development of private orders. This connection is not considered accidental. Richard Schwartz, who studied two agricultural settlements in Israel during the 1950s, argues that the egalitarian nature of the collectivist *kvutza* (the forerunner of the kibbutz) was important to its extralegal form of social control since it enabled vicarious learning that made informal sanctioning effective. Members of the kvutza were able to learn from sanctions administered against their "comrades" because their group was status-homogenous (Schwartz 1954: 483).

Based on his findings from Shasta County, Robert Ellickson (1991: 238) similarly contends that "close-knit *nonhierarchical* groups can achieve much of the internal order that centralists have classically regarded as the job of the Leviathan" [emphasis mine]. In Ellickson's formulation, decentralization defines the close-knit group: "Each group member, or his reliable allies, would have to have some of the resources of power" as well as "credible and reciprocal prospects for the application of power against" others in the group (1991: 179).

The claim regarding the nonhierarchical nature of the groups that privately order themselves appears not only in empirical scholarship but also in the theoretical-normative literature. It has been argued that as a matter of efficacy, "any form of centralized coordination, even if not controlled by the state, renders the system less private" (Yadlin 2000: 2620). Robert Cooter, for example, attributes the "superiority of private ordering to its decentralized structure and the fact that its lawmaking processes are subject to competition" (ibid.).

Two other features of the social structure associated with private ordering are less consensual among scholars. One is the group's size, which some consider important (Schwartz 1954) and others disregard (Ellickson 1991: 182). The other is the duration of relationships among group members.

When anthropologists talk about continuing relations, they generally refer to a social structure that Max Gluckman (1955) defines as multiplex. Simply put, these are multifaceted (social, political, and economic) ties that endure over time (ibid.). While the Lozi of Northern Rhodesia, whom Gluckman worked with, were entangled in a web of multiplex relations, they used litigation for resolving disputes. Nonetheless, the legal, anthropological, and sociological literature that has followed Gluckman tends to associate multiplex relations with extralegal dispute handling (Aviram 2004;

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

Richman 2005; Schwartz 1954). A narrow version of the "continuing relations hypothesis" (Yngvesson 1985: 624) disregards the complexity of the ties and assumes that the longer a relationship continues, the less likely it is that the parties will use official forums for handling their disputes (Ellickson 1991; McMillan & Woodruff 2000; Richman 2004).

The privatization-of-law model, by contrast, rejects both the association of private ordering with multiplex relations and the narrow version of the continuing relations hypothesis. According to this model, limited-purpose association is an inherent feature of market communities in that it is linked with the ability to exit. The libertarian and utilitarian commitment to exit is evident in the reluctance of certain scholars to fully address the implications of their own findings. The residents of Shasta County, for example, are caught up in a network of multiplex relationships: "Rural residents deal with one another on a large number of fronts, and most residents expect those interactions to continue far into the future," which Ellickson acknowledges to be "[a] fundamental feature of rural society [that] makes this enforcement system feasible" (1991: 55). However, he overlooks the tension between this feature of Shasta County's social structure and the residents' ability to choose dispute-processing mechanisms (for example, to dissent or to exit). As noted by Talia Fisher (2008: 491), "the libertarian stream of the privatization model attributes intrinsic value to exit and views social mobility as a crucial component of individual freedom and autonomy." Exit is also significant to the utilitarian school, which views it as "a vital component in the liquidity of the market for law, insofar as it insures market efficiency" (ibid.). The "all-encompassing *nomos*"[2] (Cover 1983) that characterizes cultural and multiplex communities stands in the way of exit and, therefore, cannot be a feature of market communities.

Information networks are the second factor considered by various researchers as conducive to the development of bottom-up private orders, though some scholars argue that such networks are indistinguishable from social structure. While information networks, used as reputation devices, often develop in close-knit or ethnic groups, legal scholars argue that gossip can be effective, through advanced technology, in larger groups as well (Bernstein 1992; Ellickson 1991; McMillan & Woodruff 2000).

A third factor posited in the development of extralegal orders is the presence of a lock-in situation. McMillan and Woodruff associ-

[2] The term *nomos* is used here to refer to minority communities that produce comprehensive alternative worldviews in which law and cultural narrative are indivisible. Such communities may create sets of group-sanctioned norms of behavior that differ from those encoded in state law (Cover 1983).

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

ate monopolies, or lock-ins, with underdeveloped economies (McMillan & Woodruff 2000). Lock-ins are considered market failures by privatization-of-law theorists (Fisher 2008: 481), since the model "envisions voluntary associations that are relatively limited in scope . . . amongst members who simultaneously commit to a plurality of normative regimes" (490) and, as stated earlier, offer easy exit.[3]

Fourth among the factors thought to affect the emergence of bottom-up private ordering is the legal culture of the group in question. Lawrence Friedman (1975: 15) defines legal culture as "those parts of general culture—customs, opinions, ways of doing and thinking—that bend social forces towards or away from the law and in particular ways." By way of example, Allan Shapiro (1976) connects the kibbutz's lack of formal mechanisms for legal control to its legal culture and argues that the founders' socialist ideology led them to reject law as a bourgeois controlling device.

Last, one factor in the development of private ordering that has received scant attention in the literature is the involvement of the public order. Legal peripheralism, as expressed in Schwartz's (1954) work on the kibbutz, assumes that formal legal institutions emerge only when informal mechanisms are insufficient and, as such, are indicators of the failure of other forms of social control. Another approach, that of legal centralism, looks at deficiencies in the public order that encourage private alternatives, and at the responses of the public order to extralegal orders that develop from the bottom up (Bernstein 1992). However, even legal centralists have not identified the public order as a proactive agent in the development of private orders (Porat 2000).

Nonetheless, the literature does capture three instances in which the authorities played a proactive role in the emergence of limited forms of private ordering. The first is the exclusion of specific legal claims from the official dispute-resolution system (West 2000). The second is the exclusion of legal claims in particular industries in order to bolster the authority of an existing hierarchical social structure, which serves as a gatekeeper in the context of that industry (Yadlin 2000). And the third is the establishment of "private" institutions by the official legal system, at a community's request (Feldman 2006). However, it is important to note that it is only in this taxonomy that these examples are seen as illustrative of a more general theory with respect to the public order's role in private ordering.

[3] It can be argued that while lock-ins reduce ex-post competition, they increase ex-ante competition because without them the system will not be able to recoup the fixed costs of creating and maintaining the system. If lock-ins create incentives to form and maintain the market, they cannot be viewed as market failures.

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

To summarize, researchers find that private orders grow from the bottom up in market communities: nonhierarchical social structures that enable free exit. Relationships among the group members are long-standing, but the level of involvement in the community is the subject of inconsistent reports, with the findings pointing toward multiplex ties but the interpretation of those findings insisting on the availability of exit offered by single-stranded relations. According to the dominant literature in the field, private orders emerge without state intervention. It should be reemphasized that none of the researchers attribute the growth of private orders to *all* the variables enumerated above; instead, most focus on one or two of these factors.

When Social Organization Hurts: The Role of Hierarchies in Bottom-Up Private Ordering

I would argue, however, the taxonomy outlined above is deficient as both a predictive and an interpretive tool of private ordering. First, it fails to take into account a critical aspect of the social structure in which private orders grow; in this regard, I would submit that bottom-up private ordering is often produced by hierarchies rooted in economic dependency. Second, it overlooks the panoply of strategies that public orders intentionally deploy to create private orders, a factor that I will be discussing in greater detail below.

