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2000

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Recommended Citation

Katz, Ellen D. "Private Order and Public Institutions." Mich. L. Rev. 98, no. 8 (2000): 2481-93.

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PRIVATE ORDER AND PUBLIC INSTITUTIONS

Comments on McMillan and Woodruff's 'Private Order Under Dysfunctional Public Order'

*Ellen D. Katz**

In *Private Order Under Dysfunctional Public Order*,[1] John McMillan and Christopher Woodruff describe the private institutions that order commercial transactions in developing economies where commercial actors view the formal legal regime as unreliable. Presenting evidence from surveys of market participants in several Eastern European countries and in Vietnam, McMillan and Woodruff depict a system of private order that requires formal organization and the creation of institutions to share information and coordinate multiparty responses. These institutions do not simply offer a viable alternative to public procedures, but also enable commercial transactions to occur where the vacuum in public order would otherwise preclude valuable trades. In conclusion, however, the authors allude to the reliance of some private-order institutions on practices of exclusion, collusion, and physical violence that yield economic inefficiencies. This "downside" to private order, they assert, means that while private order in developing economies "can usefully supplement public law, [it] cannot replace it."[2]

This assertion is correct but incomplete. McMillan and Woodruff rightly note that private order is not a substitute for public governance, and that public-order institutions are needed to facilitate internalization of the negative externalities that private order produces. But public order serves a much broader and deeper function. Democratic public-order institutions, when accompanied by public-order norms of transparency and accountability, offer processes and policies of greater legitimacy and fairness than can private-order institutions. While the goal of the public realm ought not be to supplant private-

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1. John McMillan & Christopher Woodruff, *Private Order Under Dysfunctional Public Order*, 98 MICH. L. REV. 2421 (2000).

2. *Id.* at 2423.

order decisionmaking, the inclusiveness of democratic decisionmaking ultimately means that public order should be seen as the preferable form of governance, even if public order does nothing more than ratify the existing private-order system.

These comments will discuss the difficulty in structuring public institutions in a developing economy where a vibrant, though perhaps problematic, system of private order operates, and will address the role of public order more generally as a source of legitimacy for governance of any kind.

I. THE DOWNSIDE OF PRIVATE ORDER

A substantial literature celebrates the benefits of private order.[3] Private order often provides greater efficiency and involves lower transaction costs than do public-order regimes. Many believe it achieves better results; that is, participants in the private-order regime view outcomes arising thereunder as preferable to those that might be produced by public-order mechanisms. Private-order institutions are often well-situated to monitor market conduct, and their decisionmakers remain close to and thus well-informed about industry practice. Private-order adjudicatory practices accordingly may produce more nuanced decisions than do public-order ones, particularly given the former's broader freedom to consider evidence that would generally be inadmissible in traditional law courts.[4]

The very features of private order that have prompted so much celebration may also explain the problematic facets of private order that scholars have increasingly identified.[5] Private-order institutions

3. *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 280-83 (1991); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) [hereinafter Bernstein, *Merchant Law*]; Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) [hereinafter Bernstein, *Opting Out*]; Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Value Creation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. (forthcoming June 2001) [hereinafter Bernstein, *Private Commercial Law*]; David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373 (1990); Stephen Choi, *Market Lessons for Gatekeepers*, 92 NW. U. L. REV. 916, 920-21 (1998); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1320-21 (1993); Ronald J. Mann, *Verification Instruments in Financing Transactions*, 87 GEO. L.J. 2225, 2227-28 (1999).

4. *See* Bernstein, *Opting Out*, *supra* note 3, at 126-27; Charny, *supra* note 3, at 415-16; McMillan & Woodruff, *supra* note 1, at 2425.

