

Nomos Without Narrative

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The three central themes underlying this issue of Theoretical Inquiries in Law — the privatization of law model, the legal pluralism paradigm, and multiculturalism — are united in their shared opposition, be it descriptive or normative, to the monopolistic concentration of law production power in the hands of the state. The three models focus on dispersion of the social ordering function amongst non-state agents. They advocate the claim that the state has not succeeded at securing a monopoly over law and/or should not secure a monopoly over law. On the policy front, as well, protagonists of the privatization of law model, scholars of the legal pluralism paradigm and writers in the multiculturalism tradition often unite in their plea for recognition of tribal courts or the expansion of the lawmaking capacity of local governments. However, despite their shared underlying assumption that the centralist state law model lacks normative appeal, these three bodies of research diverge significantly. The differences between them have been marginalized in the debate, because each of these models has essentially concentrated on conducting the dialogue with the state law model. Thus far, these models have been solely occupied with taking a particular stance against the centralization model of state law, and have failed to engage in any debate amongst themselves as representatives of alternative legal decentralization schemes. This Article attempts to partially fill the void, by pitting the multiculturalism model of legal decentralization against the privatization model. It will show that the differences in both models' legal decentralization visions derive from conflicting ontological premises regarding law, community,

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social life, and the human subject. These theoretical distinctions, which will be drawn between the two decentralization models, have great bearing when considering the social units that ought to supplant the state in its lawmaking capacity.

INTRODUCTION

The privatization of law model, the legal pluralism paradigm, and the literature on multiculturalism are united in the assertion that the model of legal centralism, premised upon the monopolistic concentration of law production power in the hands of the state — lacks normative appeal. The central motif intertwining the three models is the focus on dispersion of the social ordering function amongst non-state agents, and the claim that the state has not succeeded at securing a monopoly over law and/or should not secure a monopoly over law. These three bodies of research have lauded the crumbling of the state's roles as exclusive legislator, judge, and enforcement agency and have successfully advanced the idea of decentralizing power to produce law. The opposition to legal centralism is embedded both in the theoretical level and in various policy suggestions aimed at the decentralization of social ordering functions — for instance, those relating to the recognition of tribal courts, to the expansion of the lawmaking capacity of local governments, or to the recognition of private communities.

However, in conjunction with the accelerated research focus on decentralizing social ordering and supplanting the state from its exclusivity as producer of the law, a no less central issue was somewhat pushed to the margins — the question of whose hands will decentralization feed into. Which agents and organizational units are best suited to replace the state in molding social behavior, and what characteristics should they possess? In other words, thus far, the schools of research espousing privatization of law or multiculturalism have been particularly occupied with taking a stance against the centralization model of state law. They have neglected to engage in any debate amongst themselves, as representatives of differing and alternative visions of decentralization. Thus, the multiculturalism school of thought has often adopted a latent premise that state law will deconstruct into the ethnic, religious, or cultural community unit, and has failed to engage in an explicit dialogue with the privatization of law model's alternative version as to the associations which are to supplant the state in its lawmaking

capacities. The same can be said with regard to the privatization model's disregard of cultural communities in its depiction of the "market for law."

The lacuna could be explained in terms of rhetorical considerations: the contours of each of these decentralization paradigms are most prominent against the background of the state law centralization model. It could also be explained by practical considerations, by the fact that the debate tends to lean towards comparison with the most prevalent and well-known option, in this case state law. But regardless of the underlying reason, a review of the literature on multiculturalism reveals its lack of interface with the literature on privatization of law, and vice versa. The same is true with regard to the legal pluralism paradigm, which focuses on the very existence of mediating social associations between the individual and the state/state law, rather than on the distinct qualitative features of such social mediators.

This Article seeks to fill this void, at least with regard to privatization of law and multiculturalism. It is devoted to clarifying the interplay amongst the alternative models of legal decentralization and to pitting the multiculturalism model of decentralization of law against the privatization model. My claim is that the privatization model and multiculturalism represent polar and conflicting conceptions of legal decentralization and that, in the asserted sense, the privatization of law model not only amounts to an anti-state project but also to an anti-communitarian project (in the sense of the cultural, religious, or ethnic community). I attempt to show that the divergences in the two models' visions not only derive from their opposing positions on the political spectrum, but also result from differing ontological premises regarding law, community, social life, and the human experience. The theoretical distinctions which will be drawn between the models are of great significance in deciphering the social units that ought to replace the state in its lawmaking capacity.