Private orders typically develop in socially stratified groups, in which individuals within a single social system are unequally classified based on their social capital (wealth, status, and power). These groups, be they industries or cultural communities, have an interest in creating an internal mechanism for resolving disputes among group members. The stratified social structure enables group leaders to influence members of the group to use the private system. When power holders make access to resources (such as jobs for which command of the English language is unnecessary, in the Chinatowns of Chicago, Boston, and New York) or participation in the community contingent upon the use of private mechanisms of dispute resolution created by them, the threat of losing access to these resources produces not only the "choice" to use these private forums but also compliance with their decisions. Stated otherwise, there is a hierarchy-based, differentiated incentive structure in groups that develop and use private orders.

The acknowledgment that incentive structures are not randomly distributed among group members, but are apportioned based on members' ranks in the social hierarchy, improves our

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

ability to explain which controller-selecting[4] and substantive norms are adopted by the group. When a private order develops, power holders in the group tend to rely on it to maintain their power by preserving and manufacturing norms that bolster intragroup stratification, thereby guaranteeing both the private legal system and their own ongoing control over the group. As this section demonstrates, private methods of dispute resolution, and the norms that are applied within them, serve to reinforce the power structures that produced them.

Viewed in this light, private orders can be seen as mechanisms for preserving stratification within a given social setting. They work to preserve the power of dominant group members by placing them in the roles of norm makers and adjudicators. Their social dominance translates into the power to persuade the parties to submit to their discretion and to respect their rulings. It also enables them to invoke sanctions against those who do not comply. Their status is therefore not incidental to their role as dispute resolvers. From this position of power, these members are able to control the group's norms in a way that maintains the status quo. This explanation neither assumes nor requires a conspiracy on the part of the group's elite. It is, rather, an evolutionary theory, according to which private ordering is a strategy that enabled the communities in question to maintain their hierarchical structure and private forms of dispute resolution.

The following examples establish a correlation between private ordering and a hierarchical social structure while illustrating the above argument regarding the causal relations between private orders and hierarchies.

The Diamond Dealers Club

The Diamond Dealers Club (DDC) of New York was created by a group with a built-in hierarchy that habitually utilized private dispute-resolution mechanisms. Its arbitration system grew out of New York's Jewish community of the 1920s and depended on that community and its institutions for enforcement. Hierarchies, embedded in religion and economic dependency, played a triple role in the creation of private ordering within Jewish communities. First, using a carrot-and-stick approach, they produced a legal culture of avoiding public courts. Second, they served as enforcement mechanisms for the dispute-resolution decisions of private

[4] Ellickson (1991: 240) defines controller-selecting norms as "informal rules through which nonhierarchical groups seek to apportion tasks among these various sources of social control."

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

forums. Third, they produced a clear, normative value ranking, without which effective informal sanctioning would not have been possible.

The Russian pogroms of 1918 to 1921 resulted in waves of Jewish immigration to New York City. Prominent members of the Jewish community there were worried about the immigrants' impact on the community's good standing—a reputation considered key to members' ability to integrate and to prosper socially and economically. In particular, they wished to keep disputes among the new immigrants private since "had they been aired publicly in the civil courts, [they] might have caused embarrassment to the Jewish community" (Goldstein 1981: 102).

In response to this problem, Louis Richman and Rabbi Samuel Buchler, two Jewish lawyers, established the Jewish Court of Arbitration (JCA).[5] The New York Arbitration Act of 1920 (according to which mediators' decisions are enforceable in courts) was in the pipeline at the time, and as soon as it passed, the JCA held its first session (February 18, 1920). There was a clear socioeconomic gap between the JCA's mediators and the parties to the mediation. The former were rabbis, lawyers, judges, and distinguished laypeople who volunteered their time to provide this community service. The disputants were eastern European immigrants who lived in the impoverished Lower East Side neighborhood. The hierarchical differences between mediators and disputants were accentuated "to inspire confidence and implicit obedience." For this reason, "rabbis of the *am ha'aretz* [simple folk] type [were] not permitted to sit in the Jewish Court of Arbitration" (Buchler 1933: xiii).

Affluent members of the community channeled the immigrants' disputes to the Jewish court by using a set of positive and negative incentives. First, the Jewish court was free of charge. Second, hearings were conducted in the immigrants' native language, Yiddish. Third, those who agreed to use the Jewish court were promised help from the judges—be it financial, employment related, or personal—in resolving the dispute that brought them to the court: "One of the unwritten tenets of this tribunal was that the judges go out of their way in assisting litigants to comply with the Board's decisions." The well-off, influential judges would spend extra time after the proceedings had officially concluded, "trying to be helpful to some of those persons whose cases they had already heard in the formal sessions" (Goldstein 1981: 92). In other words, use of the court was incentivized by the promise that it would provide access to wealthy and influential members of the community.

[5] During the first decade of its existence, the JCA was divided due to a dispute between its founders. Rabbi Buchler established a rival court, while Richman stayed with the JCA as executive secretary (Goldstein 1981: 88).

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

On the negative side, JCA arbitrators frequently persuaded litigants not to take their cases to American courts so as to avoid *hilul hashem* ("the dishonoring of the Jewish good name by dragging unseemly situations into a non-Jewish court" [Goldstein 1981: 89]). Jews who voluntarily presented a case before a Gentile court were ostracized by the community, since such an action was regarded as undermining the authority of Jewish law and the rabbinical courts (Goldstein 1981: 4). Ostracism was especially hazardous in the case of immigrants who did not know English and were dependent on the Jewish community for their daily survival. To understand the full implications of this social exclusion, we must realize the benefits of inclusion in the community. For example, membership in associations based on locality in the country of origin (*Landsmanshaften*) gave people access to established members of the Jewish community who came from the same region or town. It also gave them sick benefits, payments to those sitting shivah after a death in the family (to compensate them for loss of earnings), burial plots, and funeral expenses, which were made available to paid-up members in good standing (Goldstein 1981: 112). Thus, exclusion from the community and its associations impaired the immigrants' ability to survive in the new country.

The JCA was dominated by intragroup hierarchies in terms of both structure and substance. In general, it reinforced the traditional (religion-based) hierarchies as well as the Jewish laws and norms that supported the stratified social structure that had produced it in the first place. In two cases cited by Goldstein (1981: 103) and Buchler (1933: 21–29) respectively, both involving the Jewish concept of *lashon hara* (defamatory gossip), we see that the hierarchy that marked the relationship between the parties and the judges shaped the categorization of the cases and the law that they applied. In the first case, the judges had difficulty attributing much importance to the reputation of "the little people," and the female plaintiff and defendant were admonished that sensible people were not concerned with false rumors and gossip and that both parties must try to live in peace and harmony. As noted by Yngvesson (1993a: 55), when "metaphors of responsibility, of restraint, of neighborliness" are used to persuade parties to "choose" to "get along," they are encouraged to view their assertions of rights as "the demand of a greedy or unsocialized self unattuned to collective needs in which each person must 'show a little concern.' "

In a business context, however—or in the case of more influential people, such as the sexton who was the plaintiff in the second case above—lashon hara was seen as a real issue and treated accordingly. It is certainly taken very seriously by Jewish diamond dealers, and one of the main functions of the DDC's arbitration board is to sort out lashon hara from truthful information.

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

The DDC's private arbitration system has been conceptualized as part of an industry, and not of New York's Jewish society in general; hence, its existence has been traced to the commercial needs of that industry (Bernstein 1992; Richman 2002). However, stepping back, one can see that the DDC is part of a long-standing tradition of Jewish dispute resolution in New York and elsewhere. That tradition casts doubt on the claim that the DDC's arbitration system developed in response to the diamond trade's unique requirements. It is possible that the Jewish approach to private ordering has been particularly useful in the context of the diamond trade, but this is a very different claim from the standard argument that the DDC's mediation system arose as an efficiency-oriented institution. If Orthodox Jews in the Diaspora avoid taking *all* their disputes—commercial (as in the diamond and other industries) and others—to non-Jewish courts, can we still locate the motivation for DDC's private arbitration system in industry-specific considerations? Or should we distinguish between the initial motivation to solve disputes extralegally and subsequent adjustments to the industry's particular needs?