5. *See, e.g.*, Serguey Braguinsky, *Enforcement of Property Rights During the Russian Transition: Problems and Some Approaches to a New Liberal Solution*, 28 J. LEGAL STUD. 515, 519-20 (1999); Kathryn Hendley et al., *Observations on the Use of Law by Russian Enterprises*, 13 POST-SOVIET AFF. 19, 39 (1997); Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41, 43-44, 92-95 (2000); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1711-25 (1996); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 961 (1996).

may rely on exclusionary entry barriers, which may be grounded on race, gender, ethnicity, or other characteristics; coordination among firms, which may yield collusive anticompetitive practices such as price-fixing; and graduated forms of coordinated sanctions, which may include physical violence and other forms of criminal activity.[6]

Some of these so-called "downside" practices are evident, perhaps unsurprisingly, in the celebrated strategies used by various communities to prevent overuse of commonly held resources. Numerous studies challenge the notion that the tragedy of the commons is inevitable by identifying mechanisms through which communal resources can be managed in a sustainable manner.[7] Most notably, a successful commons generally does not provide open access, and thus is not really a commons at all, for sustainable management typically requires some mechanism to limit access to prevent overexploitation of the so-called communal resource.[8] Whether entry depends on membership in a social or ethnic group, or on other considerations, participation becomes notably and necessarily exclusive rather than inclusive. While norms of exclusion may yield benefits for the community and even for the environment,[9] their particular instantiation may rest on irrational or otherwise objectionable discriminatory factors.

Communities managing a shared resource may also rely on an escalating series of sanctions to penalize participants and outsiders who breach management norms.[10] Penalties progress from gossip to vandalism to other forms of violence, raising concerns regarding accountability and public order generally, and calling into question the purported efficiency of private-order norms governing punishment.

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6. *See, e.g.*, JAMES M. ACHESON, THE LOBSTER GANGS OF MAINE (1988); Braguinsky, *supra* note 5, at 519-22; Cheryl W. Gray, *Reforming Legal Systems in Developing and Transition Countries*, FIN. & DEV., Sept. 1997, at 14; Hendley et al., *supra* note 5, at 19; McMillan & Woodruff, *supra* note 1, at 2456; Milhaupt & West, *supra* note 5, at 51-62.

7. *See, e.g.*, ELINOR OSTROM, GOVERNING THE COMMONS (1990), *and* THE QUESTION OF THE COMMONS (Bonnie J. McCoy & James M. Acheson eds., 1987) (collecting such studies). *See also* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (arguing that resources in an unregulated open access commons will be depleted). *But see* Harold Demsetz, *Toward a Theory of Property Rights*, 37 AM. ECON. REV. 347, 354-57 (1967) (arguing that private property will replace communal management of resources).

8. *See* ACHESON, *supra* note 6, at 48-49 (discussing practices of lobster fishermen in Maine); RUSSELL HARDIN, ONE FOR ALL 72-106 (1995) (discussing the role of norms of exclusion in defining group membership); OSTROM, *supra* note 7, at 58-102 (evaluating common-pool resource management in divergent communities worldwide); THE QUESTION OF THE COMMONS, *supra* note 7 (providing evaluative examples of common-pool resource management in divergent communities worldwide); Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. (forthcoming 2000) (discussing entry issues).

9. *But see* ACHESON, *supra* note 6, at 143-44 (noting depletion in resource despite enforcement of entry barriers); Robert Ellickson, *A Hypothesis of Wealth Maximizing Norms: Evidence from the Whaling Industry*, 5 J. LAW, ECON. & ORG. 83, 95-96 (1989).

10. *See, e.g.*, ACHESON, *supra* note 6, at 73-76; ELLICKSON, *supra* note 3, at 215-19; OSTROM, *supra* note 7, at 15-19; *see also* WILLIAM IAN MILLER, BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND 77-109, 179-220 (1990).