I. AN OUTLINE OF THE PRIVATIZATION OF LAW MODEL¹

The multiculturalism model has been the focus of considerable scholarly attention over the last decades, while the privatization model has remained

¹ This discussion will be devoted to the utilitarian strand of the privatization of law tradition. In contrast to the utilitarian approach stands the libertarian natural law theory, identified above all with the writings of the late Murray Rothbard. *See* MURRAY N. ROTHBARD, *POWER AND MARKET* (1977). This latter approach stresses the normative criterion of liberty and concentrates on the moral superiority, as opposed to efficiency, of the privatized market for law.

less familiar. Therefore, in laying the foundations for the discussion in this Article, it is vital to sketch a very brief and preliminary outline of the decentralization paradigm constructed in the privatization of law literature.

In his 1776 essay *An Inquiry into the Nature and Causes of the Wealth of Nations*,² Adam Smith asserted that in a free market economy, the interaction amongst rational maximizers of their own utility will lead to the most efficient use of resources, the by-product of which is social welfare.³ The classical liberal thinker Gustave de Molinari was the first to apply this insight to the legislative and adjudicative markets.⁴ He articulated the argument that the doctrine of free competition and enterprise is as valid with regard to the law as it is with regard to other economic goods and services. According to this approach, privatization of the legislative and judicial markets and the adaptation of the legal product to consumer demand will lead to a legal order that is more efficient and of a higher quality than state-produced law, for the same fundamental reasons that market competition leads to efficient results in general.⁵ The privatization of law model rests on such a market approach to law and extols free competition amongst legal entities that operate simultaneously within the same geo-political unit. Under this model, the authority to create legal rules and determine disputes according to those rules should be privatized and dispersed amongst the entire population, completely detached from the state apparatus. Law would not be territorially based, but rather based on individual choice and voluntary agreement. The model endorses a vision in which a diverse and wide variety of competing legal orders and communities would develop within state borders, each offering its own unique set of laws, thereby revoking the a priori conception of one uniform law. Some of the legal agencies might prohibit abortions, while some may permit them; some may make writing a constitutive requirement for contracts, whereas others may be satisfied with a verbal contract in all matters. Some legal agencies may offer all-inclusive legal regimes, while others might restrict themselves to more specific and narrow issues of social ordering.⁶ Some of these jurisdictions

2 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (R.H. Campbell et al. eds., Oxford Univ. Press 1976) (1776).

3 *See id.* at 456.

4 Gustave de Molinari, *De la production de la sécurité*, 21 *JOURNAL DES ECONOMISTES* 277 (1849), translated in *THE PRODUCTION OF SECURITY*, OCCASIONAL PAPER SERIES NO. 2, at 14 (J. Huston McCulloch trans., 1977).

5 Stephen J. Ware, *Arbitration and Assimilation*, 77 *WASH. U. L.Q.* 1053, 1054 (1999).

6 David Friedman, *Anarchy and Efficient Law*, in JAN NARVESON & JOHN T. SANDERS, *FOR AND AGAINST THE STATE* 235, 235 n.5 (1996).

would overlap, while others would be discrete and refer to distinct spheres of social ordering.⁷ Likewise with regard to the adjudicative function: Under the privatization model, the dispute-resolution function in society would be carried out by a polycentric order of competing suppliers of judicial services. Some judicial bodies may supply legislation or be affiliated with legislative agencies, while others will offer only dispute resolution services. Some judicial entities might stress certainty or adherence to strict formalistic rules in conducting the judicial process. Other private courts might focus on speediness or boast procedural lenience. We can expect to find tribunals that seek a judicial determination as well as bodies seeking consensual resolutions of disputes. Certain judicial bodies will likely specialize in narrow areas of dispute and will offer professional services to a defined clientele. In contrast, other judicial bodies will appeal to a wide clientele, offering adjudication services in an array of areas and disputes.