The arbitration system of the Diamond Dealers Club is difficult to comprehend in isolation from the Jewish Court of Arbitration, not only because the JCA is part of the sociocultural context from which the DDC arose, but also because the DDC's arbitration system depends on Jewish community institutions for enforcement. There are two ways in which these institutions enforce the DDC's decisions: one is through the rabbinical courts, and the other is through the use of informal sanctions. On the more formal level, the rabbinical courts can excommunicate an offender—a direct enforcement instrument that is rarely used—or the DDC arbitration committee can itself initiate a proceeding in a rabbinical court (Richman 2005: 40). More informally, "when the community is familiar with a member's failure to comply with contractual obligations, a withholding of excludable community goods . . . often occurs. Excludable religious goods include participation roles in daily prayer, honors in life-cycle ceremonies, and access to classes or teachers that are in limited supply or enrollment in particularly select educational institutions" (ibid.).

Another important informal sanction relates to marriage. The ultra-Orthodox communities practice traditional matchmaking, and a family's ability to find a good match for their offspring depends to a great extent on the family's reputation. Failure to comply with private Jewish forums for dispute resolution compromises the family's good standing in the community and, therefore, their offspring's chances of a worthy match.

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

Even if we accept that the DDC's extralegal arbitration should be comprehended more in sociocultural terms than in economic terms, however, there is still the need to establish that the DDC itself embodies the same hierarchies as the community that established it. Three key indications that the DDC's private ordering is rooted in hierarchies based on economic dependency are its selection criteria (that is, trustworthiness), its rehabilitation mechanism, and its collectivist mentality.

Trustworthiness

There are several factors that promote collaboration and mutual assistance among DDC diamond dealers. Among them is the fact that long-term Jewish traders operate in the framework of an intergenerational family business and cooperate to protect their family's interest (especially that of the next generation). The ultra-Orthodox in particular cooperate for two reasons. One is that group membership provides benefits that will be lost to them should they be considered dishonorable. The second motivation is religious: "the ultra-Orthodox view their economic behavior as reflections of the divine. Complying with contractual obligations thus takes on a divine quality. Fulfilling one's contractual obligations is an act that is commanded by religious law" (Richman 2005: 36).

If this were a sufficient explanation, however, any and every Orthodox Jew would be considered trustworthy enough to handle diamonds without a contract. But this is not the case. Membership in the ultra-Orthodox community may be a necessary but insufficient condition to induce confidence that a given community member is trustworthy with another's diamonds. Accordingly,

> diamond merchants will look for other assurances that suggest that a diamond contractor is committed to the community and thus committed to cooperation. . . . Community members will look to family signals or neighborhood references that indicate a merchant is fully embedded within the community. (Richman 2005: 38)

Dependency within the community differentiates those who can be trusted to cooperate from those who cannot. One signal of "embeddedness" that diamond dealers look for is dependence on the family. Long-term religious students who have started a family of their own rely on their relatives and the community for their daily survival and are therefore less likely to escape: "A young couple frequently will live with their in-laws for several years or will receive community stipends until the male completes his religious study, [which] often continues until he is 40 years old" (Richman

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

2002: 38). Under such circumstances, "by the time a male completes full-time study and is ready to assume economic responsibility, he already has a spouse and children entrenched within the community and is far less likely to depart" (ibid.).

This "commitment device" indicates that those who are considered trustworthy enough to handle expensive diamonds that they will never be able to afford are those who are closely interwoven with the community's social structure—locked in to it, as it were, through economic and cultural dependency. Identity and behavior are therefore coupled in the DDC's vetting mechanism in a manner that obscures the distinction between market communities—which serve "a screening function targeted at behaviors rather than populations"—and cultural communities, which serve as a population-screening mechanism that is identity based (Fisher 2008: 488).

Fisher writes that multiculturalism is concerned with cultural or identity communities from which exit is not a viable option. In the context of the DDC, ingrained commitment of the kind that typifies cultural communities facilitates the trust required for handling diamonds without contracts. Stated otherwise, in the diamond industry trust exists where the market community and the cultural community coincide. Embeddedness in the community not only promotes dependency, but also serves as the ultimate signal that one belongs to the legal network of ultra-Orthodox Jewry and accepts its rules. Consequently, transaction costs with an embedded person are lower.

Rehabilitation

Coordinated punishment is one of the essential elements of the DDC's effective private ordering. Most merchants do not conduct business with a person who has a bad reputation for business dealings, because "their own reputation will suffer if they are known to transact with previous cheaters" (Richman 2002: 29). However, it seems that not all merchants need to worry about their reputations to the same extent. Some "elder" merchants not only have the power to transact with transgressors without harming their own reputations, but also have the authority to rehabilitate transgressors. Rehabilitation is usually the product of both compassion (toward the transgressor) and desire for profit (although it is unclear how the guarantor profits from vouching for another's deal): "Such generosities are most likely to be effective if they are undertaken by a senior leader who commands respect from other dealers" (ibid.). We lack information about the rehabilitation mechanism: who the senior leaders are, when or how one becomes such a figure, and how rehabilitation subjects are selected. What is

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

clear is that there are hierarchies within the community that are obvious to insiders and that shape sanctioning.

Collectivist Culture

Ultra-Orthodox Jews are self-embedded in their communities (Barzilai 2004), and their communitarian lifestyle indicates the existence of a collectivist culture. Collectivism, according to Triandis (1995: 6), is typified by "(1) emphasis on the views, needs, and goals of the ingroup rather than on the self; (2) emphasis on behavior determined by social norms and duties rather than by pleasure or personal advantage; (3) common beliefs that are shared with the ingroup; and (4) willingness to cooperate with ingroup members." All four characteristics define the behaviors of the diamond dealers studied by Bernstein (1992) and Richman (2002, 2005, 2006).

To summarize, the DDC developed, and continues to exist, because the diamond merchants are not only a profit-oriented community but also part of a larger community with its own legal culture. The DDC depends on that community for norms, enforcement, and population-screening mechanisms. The role and status of individuals within the cultural community are indistinguishable from their standing in the trade community. The DDC is part of a larger private-ordering mechanism that utilizes class-based (JCA) and religious (rabbinical courts) hierarchies to regulate itself. Economic dependency, along with the requisite inclusion in the community, produces trust, which in turn facilitates extralegal contracting. In addition, hierarchies are necessary to create a clear normative code, to induce people to avoid the public order, and to enforce private settlements. As such, the DDC's system of dispute resolution cannot be viewed as an egalitarian enclave in a sea of hierarchy, distinguished from the culture that created it and enforces its decisions.

The Kibbutz

A second example of the role played by hierarchies in the creation of private ordering is Israeli kibbutzim, which were initially characterized by an ideology of egalitarianism. However, as early as 1951, according to Eva Rosenfeld, while "the social structure of the kibbutz prevents the emergence of economic differentiation . . . differential social status exists in the kibbutz society" (767–768). Rosenfeld's analysis is limited to first-generation full members and excludes "transient and marginal groups" as well as gender-based stratification (ibid.). Within the kibbutz, a special vocabulary was used to mark the social hierarchy: *ish hashuv* (an important man) referred to "top leaders in the kibbutz movement

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

or a person highly skilled and specializing in some activity of general importance in the kibbutz movement" (769); the next level down was *ehad me-havatikim* (a longtime member); the designation *oved tov* (a good, reliable worker) was used for members of no particular status; and the lowest rank, *stam p'kak* ("just a plug"), was given to newcomers and irresponsible members, who were "plugged" in to whichever job needed an extra hand on a particular day.