Poorly structured public-order institutions may explain why less than optimal private-order practices evolve.[11] As Curtis Milhaupt and Mark West note, governmental failure "to get the [public] institutions 'right' " not only increases the costs for private actors seeking to utilize state procedures, but also contributes to what they term "dark-side public ordering."[12] Poorly structured legal institutions provide fertile ground for thriving criminal organizations that promise to provide and protect property rights more effectively than does the state. Just as an existing system of private order can dampen the incentive of public officials to create and nurture valuable legal institutions, badly designed legal institutions can inhibit vibrant private order and cause it to produce negative externalities.[13]

Milhaupt and West, for example, demonstrate the link between various modes of organized criminal conduct in Japan and specific deficiencies in Japanese public-order institutions. They point to the significant holdout problems resulting from the virtual life estate Japanese law grants tenants, under which eviction becomes virtually impossible in practice. This has given rise to the *jiageya*, or "land fixers," a class of private individuals employed by real estate developers and tenants alike to make threatening telephone calls, to organize disruptive activities, and otherwise to use physical violence to prompt evictions and resolve disputes.[14]

Where public-order institutions are inadequate or even wholly absent, participants in unregulated private-order institutions may find that refraining from downside practices simply constitutes bad business. Absent a state-imposed penalty or other type of sanction, fixing prices or limiting participation to a restricted group may well present

11. *See* Hendley et al., *supra* note 5, at 39; Milhaupt & West, *supra* note 5, at 45, 92-95; *see also* DIEGO GAMBETTA, THE SICILIAN MAFIA: THE BUSINESS OF PRIVATE PROTECTION (1993); DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 101-103 (1990) (comparing consequences of differing institutional heritages in North and Latin America); Bernard Black et al., *Corporate Law from Scratch*, *in* 2 CORPORATE GOVERNANCE IN CENTRAL EUROPE AND RUSSIA 245, 255 (Roman Frydman et al. eds., 1996) (explaining that, in the face of weak state enforcement, Russian enterprise managers must lie on their tax reports, bribe state officials, pay off the mafia, and engage in other corrupt practices simply to stay in business); Keith S. Rosenn, *Brazil's Legal Culture: The Jeito Revisited*, 1 FLA. J. INT'L L. 1, 22-23 (1984) (describing the poor fit between Brazilian culture and governing law).

12. Milhaupt & West, *supra* note 5, at 45; *see also* JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED (1998) (describing failures of state planning).

13. Milhaupt & West, *supra* note 5, at 43-44; *see also* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 623-25 (1998); Mann, *supra* note 3, at 2228-29, 2272. Inadequate or otherwise problematic public policies need not, of course, promote private order's "dark side," and instead may simply prompt effective private-order institutions to develop. *See, e.g.*, Bernstein, *Merchant Law*, *supra* note 3, at 1770-71.

14. *See* Milhaupt & West, *supra* note 5, at 68-69.

the most rational and efficient course of action, at least from the perspective of institutional members. This is not, of course, to say that all problematic facets of private order stem from purely rational behavior. Less than optimal private-order norms may result from information lags, changing technologies, moral considerations, cognitive biases, and even envy.[15] But whether rational or not, private downside practices persist where neither the private institutions nor their members bear the immediate costs of the practices employed, and, even if long-term efficiency suffers, the individual benefits reaped outweigh (again from the individual's or individual institution's perspective) any aggregate loss in overall welfare. Consequently, private-order institutions will continue to engage in these practices absent a mechanism, be it public or private, to force internalization of the negative externalities produced.[16]

II. FIXING AND FACILITATING PRIVATE ORDER

Private order's downside leads McMillan and Woodruff rightly to conclude that "[w]e thus need public order to limit these abuses of private order."[17] How best to structure public-order institutions to accomplish this purpose is hardly self-evident, but three rudimentary principles should guide the effort.

A. *Developing vs. Developed Economies*

Private-order institutions exist in both developing and highly developed economies.[18] In one sense, private order responds to a similar problem in both societies, namely a dissatisfaction with the existing public order as a mechanism to govern private relationships and to resolve disputes. Whether that dissatisfaction arises from a vacuum in the public realm, or from disagreement with or distaste for the substantive content of public law and the procedures that implement it, it finds expression in the creation of a system of private rules thought better to serve the interests of those adhering to them than do those in the public arena.

15. *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (discussing cognitive biases); Posner, *supra* note 5, at 1712-23; *cf.* MILLER, *supra* note 10, at 29-32; Carol Rose, *Property As Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37 (1990) (challenging rational-actor model).

16. *See, e.g.*, Black, *supra* note 11, at 247; Braguinsky, *supra* note 5, at 517; Posner, *supra* note 5, at 1711-25.