In such a world, consent would be the basis of subordination to the jurisdiction of legal communities — legislative and judicial service-providers — as would be the case with regard to the rules created and applied by those communities. That is to say, any given legal rule would ultimately crystallize as the result of the willingness of individuals to subordinate themselves to it: the parties subject to the duty would create the duty themselves through voluntary agreement, and any such agreement would be a potential source of law. In the broad sense of the matter, all legal issues in such a polycentric legal regime would, therefore, be reducible to the law of contracts. In the narrower sense, competing legal regimes would offer different means of resolving disputes over property, torts, business transactions, and even events currently characterized as "criminal" in nature (which would be classified as "intentional torts").⁸ The normative variety that would emerge in a private market for law would enable simultaneous accommodation of the needs of many sub-markets. Individuals would be able to arrange their relations with their neighbors according to Legal Regime A, their relations with their co-workers under Legal Regime B, their conduct vis-à-vis other drivers according to the standards applied by Legal Regime C, and so on and so forth.⁹ They would be able to subject themselves to partial segments of the legal corpus offered by any given legal agency. The possibility of the parallel consumption of a number of normative regimes (by the same consumer) and

7 Tom W. Bell, *The Jurisprudence of Polycentric Law* (1992) (unpublished manuscript, on file with author).

8 *Id.*

9 John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199, 229.

the provision of an unlimited number of legal regimes (by each producer) would create an almost infinite number of potential normative variations in the framework of a polycentric legal structure.¹⁰

The described privatization process can be expected to impact the material substance of the legal rules that will be established. The focus is likely to swing from the political-public dimension of the law to the private dimension. The most pronounced shift is likely to occur on the criminal law plane, a sphere that feeds necessarily on the state-and-law link and would therefore cease to exist in the described scenario. In the framework of a private legal market, tort law is likely to subsume the criminal law: what are now criminal offenses would be treated as intentional torts;¹¹ the state would no longer have any standing in the procedure;¹² and the central legal remedy would be compensation for the victim.¹³ An additional presumable outcome of the focus on the private dimension of the law is that constraints on the individual's freedom of action would most likely be limited to conduct that involves a concrete victim, thus excluding "victimless" offenses, such as prostitution and gambling.¹⁴

The network of relations that would be established amongst the private suppliers of law and adjudication services in such a polycentric legal regime would be similar to that currently existing amongst states in the international arena. Legal agencies seeking to reduce transaction costs for their consumers would establish choice of law rules to arrange "cross-boundary" interactions with members of other agencies. In this sense, the agencies would operate both as producers of legal rules and as intermediaries for social conventions. Legal conventions and confederations would be established to contend with conflicts of law and instances of "cross-jurisdictional" legal disputes. Concurrently, the legal agencies may choose to apply one set of rules to arrange the internal relations amongst their clients and another set to arrange the external interactions between members and non-members.

10 *Id.*

11 BRUCE L. BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* 351 (1990).

12 MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* 85 (1982).

13 Despite the fact that compensation would almost certainly be the central remedy in a polycentric legal structure, there is no reason, in principle, to preclude other remedies. Thus, a survey conducted by Bruce Benson of customary law orders, such as the one operating in ancient Iceland, revealed that in particularly severe cases, the death penalty was imposed on offenders. For an expanded discussion, see BENSON, *supra* note 11, at 356.

14 *See id.* at 351.

The normative claim at the foundation of the privatization of law model is that, assuming conditions of perfect competition in the markets for legislation and adjudication, placing the power and means to create and supply the legal services described above in private hands would lead to an efficient, high quality legal order, through voluntary interactions amongst rational maximizers of their utilities.¹⁵ Exposing legal services to the effect of market forces would create incentives amongst private legislators to develop successful legal rules in line with consumer demand, in order to expand their customer bases and increase profits. A legislative agency that fails to provide legal regimes suited to society's needs and ends would not survive for long: its customers (both private and institutional, such as, for example, judicial agencies that consume the agency's legal regimes) would turn to other legislative agencies. Market forces would operate so that only legislative systems that meet quality and efficiency standards (and other objectives set by the consuming public) prevail. The same holds true for the impact of privatization or market forces on the adjudicative function: in the conditions of a competitive adjudication market, fairness and neutrality of judges would be ensured by the market forces' internal control mechanism: the voluntary nature of the resort to private courts. A private court that conducts itself in a prejudiced fashion would not survive over time. Once it acquires a dubious reputation, it will fail to win the confidence of potential litigators on both sides of disputes. External entities would refrain from entering into legal relations with the agency's customers for fear of being subject to its biased adjudication, and consequently, disputes involving external parties would not be brought before the agency. It would then remain only with disputes in which both parties are its customers. Moreover, if the agency emerges as systematically prejudiced against one particular side in such disputes as well, the consistently biased sector of its customers would also distance itself. Thus, the volume of disputes brought for determination before such an agency would slowly shrink, and it would eventually go out of business.¹⁶ The underlying assumption of the privatization model is, thus, that the competition amongst the private legislative and judicial service-providers would lead to a more efficient and sophisticated law that is better suited to the public's needs and ends.¹⁷

15 CHRISTOPHER W. MORRIS, *AN ESSAY ON THE MODERN STATE* 63 (1998). See ROTHBARD, *supra* note 1, for discussion of the superiority of the privatization of law model in light of a different normative criterion — that of liberty.