While high-ranked members received no economic advantage as a result of their social status, they did benefit in two other respects. The first was "immunity from frustrating and humiliating experiences in dealing with central distributive and administrative kibbutz institutions" (Rosenfeld 1951: 770). The second was "greater life chance for emotional gratification," meaning "less of the strain and dependency and more of the pleasures of collective living" (771). By contrast, the kibbutz's rank and file saw collective life "from the disadvantageous point of daily routine, difficult and subordinate work [as well as] tensions and conflicts in many institutional relations" (ibid.). According to Rosenfeld, the manager-leaders were oblivious to the social stratification in the kibbutz, as illustrated by the following anecdote: "In a summer rest home maintained by the kibbutz, a female newcomer became friendly with one of the old-timers. 'How I enjoy being able to talk with you!' she exclaimed once. 'Back home, I would never have dared to speak to you—you always seemed so formidable and distant.' The old-timer was bewildered at her feeling of distance. He felt that he was always approachable by anyone in the kibbutz" (1951: 772).

Rosenfeld's article was controversial at the time of its publication, since equality was central to the kibbutz's self-definition and because the movement's leaders failed to recognize both stratification and its impact. Although those who wrote about the kibbutz's system of social control were familiar with the literature about stratification within it (Schwartz quotes Rosenfeld in his paper from 1954), they did not adequately appreciate the impact of stratification on dispute processing. I would argue that the status of both offender and victim (if there was a victim) affected the categorization of incidents (as either "kids' stuff" or a crime) as well as the decision of whether or not to punish the behavior. Moreover, the kibbutz's controller-selecting norms factor in social status as a key consideration. Indeed, impunity could be added to Rosenfeld's account as a third benefit of high status in the kibbutz.

Richard Schwartz explores the development of social control through the case study of two Israeli collective settlements in 1949: a kvutza and a *moshav*. Defining legal sanctions as those administered by a specialist designated by society for the task, he argues that the kvutza had no legal institutions. He offers three main

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

explanations for their absence. First, there were no serious crimes in the kvutza; second, the community needed to protect its members from the "other"—at first from British courts and then, to a lesser extent, from Israeli ones; and third, there existed "internal controls which effectively handled existing disturbances" (1954: 474). Arguing that the kvutza's egalitarian nature was important for its effective internal control since it enabled vicarious learning, Schwartz minimizes the role of social stratification by treating it as a limitation rather than a defining aspect: "One of the greatest weaknesses of *kvutza* control arises from failure to specify the identity and special privileges of the high-prestige members" (486). A dual set of expectations applied to distinguished and "ordinary" members:

> Deviations from the general norms by the important people are less disturbing than if performed by ordinary members, since *kvutza* public opinion recognizes their special worth and power. But difficulties sometimes arise from uncertainty as to how important a given individual is and what privileges, if any, are due to him. (487)

In 1976, Allen Shapiro, who grew up on the first kvutza, published a piece that aims to refute Schwartz's analysis of the kibbutz as a group lacking legal institutions. Despite the many differences between their accounts, Schwartz and Shapiro both fail to adequately evaluate the impact of the kibbutz's stratified social structure on its system of dispute processing. However, reading between the lines of some of the cases analyzed by Shapiro and Schwartz, one can detect the role of social stratification in the kibbutz's system of dispute processing.

To demonstrate that kibbutz institutions orchestrated legal sanctioning, Shapiro compares the response to the first teakettle in both the kibbutz that Schwartz observed and in Degania Alef, where Shapiro was raised. In the early days, kibbutz members were not allowed to have teakettles in their rooms. The idea was "to prevent divisive private get-togethers" and to maintain economic equality; however, every kibbutz eventually had its first case of a private teakettle (Shapiro: 423–424). In the kibbutz that Schwartz studied, the case of the first private teakettle was brought to the kibbutz's general assembly. The unsociable behavior was denounced, and the deviant gave up his teakettle. In Degania Alef, the matter was not passed on to the general assembly. Kibbutz leaders told Shapiro that they decided to avoid fighting a losing battle. Shapiro suggests that their foresight was compounded by "a reluctance to bring the matter to a head, involving as it did the spouse of a valued and respected member." He further observes

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

that the woman was too economically independent to be forced to abide by the local norm: the fact that she had a profession that could be practiced outside the kibbutz enhanced her mobility. As a result, "only informal controls were employed, and the matter was not brought for decision before the General Assembly," despite the fact that "public opinion was aroused by the member's clearly deviant behavior" (424).

In other words, the decision of whether or not to refer a case to the general assembly, which Shapiro considers a legal institution, was a function of the member's position in the community and of his or her (related) economic power (i.e., level of dependence on the kibbutz for economic survival). Referral to the general assembly was not merely a procedural matter: while it was possible for non-other-directed individuals to disregard informal sanctioning, "had there been an authoritative decision of the Assembly . . . the member would have been forced to decide between her tea kettle and her kibbutz membership" (ibid.). In circumventing the general assembly, the decision was left to the member: she could choose to resist or submit to social pressure; however, if the assembly had been asked to reach a decision, she would have had to abide by it or leave. Because she was not economically dependent on the kibbutz and was married to a high-ranking member, the kibbutz chose a less formal control mechanism to avoid this dilemma.

Shapiro observes that resorting to external sanctions was sometimes used "as a method of forcing [out] undesirable members" (352). In one case, a member stole kibbutz property and "his standing in the kibbutz, as well as the standing of his family, perhaps facilitated the taking of measures that would not have been employed otherwise" (354). By contrast, external controllers were seldom approached when the aggressor was of high status and the victim of low status.

Even-Yosefson and Koren's 2007 study confirms that in the case of the kibbutz, controller-selecting norms are shaped by the social status of the parties involved.[6] Their questionnaire asked about the preferred form of response (out of four possibilities) in each of 28 cases of delinquent behaviors, including sexual abuse, assault, domestic violence, and theft of kibbutz property. The descriptions of the behaviors included the status of both victim and offender. In one category of kibbutzim studied, the survey produced the following results: When the offender and the victim were of low status, 45.2 percent favored discreet handling of the case, while 19.2

[6] With the decline of the kibbutzim in the 1980s and 1990s, a stream of horror stories about the manner in which kibbutz functionaries used their authority to silence cases of rape and abuse appeared in the Israeli press. For a detailed examination of one of the most notorious of these incidents, the Shomrat rape case, see Mandel (2008).

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

percent preferred going to the police. When both victim and offender held a high status, 38.4 percent from the same kibbutzim preferred a discreet response, whereas 23.3 percent supported going to the police. But the most striking (albeit predictable) results concern sexual offenses committed by an offender of high status against a low-status victim. In these cases, 64.4 percent of responders supported discreet handling, while 16.4 percent preferred taking the case to the police (23). Although the study examines kibbutz members' attitudes as opposed to the actual handling of disputes (meaning that it is possible that the controller-selecting norms were not necessarily consistent with the reported opinions, and that in practice, cases were taken [or not taken] to the police regardless of differences in attitudes demonstrated in the survey), it serves to show that kibbutz members factor status into controller-selecting norms.[7]

To conclude, kibbutzim highly prized their status as groups in Israeli society. They aspired to be egalitarian elites, and part of that identity was the myth that they were free of violence and crime. Therefore, when crime occurred on the kibbutz, the leaders and influential members, who wished to protect the kibbutz's good name, would pressure the (often low-status) victims not to embarrass the kibbutz by going to the police. The victim would find herself cast as an "enemy of the people" (Ibsen 1882), with the kibbutz united against the possibility of exposure. Apparently these pressures, which were rooted in internal hierarchies, were extremely effective. The result was that high-ranking members in the kibbutz enjoyed deferential treatment: their violations were winked at, and their victims were discouraged from approaching state authorities.