17. McMillan & Woodruff, *supra* note 1, at 2458.

18. *See, e.g.*, Bernstein, *Private Commercial Law*, *supra* note 3; McMillan & Woodruff, *supra* note 1, at 2432, 2438.

But while the origins may be similar, at least when broadly defined, the systems of private order in developing and developed economies may require wholly distinct responses from the public sectors. Seemingly successful public norms and programs from industrial or developed economies may be ill-adapted to the complex issues confronting less developed ones.[19] For example, a developing economy may be characterized by a lack of experience with and commitment to competitive markets, the prevalence of bribery and acceptance of bribery as a means of doing business and transacting with public officials, and a history of opaque decisionmaking and adjudicatory processes.[20]

In such a climate, a public prohibition on price-fixing with an accompanying private right of action in court might have little impact on anticompetitive private-order practices. Those injured by private-order collusion justifiably may lack confidence in public-order institutions to provide redress given that opaque decisionmaking and corruption have previously been the dominant characteristics of public dispute resolution.[21] Public institutions, moreover, may lack personnel with sufficient experience with competitive markets to implement a ban on price-fixing or more open-ended public norms. Indeed, inexperienced or ill-trained public officials can make matters worse.[22] And the absence of necessary supportive institutions, the class Milhaupt and West call "rights enforcement agents," can further hinder enforcement of public norms; accountants, appraisers, credit rating services, the private bar, and the press reduce uncertainty by bridging reputational and informational gaps among parties to commercial

19. *See* NORTH, *supra* note 11, at 101 (describing failed adoption of U.S. and European law in Latin America); SCOTT, *supra* note 12 (noting problematic transfer of agricultural programs developed in western nations to less temperate regions, particularly in Africa); Black et al., *supra* note 11, at 245; Bernard Black et al., *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. (forthcoming 2000); Gray, *supra* note 6, at 15; Rosenn, *supra* note 11, at 22-23 (laws transplanted in Brazil not tailored to Brazilian culture, producing gap between law and practice).

20. *See, e.g.*, NORTH, *supra* note 11, at 67; Black et al., *supra* note 11, at 247; Black et al., *supra* note 19; Braguinsky, *supra* note 5, at 519-20; Gray, *supra* note 6, at 14; Hendley et al., *supra* note 5, at 22; *see also* Donatella della Porta & Alberto Vannucci, *The 'Perverse Effects' of Political Corruption*, 45 POL. STUD. 516, 537 (1997).

21. *See, e.g.*, Black et al., *supra* note 11, at 246; Ambassador James Jones, *Remarks Before the International Gathering of Experts on the Role of Legal Institutions in the Economic Development of the Americas (Oct. 15-16, 1998)*, *in* 30 L. & POL'Y INT'L BUS. 33, 35 (Supp. 1999) (discussing preference among lawyers and investors in Latin America for ADR and other forms of private decisionmaking over public law processes); Frank C. Shaw, *Reconciling Two Legal Cultures in Privatizations and Large-Scale Capital Projects in Latin America*, 30 L. & POL'Y INT'L BUS. 147, 156 (Supp. 1999) (same).

22. *See* Black et al., *supra* note 11, at 254; Jeffrey Davidow, *Remarks Before the International Gathering of Experts on the Role of Legal Institutions in the Economic Development of the Americas (Oct. 15-16)*, *in* 30 L. & POL'Y INT'L BUS. 15, 16 (Supp. 1999).

transactions and thereby facilitate enforcement of the public norms governing those exchanges.[23]

These factors necessarily circumscribe the mechanisms available to public policymakers seeking both to remedy downside facets of private order and to facilitate implementation of its beneficial components. Accordingly, the design of public institutions in developing economies should be seen as a distinct project from the design (or redesign) of such institutions in developed ones. Blind mimicry of public-law structures utilized in highly developed economies will not only replicate the problematic features of those systems, but at best will ignore and more likely exacerbate the unique mix of problems confronting developing ones. Developing economies should not be seen simply as developed ones at an earlier stage of evolution.