16 David Osterfeld, *Anarchism and the Public Goods Issue: Law, Courts, and the Police*, 9 J. LIBERTARIAN STUD. 47, 57 (1989).

17 DAVID FRIEDMAN, *THE MACHINERY OF FREEDOM* 175 (1973).

A considerable portion of the debate on the privatization of law model revolves around the question of whether such a competitive market for law is, in fact, a viable option. It is not enough to make normative assertions regarding the superiority of a privatized market for law as compared to the state law model, if market failures would prevent a market for law from forming and functioning in the first place. Elsewhere, I¹⁸ and others¹⁹ have extensively discussed the issue of the viability of privatizing law, considering the market failures likely to arise in a free market for law, as well as possible means of resolving these failures. I will briefly outline some of the central arguments presented in this context.

The market failures likely to arise in a free market for law can be categorized into three groups, beginning with the failure associated with the provision of public goods: Legal rules and adjudication services can be characterized as public goods, for once a legal rule has been formulated, people can "consume" it, i.e., subject themselves to that rule, at no additional cost. Furthermore, it is impossible, as well as undesirable, to exclude people from "consuming" the legal rule, that is, from subordinating themselves to the rule. The same is valid with regard to the resolution of disputes by peaceful means: the benefits of peace and social order are also non-excludable. This raises free-rider problems, the result of which would be an under-supply of legal rules and adjudication services in a free market for law.²⁰ Despite the fact that the existence of clear and widely accepted legal precepts and effective means for adjudicating disputes would provide a non-excludable benefit to society at large, private individuals would not internalize this public

18 Talia Fisher, *The Privatization of Law*, 30 TEL AVIV U. L. REV. (forthcoming 2008) (Hebrew).

19 Terry L. Anderson, *An American Experiment in Anarcho-Capitalism: The Not So Wild, Wild West*, 3 J. LIBERTARIAN STUD. 9 (1979); Tom W. Bell, *Polycentric Law*, 7 HUMANE STUD. REV. 1 (1991); Bruce L. Benson, *The Lost Victim and Other Failures of the Public Law Experiment*, 9 HARV. J.L. & PUB. POL'Y 399 (1986); Bruce L. Benson, *Legal Evolution in Primitive Societies*, 144 J. INSTITUTIONAL & THEORETICAL ECON. 772 (1989); David Friedman, *The Private Creation and Enforcement of Law: A Historical Case*, 8 J. LEGAL STUD. 399 (1979); Hasnas, *supra* note 9; Andrew P. Morriss, *Miners, Vigilantes & Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law*, 33 LAND & WATER L. REV. 581 (1998); Osterfeld, *supra* note 16; George H. Smith, *Justice Entrepreneurship in a Free Market*, 3 J. LIBERTARIAN STUD. 405; John D. Sneed, *Order Without Law: Where Will the Anarchists Keep the Madman?*, 1 J. LIBERTARIAN STUD. 117 (1977).

20 William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979).

benefit in their utility functions, resulting in the under-production of law and adjudication in the free market.

A second type of market failure stems from the network effects prevailing in the legal enterprise. A network effect can be defined as the surplus in benefit that a consumer derives from a particular good or service, in conjunction with the increase in the number of consumers of that good or service. For example, as fax machines become more popular, the fax machine one owns becomes increasingly valuable, since it enables interaction with a growing number of individuals.²¹ Law is a network industry, characterized by such demand-side returns to scale: the more people join a legal network to which one belongs, i.e., abide by the rules one has accepted/recognized, the larger the group of people with whom one's transaction costs are lower. Each consumer of legislation and adjudication services confers network benefits upon other members of her legal network, by virtue of her mere affiliation with the network. In other words, in a private market for law, the value of the services a given legal agency can supply would be relative to the number of customers purchasing its services. The fact that law is a network industry gives rise to the possibility of two opposing market failures. The one is under-standardization in the market for law: In a private legal market, the claim would go, every consumer of legal goods would fail to internalize in her utility function the benefit all other consumers derive from her membership in the network, the result of which would be "too many legal networks" operating within a single geopolitical unit. The second potential market failure can be conceived of as over-standardization, namely, the problem of legal lock-ins: Providers and consumers of legal services would have incentive to join the largest legal network in order to reap the benefits of large scale, even if that network locks in on a sub-optimal legal standard. Leaving a large legal network and switching to alternative legal standards would entail a high switching cost, and so rational maximizers of their utilities will be induced to remain with the large-scale suboptimal network. All else being equal, the latter network will thus grow at the expense of competing networks (since it has the most valuable network externalities and, hence, involves the highest switching costs). In other words, it could be argued that, in a free market for law, not only