Shasta County

The final example of the role of hierarchies in the development of extralegal orders is the case of Shasta County, California. The close-knit group that Ellickson discusses in his celebrated book *Order without Law* (1991) comprises ranchette owners and cattlemen from well-established families who have resided in the county for generations. Cattlemen in Shasta County can be broadly divided into two categories: traditionalists and modernists. Traditionalists allow their cattle to roam, essentially untended, in unfenced moun-

[7] It is of course possible that the process of privatization has changed kibbutz members' controller-selecting norms, and that we cannot infer preprivatization positions from positions expressed postprivatization; but even if that is the case, it is safe to assume that the inclination to handle disputes internally was even higher in the preprivatization era.

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

tain areas during the summer, whereas modernist ranchers fence in their livestock. Modernists are also younger, more active in the Shasta County Cattlemen's Association, and more educated than traditionalist ranchers are. Ranchette owners are more recent settlers who reside in the foothills. They are either retirees or younger migrants from California's major urban areas, and most do not earn their income from ranching. Ranchette owners "admire both the cattleman and the folkways traditionally associated with rural Shasta County" (Ellickson 1991: 21). While the three groups are geographically integrated, ranchers hold all the political influence, material resources, and symbolic power (Yngvesson 1993b: 1791). Ellickson documents these asymmetrical relations but fails to notice their significance for local dispute processing.

Ranchers in Shasta County prefer private forms of dispute resolution that allow them to protect their interests regardless of the formal law. Their power enables them to keep the authorities from intervening in their private dispute processing, even when it involves a violation of state law. By contrast, those who do not possess the capital for private forms of dispute management—i.e., the ranchette owners—"sometimes respond to a trespass incident by contacting a county official who they think will remedy the problem" (Ellickson 1991: 59). Ranchette owners usually know whose animal has trespassed on their territory, but their position in Shasta County's social structure has led them to the understanding that "requests for removal have more effect when issued by someone with authority" (ibid.).

The norm of private dispute management serves to reinforce Shasta County's social structure, where ranchers are the ruling elite. In keeping with this norm, the powerful ranchers tend to respond to grievances by using force and banking on their capital to keep the authorities from intervening in their illegal activities, while ranchette owners are left without power to respond to trespassing by the ranchers' cattle. In Shasta County there is a powerful combination of "the traditionalists who let their animals loose in the mountain during the summer [and] are less scrupulous . . . in honoring the norms of neighborliness" and the norm against the invocation of formal legal rights (Ellickson 1991: 56, 60). This combination results in a situation whereby cattle roam freely and cause damages that are not compensated while ranchette owners "choose" not to file formal lawsuits or even submit informal monetary claims, in an effort to get along with the ranchers, who make no reciprocal efforts.

Shasta County's residents believe that when a certain range is declared closed, the liability of the owners of stray livestock for damages done by their cattle increases. Moreover, a closed range diminishes the ranchers' ability to solve disputes privately, as it

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

introduces a legal norm that can be enforced by the police and the courts. An open range is thus associated with traditional norms, including private resolution of disputes. It is therefore noteworthy that, although we would expect to see modernists, who tend to fence in their cattle, uniting with ranchette owners against traditionalist ranchers, who damage both groups, "modernist cattlemen typically join the traditionalists in opposing proposed legal changes that would increase the liabilities of owners of stray cattle" (Ellickson 1991: 25). In other words, their status within the local hierarchy predicts ranchers' positions with regard to legal rights and the resultant forms of dispute resolution, even when these seemingly work against their interests.

To conclude, controller-selecting norms in Shasta County are embedded in local hierarchies. The powerful ranchers use (sometimes violent) self-help measures, while the officials look the other way. Ranchette owners, on the other hand, lack the social capital to get away with the execution of private justice. As a result, they either seek the assistance of public officials (who usually turn them down), thereby running the risk of violating local norms of neighborliness, or swallow their grievances toward ranchers and "choose" to get along.

The conclusion that emerges from this section, which introduces the first prong of my new private-ordering theory, is that incentives for private orders are not randomly apportioned among members of the groups that create them. Rather, the incentives are distributed based on the members' positions within the group's stratified social structure. Hierarchies shape not only the controller-selecting norms of the group members but also the substantive norms, which are conserved, produced, and enforced by the private controllers. The substantive norms serve the dominant elements in the community by maintaining the group's power structure. Hence, private ordering is not a "nonhierarchical process of coordination" resulting in interactions that serve group members' "mutual advantage without the help of a state or other hierarchical coordination" (Ellickson 1991: 1, 5). Rather, it is the product of domination, and it serves the group's privileged class.

To several scholars (for example, Cooter 1996; Ellickson 1991), the centralized nature of the orders that have been identified thus far in the literature disqualifies them from being considered private. Others (Bernstein 1996; Yadlin 2000) suggest that orders are private only when they compete with other orders. According to this school of thought, when people are locked in to a private order, there is no such competition, and the orders in question are therefore not private. Thus, based on my critical analysis, by most definitions the private orders that are depicted in the most influential literature in the field are not private.

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

The Role of the Public Order in Creating Private Ordering

The literature tends to ascribe a passive role, if any, to the public order when it comes to the development of private ordering. For some scholars, private orders are defined simply as those whose norms "are not manufactured or enforced by the state" (Yadlin 2000: 2620). When the literature does acknowledge the involvement of the public order in private ordering, it focuses mainly on its *omissions*, which lead to the emergence of private ordering. The claim put forth in this section, as the second part of my two-pronged theory of public ordering, is that the public order is often intentionally *proactive* in creating private orders. This role varies along a continuum from acknowledging the existence of private orders to imposing them on a population that is reluctant to resolve disputes privately (Sagy 2009).

Private orders first developed and thrived in the pre–nation-state era;[8] however, in the "national order of things" there is no longer any territory that does not belong to a nation-state (Malkki 1995). This article addresses the development of private orders in the current context—that is, within nation-states in which an official legal system of some sort exists. In addition, since I am concerned with "legitimate" private ordering, studies about "the dark side of private ordering" by organized crime (Milhaupt & West 2000), or about militias' methods of achieving order (Brewer et al. 1998), will not be dealt with here. I do not suggest that private orders that run counter to state interest cannot emerge; in fact, the state is at times too weak to prevent the rise of private orders, as was the case in the Palestinian refugee camps in Lebanon (Peteet 1987). Rather, I pose a narrower question here: given a modern, functioning public order, what role, if any, does it assume in the development of legitimate private orders within its territory? More specifically, my focus is on situations in which the public order is proactive in intentionally creating private orders. Because the purpose of this paper is to analyze the dominant literature, I am bound by the types of disputes and contexts that have been examined to date.

In Shasta County, for example, the public order produced "the neighborly order of 'lumping' (that is, absorbing the damage from) trespass incidents" (Yngvesson 1993b: 1797) in various ways. In 1945, a state statute privatized the creation of local norms by authorizing the Shasta County Board of Supervisors, which is a locally elected governing body, "to 'close the range' in sub-areas in the county" (Ellickson 1991: 3). In so doing, the state transferred norm making to local elective institutions, thereby determining that

[8] A discussion of private ordering in the pre–nation-state era is beyond the scope of this article. See, for example, Greif (1989) and Clay (1997).