B. *The Need for Public-Order Norm Creation*

The existence of well-developed, operational private norms might suggest that the goal of public institutions in a developing economy should be restricted to facilitating implementation of private-order norms. Limited resources, it might be argued, ought not be wasted on an attempt to replicate what already exists, particularly given the extensive literature praising the ability of private-order institutions to develop norms that are often more efficient than those produced by the public sector.[24] Better to concentrate on mechanisms to aid the smooth and efficient functioning of the private-order system.

Notwithstanding the facial allure of such a strategy, public-order institutions in a developing economy should seek not only to facilitate enforcement of sound and effective private norms, but also to promulgate substantive public norms governing primary conduct. Private order's downside is not limited to problems of enforcement. The externalities produced by anticompetitive or discriminatory practices cannot be remedied by a public-order institution restricted to the efficient and unreflective enforcement of private-order norms. Where an unregulated private sector is characterized by such practices, the public realm should promulgate corrective public norms, although not necessarily strictly coercive ones,[25] to force private-order institutions

23. *See* Milhaupt & West, *supra* note 5, at 58; *see also* Ronald V. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 255 (describing "transaction cost engineers"); Gray, *supra* note 6, at 16 (referring to "watchdog institutions"); Mann, *supra* note 3, at 2267-68 (describing role of "information merchants").

24. *See, e.g.*, ELLICKSON, *supra* note 3, at 281-82; Bernstein, *Merchant Law*, *supra* note 3, at 1803-04; Bernstein, *Opting Out*, *supra* note 3, at 157; Bernstein, *Private Commercial Law*, *supra* note 3; Richard A. Epstein, International News Service v. Associated Press: *Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 88-89 (1992).

25. *See infra* Section II.C.

to internalize the externalities they produce, and to act in ways that are efficient not only in the short run.[26]

And even where private-order norms appear productive and efficient in light of current market conditions, public-order institutions can help curb the potential for private-order inefficiencies in the future. Just as private-order systems may arise because of dissatisfaction with the content of substantive public-order norms,[27] the continued development of considered public-order rules can function to keep a private-order regime from becoming sluggish. While private norms often may be more efficient, and indeed preferable to public-order rules, various factors may cause private norms to lag behind technological and other changes and thereby regulate private behavior less than optimally.[28] The promulgation of public-order norms thereby should foster an ongoing dialogue between private- and public-order institutions about the optimal content of substantive norms.

Finally, in specified contexts, public intervention may be appropriate notwithstanding the fact that private-order practices may reflect rational considerations and yield policies deemed efficient from both short- and long-term perspectives. In other words, even where private order may be efficient and flexibly so, it may run counter to fundamental principles that a society, upon proper reflection, decides should not be subject to the calculus of efficiency.

C. *Implementation Measures*

Public-order institutions should foster implementation of both well-functioning private norms and the public-order rules that displace problematic private ones.

First, while some private-order institutions reject wholesale any interaction with public-order institutions,[29] carefully targeted action by public-order institutions can facilitate implementation of robust and efficient private norms. Elinor Ostrom has explained, for example, how California provided public institutional facilities needed to implement a program devised by private parties and local governments to manage underground water storage basins in the Los Angeles met-

26. *See, e.g.*, Posner, *supra* note 5, at 1729-30.

27. *See, e.g.*, ELLICKSON, *supra* note 3, at 282-83; Bernstein, *Merchant Law*, *supra* note 3, at 1770-71; Bernstein, *Private Commercial Law*, *supra* note 3.

28. *See* PAUL ALEXANDER, SRI LANKAN FISHERMEN: RURAL CAPITALISM AND PEASANT SOCIETY 261-62 (1982); Posner, *supra* note 5, at 1713 (arguing information lag may contribute to greater efficiency of public-order norms).