21 For further discussion of network industries and their unique characteristics, see Stanley J. Liebowitz & Stephen E. Margolis, *Network Externalities (Effects)*, in 2 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 671 (1998); William J. Kolasky, *Network Effects: A Contrarian View*, 7 GEO. MASON L. REV. 577 (1999); Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93 (1994); Michael L. Katz & Carl Shapiro, *Network Externalities, Competition and Compatibility*, 75 AM. ECON. REV. 424 (1985).

would there be an under-supply of legal rules (deficiency in quantity as a result of their public good quality), but also those legal rules that are formulated will lock-in on a sub-optimal and inefficient content (deficiency in quality due to network effects).

A final form of market failure relates to the monopolization tendencies of private suppliers of legislative and adjudication services. Private agencies, it can be claimed, will overcome the public good hurdles entailed in adjudication and legislative services — and supply the legal services crucial for a secure life — only if they set mechanisms for resolving "cross-jurisdictional" conflicts. However, this sort of cooperation would generate a vehicle for inter-agency collusion, for cartelization and the exercise of monopolistic power.²² Accordingly, privatization of the legal market could lead to the effective establishment of a very small number of giant providers of legal services that exploit their cartelistic status in a given geographical area to harm the consuming public. In other words, there seems to be an inherent difficulty to dealing concurrently with both types of market failures in the market for law — the market failure entailed in providing a public good, on the one hand, and that generated by the tendency to cartelization, on the other hand. Those forces that facilitate internalization of externalities and overcoming the public good-related market failure are the same forces that lay the groundwork for the cartelization of the legal market and, thus, the second type of market failure. Competing legal systems, therefore, would either be unstable or collapse into one monopolistic agency or cartel.²³

Elsewhere²⁴ I have given critical consideration to each of these types of market failures, questioning the extent of their impact on the viability of a free market legal order. There is also room to claim that these market failures would have fewer ramifications in moderate and more plausible versions of the privatization model rather than the more extreme variations of privatization calling for total abolition of state law and elimination of the state's capacity as adjudicator and legislator. Under such more moderate models, a thin body of state law is preserved, while large portions of the law are turned into negotiable default rules, and individuals are given more extensive choice for opting out of the state legal system, including in areas of law currently monopolized by the state. I will not delve into these issues here, for the technical details and exact scope of state intervention in law under the different privatization

22 Tyler Cowen, *Law as a Public Good — The Economics of Anarchy*, 8 *ECON. & PHIL.* 249 (1992).

23 *See id.*

24 Fisher, *supra* note 18.

models are immaterial to the current discussion. My aim in this project is to proceed beyond the issue of the viability of the privatization model, in order to lay the foundations for examining its normative desirability from a new perspective yet to be discussed in the literature, namely, as compared with the alternative version of legal decentralization presented in the literature on multiculturalism.

II. LEGAL DECENTRALIZATION UNDER THE PRIVATIZATION OF LAW MODEL VERSUS THE DECENTRALIZATION SCHEME OF MULTICULTURALISM

The above depiction of the privatization of law model reveals that it has shared theoretical foundations with the multicultural paradigm.²⁵ Both the multiculturalism and privatization of law models are essentially premised upon liberal ideological foundations. Both acknowledge the centrality of law²⁶ in the lives of human beings and view it as an axis around which social life revolves. The decentralization visions of both multiculturalism and the privatization of law paradigm are premised upon scaling down as well as scaling up dispersion of the state's lawmaking capacities, to the infra-state and supra-state levels: under both models, communal life is founded on the existence of a mutual set of norms. The two decentralization paradigms also share the belief that mechanisms of communal life and social cooperation enable individuals to lead more adequate and fulfilling lives, as well as the understanding that any form of social cooperation amounts to constraints on the leeway of individual members. These similarities notwithstanding, however, there is more separating the two models than is shared by them. It is on the essence of law, the phenomenology of communities and the phenomenology of exit is, as well as the role of social