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

an important norm would be shaped by the local power structure. The role of local hierarchies in the creation of norms by the board is apparent in two cases presented by Ellickson in his book. He frames these cases as exceptions to the rule of neighborliness, but I view them as *precedents* that reinforced the local norm of lumping.

The Round Mountain case of 1973 involved three traditionalist ranchers who let their cattle roam freely and ignored their neighbors' complaints about the resulting damages. This frustrated several ranchette owners and a modernist rancher, who then petitioned to close off the range in question. The petition was mailed to John Caton, a newly elected board member and a ranchette owner himself. At the hearing on the petition, two of the three traditionalist ranchers did not show up. Moreover, the Shasta County Cattlemen's Association did not send a representative, although modernist ranchers are the most active members in this association, and the closing of the range was in their interest. In other words, the powerful forces in Shasta County dismissed the hearing as inconsequential. The ranchers did not need to use official tools such as petitions and hearings to influence local norm setting. In fact, to reinforce their norm of private ordering, they ignored the hearing altogether and used informal sanctions, which were much more effective and long lasting: after Caton and three other board members voted in favor of the closure, "to chide him for supporting what they regarded as a lamentable precedent, [the ranchers] referred to the affected area as 'Caton's Folly' or 'Caton's Acres.' Caton got the point. During the next decade, he successfully persuaded the Shasta County Board of Supervisors to reject all petitions that would have closed additional territories in foothill areas of his district" (Ellickson 1991: 32).

The State of California in essence privatized the legal categorization of local ranges in Shasta County by handing over this responsibility to the county's board of supervisors, which caused the board's decisions to be shaped by local hierarchies. Thus, both the state and the board intentionally and proactively contributed to Shasta County's private ordering.

A further example of this process appears in Ellickson's account of a rancher who had had recurring problems with a trespassing bull many years earlier. This rancher told a key law enforcement official that he wanted to castrate the bull and "turn it into a steer." The official replied that he would look the other way if that were to occur. The rancher asserted that he then carried out his threat (Ellickson 1991: 58). In this case, the law enforcement official produced a space of nonintervention that enabled the emergence of private ordering. By contrast, the lower-ranked ranchette owners are generally informed, in a variety of ways, that their claims will not be addressed by the official order, and this leaves them with no

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

option but to submit to intragroup hierarchies. Traditionalist cattlemen, who aspire to maintain an open-range regime in Shasta, have a powerful lobby that connects them to county officials. The latter dissuade the victims of trespass from submitting claims, despite the range of remedies offered by the official legal system:

> When talking to ranchette owners living in open range who have called to complain about trespassing mountain cattle, Bogue [the county's animal control officer] informs them of the cattleman's open-range rights. He asserts that this sort of mediation is all that is required in the usual case. In most years, Bogue's office does not impound a single head of cattle or issue a single criminal citation for failure to prevent cattle trespass. (Ellickson 1991: 48)

By choosing to inform ranchette owners of the cattlemen's open-range rights, rather than the ranchette owners' legal right to seize the trespassing animals, to obtain an injunction against the cattle owner in certain cases, and/or to receive compensation, the county officials manipulate ranchette owners away from the official legal system, thereby maintaining Shasta's private order. As opposed to situations in which the official system unintentionally excludes groups or claims by omission, here we find public officials actively contributing to the creation and perpetuation of private ordering.

Another example of an intentional, proactive, force-out policy can be found in the case of the Jewish Court of Arbitration (JCA). In addition to receiving ongoing encouragement from prominent Americans, the JCA was supported by state courts that reinforced its power by refusing to reverse decisions on appeal (Goldstein 1981: 90). Moreover, according to Goldstein (1981: 99), "the civil courts and the various social services agencies recommended [JCA's] services to those who in their view would best be served by [it]." It is unclear how the vague standard of "best served" was interpreted by the relevant authorities, but a case of assault that was referred to the JCA suggests that the persons' religious/ethnic identity, and not the substance of the case, was the key. In another case, one person slapped another during the annual concert of the Jewish Ministers and Cantors Association. The attacker was arrested by a policeman and brought to night court. The moment he realized the parties were Jewish, the court's magistrate referred them to the JCA without even hearing the details of the case (Buchler 1933: 79).

Claims submitted by low-status Jews were forced out of the American formal system and left to be handled by powerful members of the Jewish community. Public officials were aware of the stratified context within which JCA adjudications took place. For example, in a keynote speech he gave in 1954 to mark the 35th anniversary of the Jewish Conciliation Board of America (JCB;

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

successor to the JCA), Supreme Court Justice William Douglas spoke about "The Problems of the Little People" with which the JCB admirably contended. In 1959, the governor of New York State wrote a congratulatory telegram to the JCA stating, "The benevolent motive of the JCB's activities is manifested in the fact that, in more than forty years, it has settled thousands of disputes without charge or fee. In so doing, it has been a great help *to people who cannot afford the cost of litigation*" [emphasis mine] (Goldstein 1981: 98).

A similar constellation existed in the context of Chinatowns in the United States. In 1932, an article titled "Administration of Law among the Chinese in Chicago" was published in the *Journal of Criminal Law and Criminology*. The author, Chu Chai, was a student of Andrew A. Bruce, who served as a supreme court justice from 1911 to 1918 and joined the faculty of Northwestern University Law School in 1922. In his preface to Chai's article, Bruce explains that the study was conducted to fulfill the requirements of an administrative law course Chai took with him and was designed to be part of a larger research project. Bruce explains that he initiated the research out of interest in Chinese private ordering and adds, "I am actuated by no hostile spirit but *am inclined to believe that there is much good in that practice*" [emphasis mine] (Chai 1932: 806). In other words, Bruce's intention in publishing his student's paper was not to compound anti-Chinese sentiment, which was prevalent in the United States at the time. Instead, he felt that there could be an advantage in letting the Chinese administer law privately.

That Bruce's intention was to legitimate Chinese private ordering is also clear from the second paragraph of his exposition to the article, in which he reminds the reader that "in America today Boards of Trade and numerous other organizations have tribunals of arbitration and largely settle their own disputes without any resort to the civil courts" (ibid.). Moreover, "through many centuries the Hebrews have largely administered their own law and . . . even the early Christians for at least three hundred years after the time of Christ did the same thing"; Against this backdrop of "legitimate" private ordering, Bruce articulates his interest in Chinese private ordering: "The purpose of the study and of this introductory report is to obtain an intelligent estimate of the nature and extent and methods of the Chinese administration *and the extent to which it relieves the civil courts of the burden of litigation*" [emphasis mine] (ibid.). As a former supreme court justice and a scholar at a distinguished law school, Bruce was interested in learning more about Chinese private ordering in the United States in order to assess whether it was proper to allow it to continue, inasmuch as it relieved American courts of the "burden" of dealing with a population that was markedly different in language, culture, and norms.

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

Chai's critical approach to the administration of justice by Chinese associations in Chicago put an end to his research. In a footnote to an article published two years later—in the same journal, under the same title—by Remigio Ronquillo, a Philippine student of his, Bruce states that Chai's study "was stopped by the refusal of the Chinese leaders and representatives to allow any further and intensive study of the inner workings of the American Chinese ex-territorial government, either in Chicago or San Francisco" (Ronquillo 1934: 205). However, Bruce's interest in the subject remained undiminished. Ronquillo writes that his own study "has been suggested by Judge Andrew A. Bruce of Northwestern Law School whose interest in the foreign-born elements in the city of Chicago is one of self-consuming devotion," and that Bruce's motivation is the realization of his motto to live and let live (ibid. 206).