29. *See, e.g.*, Bernstein, *Merchant Law*, *supra* note 3, at 1770 (arguing private transactors may employ state procedures in end-game situations while preferring extra-legal norms in cooperative relationships they seek to preserve); Bernstein, *Opting Out*, *supra* note 3, at 115; Bernstein, *Private Commercial Law*, *supra* note 3.

ropolitan area.[30] The state codified the local arrangement as state law; it opened its courts, subsidized the cost of litigation, and conferred standing on participants in the program to ease speedy resolution of disputes; and it provided important technical assistance to assess the stability and capacity of the underground basins. While the underlying arrangement was not a purely private one, Ostrom's observations regarding the state's role in facilitating sustainable management of this common pool resource indicate more broadly that the public realm can provide important institutional facilities to enforce and otherwise support promising norms produced by private order.

The reliance of certain private-order institutions on externality-producing enforcement mechanisms further supports the need for effective public implementation of some private-order norms. Private actors may rely on vandalism or other forms of physical violence precisely because the underlying private-order arrangement conflicts with an established public norm, as, for example, when the underlying arrangement is a loansharking contract. In this context, the public realm must either accept the violence or commit the resources necessary to curtail the underlying substantive private norm; simply providing an alternative mechanism to enforce the private norm will not suffice. Elsewhere, however, private-order norms may fully comport with public-order principles; the private norms designed to restrain overuse of a communal resource often provide such an example. Here the problem is not the underlying private norm, but the reliance of private-order institutions on unaccountable forms of self-help, including vandalism and other acts of physical violence, to enforce the norm.[31] And while private order's ability to employ such measures may explain the efficacy of some private-order systems, public institutions, at least in theory, can offer an alternative remedy.[32]

Second, where public-order institutions seek not to implement or improve the implementation of private norms, but instead to modify or supplant a substantive private-order norm that thwarts public concerns for efficiency and fairness,[33] they should be wary of employing purely coercive measures. Such measures can, at times, advance public policy aims,[34] but they often impose sizeable costs, both to the pub-

30. *See* OSTROM, *supra* note 7, at 133.

31. *See, e.g.*, ACHESON, *supra* note 6, at 73-76; ELLICKSON, *supra* note 3, at 215-19; OSTROM, *supra* note 7, at 15-19; *see also* MILLER, *supra* note 10, at 77-109.

32. In this regard, the public realm's role mirrors that played by some private entities when public-order norms emerge without accompanying complementary enforcement mechanisms. *See* Milhaupt & West, *supra* note 5, at 58-60 (describing public-order enforcement gap).

33. Identification of such norms is not necessarily an easy task. *See* Posner, *supra* note 5, at 1726-27.

34. *See, e.g.*, Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 107 (1998).

lic sector and to the private-order entities subject to them, and they are likely to engender counterproductive resistance by the regulated community.[35] Public institutions themselves may lack the ability and resources to enforce them fairly and effectively.[36]

A more promising strategy may be to encourage private-order implementation of the public norm.[37] Various mechanisms exist to accomplish this, including technology-forcing laws that instruct designated private industries to internalize the externalities they produce;[38] market-based incentive structures;[39] and rules that encourage private self-regulation.[40] To varying degrees, a credible threat of wholly public enforcement mechanisms must generally lie behind these approaches.[41]

Finally, when public procedures are employed to implement public norms, those procedures must be tailored to accommodate the power and resources of the public institutions that will oversee them. In developing economies marked by the difficulties discussed earlier, this

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35. *See, e.g.*, PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994); Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985); Richard B. Stewart, *Economics, Environment, and the Limits of Legal Control*, 9 HARV. ENVT'L L. REV. 1 (1985).

36. *See, e.g.*, Braguinsky, *supra* note 5, at 517; Gray, *supra* note 6, at 14.

37. *See* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1008-14 (1995); Posner, *supra* note 5, at 1729-32; Sunstein, *supra* note 5, at 923.