25 There are numerous versions and definitions of multiculturalism. The definition adopted for purposes of this Article refers to the aspiration for the peaceful coexistence of a plurality of cultural, religious, or ethnic groups and normative systems within a single geo-political unit. *See also* Isaak Dore & Michael T. Carper, *Multiculturalism, Pluralism, and Pragmatism: Political Gridlock or Philosophical Impasse?*, 10 WILLAMETTE J. INT'L L. DISP. 71 (2002).

26 The term "law" does not necessarily refer to formal state law, but rather to all forms of rules governing social behavior. The definition of law which will be adopted throughout the Article refers to Fuller's definition of law as "the enterprise of subjecting human behavior to the governance of rules." LON L. FULLER, *THE MORALITY OF LAW* 124 (Yale Univ. Press 1969) (1964).

cooperation mechanisms in the lives of people, that these two visions of decentralization fundamentally diverge. To begin with, the requirement of contractual formation of communities for law, at the heart of the privatization of law model, essentially invokes the political theory associated with contractarianism²⁷: that the basic social unit is comprised of individuals "whose attitude toward the world is one of instrumental rationality."²⁸ Consequently, the model has a consumer-oriented²⁹ perception of social interaction and ordering. Society is viewed as a locus for cooperation and competition between agents pursuing individual goals, and exit conceived of as an essential component of the individual-community interaction. The fundamental role of law in such a world is to enforce consensual transfers.³⁰ These features of the privatization model combine to form a notion of legal decentralization that is strikingly different from that endorsed and promoted by the multicultural school of thought.

The differences between the multiculturalism and privatization of law models, between their conflicting visions of the non-governmental institutions and private legal systems that should take over the state's behavior-regulating role, are exemplified in the contradistinction between the diamond industry community with its private legal system and the Ultra-Orthodox Jewish community with its system of rabbinical courts and private Jewish Law regime. In brief, over the past few centuries, the diamond industry has been primarily self-regulating and essentially independent of the state law apparatus.³¹ Within the diamond industry, a sophisticated private legal system developed based upon an internal set of rules, adjudicative institutions, and enforcement mechanisms, for the ordering of interactions between members and the handling of intra-industry disputes.³² In the words of Lisa Bernstein, "The private dispute mechanisms in the world's diamond bourses, combined with widespread adherence to the

27 The sort of contract envisioned by the privatization of law model refers to the discrete transaction contract, as opposed to the relational contract. *See generally* Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978).

28 Menachem Mautner, *Contract, Culture, Compulsion, or: What Is So Problematic in the Application of Objective Standards in Contract Law?*, 3 THEORETICAL INQUIRIES L. 545, 546 (2002).

29 CHARLES TAYLOR, *PHILOSOPHICAL PAPERS: PHILOSOPHY AND THE HUMAN SCIENCES* 187 (1985).

30 For further discussion of the link between contractual formation and social atomism, see CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 118 (1991).

31 Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 156 (1992).

32 *Id.* at 116; Barak Richman, *How Community Institutions Create Economic*

secrecy norm, have succeeded in maintaining a largely extra-legal contractual regime where transactions are concluded on the basis of the dealers' reputation and the incidence of breach is low."³³ Similarly, the Jewish Ultra-Orthodox community, in its various sects, is also organized and ordered externally to the state law domain. It operates under an elaborate and sophisticated religious private legal system conforming with Jewish Law (*Halacha*). At the foundation of this system lies a complicated network of private rabbinical courts (*Batei Din Zedek*), which resolve most of the disputes between community members, both within a religious sect or Hassidic group and across Jewish religious communities. Such private rabbinical courts operate throughout the world.³⁴ They handle cases relating to a wide array of social ordering matters, from the spiritual ceremonial aspects of human ordering, to contractual or tort-like suits, to disputes that would be classified as criminal in the state legal system.³⁵ The legislative aspect of this private legal system takes the form of rules of conduct issued by spiritual leaders in the Ultra-Orthodox community. These rules relate to all aspects of human life (dress codes, access to mass media, decisions regarding participation in political elections, dietary ("*Kashrut*") laws, etc.) and are prescribed by a variety of means, such as legal rulings ("*Piskei Halacha*") or routine religious sermons.³⁶

Interestingly, both social entities — the diamond industry and the Ultra-Orthodox Jewish community — are comprised, to a large degree, of the same population. Over the last few centuries, the diamond industry has been dominated by Jewish merchants, an overwhelming majority of whom belong to an Ultra-Orthodox community.³⁷ Despite this overlap, however, their private legal systems reflect distinctly diverging notions of legal decentralization. The inner logic of each of the two communities, their modes and terms of association, the objects of the extra-legal norms they formulate, the features of their legal systems, and the types of reputation bonds on which these legal regimes are established are fundamentally different.