As noted by Merry (1979), the autonomy given to Boston's Chinatown in exchange for its vote did not benefit its weaker residents but rather served to reinforce internal hierarchies: "In most cases . . . the benefit of these contacts accrue to the merchants rather than to poor workers" (ibid.). The merchants' connection to the authorities infused their power with the clout of city hall. Likewise, the private order, which reinforced the ruling elites' control in Chinatown and blocked the rank and file's access to the justice system, was imbued with official power by a system that enjoyed the order produced by that hierarchy. Leigh-Wai Doo (1973: 650) contends that American courts "have been known to refer cases involving two Chinese litigants to the Benevolent Association due to the courts' difficulty in understanding the Chinese custom which gave rise to the dispute and to language difficulties." In addition, American courts conferred a quasi-official power on Chinatown's Benevolent Association by involving its members in court cases as collection agents, interpreters, and bondmen (ibid.).

To conclude, the examples presented in this section substantiate my argument regarding the role of state action in the production of private orders. In addition to investing private mechanisms with the power of the state, thereby magnifying their enforcement capabilities, state intervention guarantees that the "choice" of private forums for dispute resolution is the only real option for lower-ranked members of the group. Once group members realize that attempts to approach the public system will not only be rejected by it but also lead to internal sanctions, they soon cease viewing it as an option. A focus on the point in time when this precedent was established (i.e., when the problem in question was classified by the public order as private and the complainant was pushed to use extralegal dispute resolution) is therefore necessary to analyze the formation of private orders.

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

Conclusions

I have argued above that private orders are developed by hierarchical groups. Moreover, I have underscored the intentional proactive strategies employed by the state and its organs to create private orders. In disregarding the role of public orders, on the one hand, and the role of intragroup power relations, on the other, the private-ordering literature has unfortunately overlooked the aspect of domination that characterizes private orders, whereby the state creates or acknowledges power structures that block access to justice for weaker members of the group. It can be deduced that (1) there are no private orders (which were documented by the relevant literature), or (2) that the current definition of private orders ought to be amended. This article supports the latter conclusion.

In a similar vein, the fact that it has not been demonstrated that market communities engage in private ordering leads us to conclude that there is a need to reevaluate the feasibility and desirability of the privatization-of-law model. Privatization-of-law scholars and the private-ordering literature maintain that private orders are superior to the official legal system both normatively and practically. Normatively, they are portrayed as choice-based, voluntary, and consensual mechanisms for achieving social order that are better aligned with personal freedom and autonomy than the coercive official legal system is. They are also considered more efficient from a utilitarian perspective. The critical analysis of private orders in this article, however, points to the conclusion that the social context in which the choice of private forums is produced typically places private orders in conflict with freedom and autonomy. Likewise, it suggests that because of their social contexts, private orders offer no internal control mechanisms. My analysis exposes the built-in tension between readily available exit from groups and private ordering. In the absence of choice, there is no competition between private orders and other orders (be they state or private), and thus no incentive for private forums to offer their constituents efficient, just law that is suited to their needs. While I do not claim that a hierarchical social structure necessarily leads to stagnation and precludes the possibility of change, I would contend that such a structure impedes the competition that free exit enables, and this competition is essential to a market for law.

Under the current centralist paradigm, which underlies modern nation-states, there is a preference in principle for state monopoly over the administration of law. Thus, the burden of justification for deviating from this model in the form of private orders rests on those who advocate them. In this article, I have challenged the private-ordering literature's rationalization for such

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

a deviation. There are two possible theoretical implications arising from this challenge. First, there is a need to develop a new set of justifications for the superiority of private orders over the official system—one that will incorporate both the social structure that produces them and the impositions it places on freedom of choice and on the ability to exit. While it is certainly true that disempowered groups have limited access to justice within the official system as well, leaders of that system at least generally regard these limitations as a problem. Legal aid and public defenders are but two examples of the official system's attempts to rectify this failure. However, private orders actually seem to rely on such barriers to justice. Thus, the private-ordering literature must justify its superiority, given this challenge.

The second conclusion is that the private-ordering literature should focus on the distribution of rights among members of the groups engaged in private ordering, and on the social costs of these methods of achieving order. Multiculturalists have focused on the balance between accommodating group rights and the rights of individuals within those groups (Moller Okin 1999, 2002; Shachar 2000, 2001). The critique of private orders offered in this paper suggests that in order to maintain their normative appeal, both the privatization-of-law model and the private-ordering literature must invest intellectual effort in the same set of concerns—namely, the remedies that the private and public systems can provide to vulnerable group members in situations of private ordering.

Last, the second prong of the private-ordering theory presented in this article challenges the multiculturalist solution to the problem of intragroup oppression. Multiculturalists assume that the state is interested in having a monopoly over the administration of law. They therefore argue in favor of legal multiplicity and the accommodation of group rights; in other words, they try to convince the state to give up its monopoly in cases where it is normatively justified. On the basis of their initial assumption, they consider it self-evident that when the state is asked by vulnerable group members to protect them from intragroup oppression or violation of rights, it will be more than willing to reassert control. What multicultural theorists fail to consider, however, and what the second prong of my theory underscores, is that the state often has a vested interest in the group's private forms of ordering, and hence is unwilling to retake control when asked to do so by the vulnerable.

In other words, multiculturalists have been presupposing the state's reluctance to decentralize the administration of law, and consequently have been assuming that the state can be either kept at arm's length or asked to intervene, as the group members see fit.

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

By calling attention to the intentional, proactive ways in which the public order pushes groups into private ordering, this paper suggests that multiculturalists should rethink their solutions to intragroup violations of rights. For example, Shachar (2000: 410) suggests a balanced approach to solving this conundrum, whereby "powers and responsibilities relating to the individual are shared by the group and the state." However, her innovative solution is based on the assumption that the state is indeed interested in protecting individuals within the group and has not used multicultural terminology to cover for other motivations such as neglect. But as this paper has shown, the state may be reluctant to intervene in rights violations in certain cases, as borne out by the examples of Shasta County, the Chinatowns of four major cities, and the Jewish community in New York. Therefore, multiculturalist theory is still deficient in the solution it offers to in-group violations of rights, whether in the context of private ordering or in the context of group autonomy. As such, private-ordering proponents and multicultural theorists alike still need to achieve a workable balance between judicial autonomy and the rights of disempowered individuals.

References

Aviram, Amitai (2004) "A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems," 22 *Yale Law and Policy Rev.* 1–68.

Barzilai, Gad (2003) *Communities and Law: Politics and Cultures of Legal Identities*. Ann Arbor, MI: Univ. of Michigan Press.

——— (2004) "The Different Among Us: Law and Political Boundaries of Religious Fundamentalism," 27 *Tel Aviv Law J.* 1–39. (Hebrew).

Benson, Bruce L. (1990) *The Enterprise of Law: Justice Without the State*. San Francisco, CA: Pacific Research Institute for Public Policy.

Bernstein, Lisa (1996) "Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms," 144 *Univ. of Pennsylvania Law Rev.* 1765–1721.

——— (1992) "Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry," 21 *J. of Legal Studies* 115–157.

Bourdieu, Pierre (1977) *Outline of a Theory of Practice*. Trans. Richard Nice. Cambridge and New York: Cambridge Univ. Press.

Brewer, John D, et al. (1998) "Informal Social Control and Crime Management in Belfast," 49 *The British J. of Sociology* 570–585.