38. *See, e.g.*, Christina S. Chen, *Persistent Organic Pollutants: Regime Formation and Norm Selection*, 13 CONN. J. INT'L L. 119, 126-31 (1998) (discussing examples such as tradable emission rights, eco-labels, emissions taxes, aggregate national caps, and benchmark standards); Richard W. Parker, *Choosing Norms to Promote Compliance and Effectiveness: The Case for International Environmental Benchmark Standards*, *in* INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 145, 148 (Studies in Transnational Legal Policy No. 29, 1997); *see also* Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 518-19 (1999) (discussing the V-chip and congressional technology-forcing responses to digital telephones and digital audio technology); Richard E. Wiley, *Developments in Communications Law: Competition, Consolidation, and Convergence*, *in* 17TH ANNUAL INSTITUTE ON TELECOMMUNICATIONS: POLICY & REGULATION 155, 214 (PLI Intellectual Property Course Handbook Series No. G-584, 1999) (discussing V-chip).

39. See Richard B. Stewart, *United States Environmental Regulation: A Failing Paradigm*, 15 J.L. & COM. 585, 591-95 (1996).

40. For example, the relatively new Russian corporate law seeks to increase opportunities for significant minority shareholders to protect their interests against self-dealing company insiders, notwithstanding weak procedures for public judicial oversight. The law increases the number of decisions that require shareholder approval, authorizes supermajority voting requirements, and restricts certain decisions to disinterested directors. *See* Black et al., *supra* note 11, at 248-51.

41. Effective implementation of public norms also requires the participation of the "rights-enforcement agents" that Milhaupt and West describe. Lawyers, accountants, investment bankers, credit rating agencies, and even the press acquire and share information and monitor behavior by both private and public actors. In developing economies where too few of these agents operate, public-order institutions should facilitate growth of this class through financial incentives, job training, and the removal of state-imposed or otherwise artificial barriers to entry. *See* Milhaupt & West, *supra* note 5, at 58-60; *see also* Gray, *supra* note 6, at 16.

means that the public realm may be required to adopt procedures that sacrifice flexibility for clarity and that limit the discretion exercised by public decisionmakers.[42] Even the rigidity and formality of the English writ system might provide a model approach. Notwithstanding the extensive criticism lodged against it, the writ system offered a fixed process and standardized remedies that largely removed discretionary power from the primary decisionmaker's role.[43] To be sure, rules that sacrifice flexibility for clarity may fail to do justice in an individual case. But a developing economy may well find that such a cost must be incurred until the systematic deficiencies that mark emerging public institutions are mitigated or ideally eliminated. At that time, more nuanced, albeit less clear rules, the ones Carol Rose terms "muddy," can emerge.[44]

III. THE LEGITIMACY OF PUBLIC ORDER

Private order is not, as McMillan and Woodruff appropriately conclude, a substitute for public order. The public realm performs, or at least should perform, an important function in both developing and developed economies by correcting problematic features of otherwise well-functioning private-order systems, and by facilitating the smooth implementation of effective private-order norms. It is not, however, solely these functions that warrant state involvement when a system of private order operates. The process of democratic deliberation, with its accompanying norms of transparency, predictability, and accountability, offers the promise of more reflective and inclusive governance than can even the most efficient private-order institution.

Private-order systems are, by definition, private, and accordingly do not and need not embody "the legal norms and political consensus on which state order is based."[45] Indeed, it is their freedom from these constraints that yields much of private order's effectiveness and productivity. Private-order institutions may choose to hear from nonmembers prior to adopting a policy or practice, but they need not do so. Likewise, private-order decisionmakers can, but need not, employ the rules that govern in public judicial proceedings; indeed, their abil-

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42. *See, e.g.*, James Spinner, *Remarks Before the International Gathering of Experts on the Role of Legal Institutions in the Economic Development of the Americas (Oct. 15-16, 1998)*, *in* 30 LAW & POL'Y INT'L BUS. 47, 49 (Supp. 1999).

43. *See, e.g.*, F. MAITLAND, EQUITY AND THE FORMS OF ACTION 295-375 (A.H. Chaytor & W.J. Whittaker eds., 1909); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 271-84 (5th ed. Little, Brown & Co., 1956) (1929); MARTIN SHAPIRO, COURTS 80-82 (1981).

44. Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 582-83 (1988). *See also* Black et al., *supra* note 11, at 251 (expressing preference for bright-line rules where emerging public institutions are weak).