Advantage: Jewish Diamond Merchants in New York, 31 LAW & SOC. INQUIRY 383 (2006).

³³ Bernstein, *supra* note 31, at 156.

³⁴ See Abner S. Greene, *Kiryas Joel and the Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 2 (1996).

³⁵ For further discussion on the subject of these private courts, see Shlomo Daichovsky, *A Critique of Rabbinical Court Decisions*, 13-14 DINE ISRAEL [ANNUAL OF JEWISH LAW] 17 (1986) (Hebrew); Shlomo Daichovsky, *The Rabbinical Court as Arbitrator*, 16-17 SHNATON HAMISHPAT HAIVRI [YEARBOOK OF JEWISH LAW] 527 (1991).

³⁶ See, for instance, with regard to the Satmar community, ISRAEL RUBIN, *SATMAR: AN ISLAND IN THE CITY* 40 (1972).

³⁷ See Bernstein, *supra* note 31, at 116.

Consequently, the two modes of private ordering and communal association present a compelling illustration of the differences between multiculturalism's version of legal decentralization and that advanced by the privatization of law paradigm. The diamond industry can be viewed as an embodiment of the privatization model's vision of the mediating social agent to which state lawmaking capacities should be delegated, whereas the network of rabbinical courts in the Ultra-Orthodox community can be perceived as a clear manifestation of the multicultural alternative vision of legal decentralization.

The following sections embark on a more extensive elaboration of the claim that the privatization of law model and the multicultural paradigm incorporate two distinct, opposing prototypes of legal decentralization.³⁸ I shall demonstrate at which points the visions of private ordering advanced by the two models depart. Over the course of this discussion, it would be useful to keep in mind the example of the diamond trading community as reflective of the privatization model versus the Ultra-Orthodox community as a manifestation of the multicultural paradigm.

But first, a preliminary word of clarification is in order. I am aware of the fact that there are numerous distinctive versions of the multiculturalism model, both individualistic and communitarian in nature. The privatization of law literature is no less multifaceted, offering diverging libertarian and utilitarian variations of the privatization model. The classifications I will suggest for distinguishing between these two models do not attempt to fully capture the subtle complexities within each and may, therefore, appear overly simplistic at times. The aim of the analysis, however, is a rudimentary depiction and comparison of the two models in their ideal forms, in order to create a new analytical framework through which legal decentralization and pluralism can be understood and examined.

A. Essence of Community

One point of divergence between the multiculturalism and privatization models is with regard to the phenomenology of communal life and the essence of community.

1. Community as Identity Versus Community as Purpose

Multiculturalism theory endorses a thick phenomenology of community, essentially viewing it as a means for satisfying the human quest for

³⁸ For a discussion of such classification in the corporate context, see Paul N. Cox, *The Public, the Private and the Corporation*, 80 MARQ. L. REV. 391, 401 (1997).

social stability and companionship. The prototype social agency of the multiculturalism model is, accordingly, the cultural/ethnic/religious community. Such communities are conceived of as representative of "a people," as intergenerational entities comprised of individuals who are homogeneous and distinct from others.³⁹ In this sense, community serves as a population-screening mechanism. Community members typically interact with each other on a regular basis and in a direct manner. They share a collective consciousness founded on a common history, a joint language, and a shared culture. Communities of these types are "paideic," in Robert Cover's terms, that is, constituted by a common narrative that is embedded in their members' internal, normative worlds.⁴⁰ Community members share common understandings of the meanings of the normative aspects of their common lives⁴¹ and are united by a set of beliefs and artifacts,⁴² above and beyond the promotion of particular enterprises or the realization of specific goals.⁴³ Under this paradigm, people need community not only to attain various material or intellectual ends, but also for identity and self-reference. The plural identity of the group — the shared spirit and communal normative apparatus — are part of community members' "self understanding."⁴⁴ The community constitutes a "causal component in the makeup of the self."⁴⁵ Individuals are also defined by others according to the cultural communities they inhabit. For purposes of simplification, I will term such prototype communities "cultural communities" or "identity communities."⁴⁶

The privatization of law model, in contrast, presents a thin and diffuse version of community. Community is perceived as a necessary mechanism for the provision of public goods, such as dispute resolution, and for the amelioration of collective action problems, by preventing otherwise

39 For a similar discussion with regard to the nation-state, see Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 860 (1999).