Buchler, Samuel (1933) *"Cohen Comes First" and Other Cases: Stories of Controversies before the New York Jewish Court of Arbitration*. New York: Vanguard Press.

Chai, Chu (1932) "Administration of Law among the Chinese in Chicago," 22 *J. of Criminal Law & Criminology* 806–818.

Clay, Karen (1997) "Trade without Law: Private-Order Institutions in Mexican California," 13 *J. of Law, Economics, and Organization* 202–231.

Cooter, Robert (1996) "Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant," 144 *Univ. of Pennsylvania Law Rev.* 1643–1696.

https://doi.org/10.1111/j.1540-5893.2011.00461.x Published online by Cambridge University Press

Cover, Robert M (1983) "The Supreme Court 1982 Term—Foreword: Nomos and Narrative," 97 *Harvard Law Rev.* 4–68.
Doo, Leigh-Wai (1973) "Dispute Settlement in Chinese-American Communities," 21 *American J. of Comparative Law* 627–663.
Ellickson, Robert C. (1991) *Order Without Law: How Neighbors Settle Disputes*. Cambridge: Harvard Univ. Press.
Even-Yosefson, Tamar, & Eliana Koren (2007) "Privatization Processes in Kibbutzim and Methods for Coping with Delinquency: Differences between Conservative and Liberal Kibbutzim," 25 *Mifgash* 11–33. (Hebrew).
Feldman, Eric A. (2006) "The Tuna Court: Law and Norms in the World's Premiere Fish Market," 94 *California Law Rev.* 313–369.
Fisher, Talia (2008) "Nomos without Narrative," 9 *Theoretical Inquiries in Law* 473–502.
Friedman, David D. (1973) *The Machinery of Freedom*. Chicago, IL: Open Court Publishing.
Friedman, Lawrence M. (1975) *The Legal System: A Social Science Perspective*. New York: Russell Sage Foundation.
Gluckman, Max (1955) *The Judicial Process among The Barotse of Northern Rhodesia*. Manchester: Manchester Univ. Press.
Goldstein, Israel (1981) *Jewish Justice and Conciliation: History of the Jewish Conciliation Board of America, 1930–1968 and a Review of Jewish Judicial Autonomy*. New York: Ktav Publishing House.
Greif, Avner (1989) "Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders," 49 *J. of Economic History* 857–882.
Hobbes, Thomas [1651] (1909) *Leviathan*. Reprint, Oxford: Clarendon Press.
Ibsen, Henrik [1882] (1999) *An Enemy of the People*. Mineola, NY: Dover Publications.
Malkki, Liisa (1995) "Refugees and Exile: From 'Refugee Studies' to the National Order of Things," 24 *Annual Rev. of Anthropology* 495–523.
Mandel, Roy (2008) "Twenty Years Since the Shomrat Case: The Conspiracy of Silence is Ongoing," *Yedioth Ahronoth*, online, 9 Sept., http://www.ynet.co.il/articles/0,7340,L-3592503,00.html (accessed 29 Jun. 2010).
McMillan, John, & Christopher Woodruff (2000) "Private Order Under Dysfunctional Public Order," 98 *Michigan Law Rev.* 2421–2458.
Merry, Sally E. (1979) "Going to Court: Strategies of Dispute Management in an American Urban Neighborhood," 13 *Law and Society Rev.* 891–925.
——— (1988) "Legal Pluralism," 22 *Law and Society Rev.* 869–897.
Milhaupt, Curtis J., & Mark D. West (2000) "The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime," 67 *Univ. of Chicago Law Rev.* 41–98.
Moller Okin, Susan (1999) "Is Multiculturalism Bad for Women?" Cohen, J., M. Howard, & M.C. Nussbaum, eds., *Is Multiculturalism Bad for Women?* Princeton, NJ: Princeton Univ. Press.
——— (2002) "'Mistresses of Their Own Destiny': Group Rights, Gender, and Realistic Rights of Exit," 112 *Ethics* 205–230.
Osterfeld, David (1983) *Freedom, Society and the State: An Investigation into the Possibility of Society without Government*. Lanham, MD: Univ. Press of America.
Peteet, Juliet (1987) "Socio-Political Integration and Conflict Resolution in the Palestinian Camps in Lebanon," 16 *J. of Palestinian Studies* 29–44.
Porat, Ariel (2000) "Enforcing Contracts in Dysfunctional Legal Systems: The Close Relationship Between Public and Private Orders: A Reply to McMillan and Woodruff," 98 *Michigan Law Rev.* 2459–2480.
Richman, Barak D. (2002) "Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York," Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series.
——— (2004) "Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering," 104 *Columbia Law Rev.* 2328–2368.

——— (2005) "How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York," Presented at the annual meeting of the American Law & Economics Association, New York.
——— (2006) "How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York," 31 *Law and Social Inquiry* 383–420.
Ronquillo, Remigio B. (1934) "The Administration of Law among the Chinese in Chicago," 25 *J. of Criminal Law and Criminology* 205–224.
Rosenfeld, Eva (1951) "Social Stratification in a 'Classless' Society," 16 *American Sociological Rev.* 766–774.
Rothbard, Murray N. (1977) *Power and Market: Government and the Economy*. Kansas City, KS: Sheed Andrews and McMeel Inc.
Sagy, Tehila (2009) "Outside the Pale of Law: The Processing of Violent Disputes in the Buduburam Refugee Camp in Ghana," Ph.D. diss., Stanford Law School.
Schwartz, Richard D. (1954) "Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements," 63 *The Yale Law J.* 471–491.
Shachar, Ayelet (2000) "The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority," 35 *Harvard Civil Rights-Civil Liberties Law Rev.* 385–416.
——— (2001) *Multicultural Jurisdictions: Cultural Differences and Women's Rights*. New York: Cambridge Univ. Press.
Shapiro, Allan E. (1976) "Law in the Kibbutz: a Reappraisal," 10 *Law & Society Rev.* 415–438.
Starr, June, & Jane F. Collier, eds. (1989) *History and Power in the Study of Law: New Directions in Legal Anthropology*. Ithaca, NY: Cornell Univ. Press.
Stringham, Edward P. (2007) "Introduction," in Stringham, E.P, ed., *Anarchy and the Law: The Political Economy of Choice*. Oakland, CA: The Independent Institutute.
Taylor, Michael (1976) *Anarchy and Cooperation*. New York: John Wiley & Sons.
Triandis, Harry C. (1995) *Individualism and Collectivism: New Directions in Social Psychology*. Colorado: Westview Press.
West, Mark D (2000) "Private Ordering at the World's First Futures Exchange," 98 *Michigan Law Rev.* 2574–2615.
Yadlin, Omri (2000) "A Public Choice Approach to Private Ordering: Rent-Seeking at the World's First Futures Exchange," 98 *Michigan Law Rev.* 2620–2635.
Yngvesson, Barbara (1985) "Re-Examining Continuing Relations and the Law," 3 *Wisconsin Law Rev.* 623–646.
——— (1993a) "Beastly Neighbors: Continuing Relations in Cattle Country," 102 *The Yale Law J.* 1787–1801.
——— (1993b) *Virtuous Citizens, Disruptive Subjects: Order and Complaint in a New England Court*. London: Routledge.

Tehila Sagy *is a Lecturer in Socio-Legal Studies at the University of Leicester School of Law (United Kingdom). She received her JSD from Stanford University Law School. Her research interests are in the fields of legal anthropology, private ordering, privatization of law, human rights, multiculturalism, policing, and international organizations. She is currently working on a book project based on her ethnographic field research at the Buduburam refugee camp in Ghana between 2005–2007.*