45. Milhaupt & West, *supra* note 5, at 92.

ity to consult evidence that would be inadmissible in public-adjudicatory processes arguably enables them to produce more tailored decisions than can public institutions.[46] Participants in private-order institutions benefit in both the short and long term from these techniques.

Democratic public-order decisionmaking, by contrast, requires compliance with established procedural norms, including public processes in which all affected individuals and groups are or at least should be able to participate.[47] The resulting process may well be unwieldy and the ultimate policy choice may itself yield inefficiencies. But these sacrifices find justification in the value produced by public participation itself. That participation both confers public legitimacy on the substantive decisions reached, regardless of their content, and fosters public acceptance of, if not agreement with, policy choices that are implemented. As important, the act of participation itself, wholly independent of the outcome produced, holds value as a mechanism to create and develop identity and community. As Frank Michelman has explained: "Through political engagement, persons or communities (or both, reciprocally) forge identities, and persons assume freedom in the 'positive' sense of social and moral agency. The value of the engagement is thus understood as inseparable from the self-constitutive value of identity and freedom."[48]

The particular substantive policies that result from public participation in their creation provide a further basis to prefer public-order decisionmaking to private. Unlike private-order norms, public rules produced through the process of democratic deliberation should embody a conception of the common public good, as opposed to purely private preference.[49] To be sure, public decisions often fall short of this aspiration, and a sizeable literature suggests that they will invariably fall short.[50] But even if the public-regarding character of public

46. *See* McMillan & Woodruff, *supra* note 1, at 2425; *see also* Bernstein, *Opting Out*, *supra* note 3, at 126-27; Charny, *supra* note 3, at 415.

47. *Cf.* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 286-89 (1962) (describing influence of special interest groups on public decisionmakers); Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 723-26 (1985) (describing the advantages "discrete and insular" groups have in forming well-organized lobbies).

48. Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 451 (1989).

49. *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1691 (1984); *see also* GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 58 (1972); Michelman, *supra* note 48, at 445.

50. *See, e.g.*, KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963); ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY 31-54 (1982); WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM (1982); Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561, 571-81, 572 n.13 (1977). *But see* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990).

policy is more aspirational than descriptive, that aspiration and a commitment to strive toward achieving it distinguish the public from the private realm and provide a basis to prefer the former over the latter. Private order is private preference, with no pretense that it defines or pursues a common good. And while those truly pessimistic about public order's ability to avoid capture and factional control might prefer private order for the transparency of its goals, a system that offers the promise and at times the reality of transcending individual self-interest in order to define and promote a common public good ought to be the object of our aspirations. Here, we should reject the notion that the best is the enemy of the good, and instead strive for the first-best solution, because it can be the only source of public legitimacy in a democratic society. In other words, the democratic political process should not be understood "as simply another sort of market."[51]

This does not mean that public-order institutions should aim to supplant the system of private order in whole or even in part. The scholarship on private order has demonstrated how, in many circumstances, private norms yield benefits that the public realm cannot effectively produce.[52] Democratic public-order institutions are nevertheless needed to confer public legitimacy on well-functioning private-order norms. Particularly in developing economies where a vacuum in public order spurs the creation of private-order norms to structure transactions, public institutions should be developed to assess those norms, even if the process of democratic deliberation yields nothing more than acquiescence to or ratification of the extant system of private order. Such deliberation certifies the fairness and public acceptance of the private system and thereby confers public legitimacy that the private-order system would otherwise lack in a democratic society.[53]

Democratic public institutions thus are critical, and in this sense foundational, even where private order appears to function smoothly and efficiently. Their role is limited neither to repairing cracks in private order nor to fillings gaps in that regulatory system. Instead, an inclusive, transparent, and democratic public sphere ultimately provides the authoritative forum for deliberation about norms of governance. It provides the starting and ending point for public legitimacy, and thus the foundation of legitimacy for private order as well.

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51. Sunstein, *supra* note 49, at 1693.

52. *See supra* notes 3 and 4 and accompanying text.

53. *Cf.* Sunstein, *supra* note 5, at 958-59, 964.