40 Robert Cover, *The Supreme Court 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 14 (1983).

41 *Id.* at 16.

42 Ford, *supra* note 39, at 860.

43 For a similar distinction, see also Hanoch Dagan & Michael Heller, *The Liberal Commons*, 110 YALE L.J. 549, 558 (2001).

44 See Hanoch Dagan & Michael Heller, *Conflicts in Property*, 6 THEORETICAL INQUIRIES L. 37, 58 (2005).

45 Stephen A. Gardbaum, *Law, Politics and the Claims of Community*, 90 MICH. L. REV. 685, 701 (1991).

46 This prototype of communal association corresponds, to a large degree, to the sociological category of *Gemeinschaft* introduced by Ferdinand Tönnies. See FERDINAND TÖNNIES, *COMMUNITY AND CIVIL SOCIETY* (Jose Harris ed., 2001).

atomistic individuals from free-riding on the efforts of others.⁴⁷ The prototype social agency under this paradigm can be characterized as a nexus of contracts: a "network of social relationships marked by mutuality and reciprocity."⁴⁸ Community thus conceived is a simple aggregation of individuals, engaged in voluntary contractual relations with one another, in the form of both direct association and indirect interaction, through intermediary agencies such as insurance companies. The underlying assumption of the privatization model is that every reciprocal set of rules erects and "seals" a community of sorts and that this satisfies the criteria of the ontology of community life. The community serves a screening function targeted at behaviors rather than populations: in terms of population composition, the community's parameters are erratic and ever-changing. Community members are itinerant and rootless: they are mobile both within a particular voluntary association and across communities.

Furthermore, the prototype community in the privatization model is not premised on common associational worlds or shared normative beliefs, but, rather, on the converged preferences of its members. These members need not have a shared purpose in life beyond the immediate enterprise for which the social group was established. The community is conceived as comprising individuals temporarily united for their mutual benefit. It is viewed through a market prism, as opposed to a social one⁴⁹: membership in the community is fundamentally instrumental or functionalist. Members conceive of themselves as consumers, as rational maximizers of their utilities who choose to conform to a set of rules and activities in order to facilitate their ends and preferences. I term this prototype community "a voluntary association" or "market community."⁵⁰

2. *The Community as All-Encompassing Versus Partially Encompassing*

Another feature that distinguishes between the prototype community of the multiculturalism paradigm and the community under the privatization model

47 For further discussion of the role of community with regard to the supply of public goods, see Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75, 81 n.16 (2004).

48 Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 26 (1989).

49 Kenneth L. Grasso, *Theological Perspective: The Rights of Monads or of Intrinsically Social Beings? Social Ontology and Rights Talk*, 3 AVE MARIA L. REV. 233, 234 (2005).

50 This prototype of social association can be analogized to the sociological category of *Gesellschaft* introduced by Tönnies. See TÖNNIES, *supra* note 46.

is their permeation and containment of the associational and normative worlds of their members. The cultural community typically aspires to constitute an all-encompassing nomos,⁵¹ containing the most significant dimensions of its members' lives⁵² and reflecting their most important normative commitments.⁵³ Cultural and religious communities such as the Amish, Ultra-Orthodox Jews, early Mormons, Mennonites, and groups who form communes in urban surroundings have holistic normative and ethical systems⁵⁴ aimed at addressing all the central aspects of human existence.⁵⁵ To achieve this, the cultural community bundles together various areas of social ordering that relate to a wide range of human interaction. Membership in the community usually entails the acceptance of this bundle of linked normative precepts.⁵⁶ Such groups are more likely to demand exclusivity from their members and are typically less tolerant of cross-cutting affiliations.⁵⁷ They tend to view alternative nomoi (and especially the state) as "alien, redundant and potentially threatening."⁵⁸ In this respect, it can be claimed that the multiculturalism model ultimately endorses a singular ethos regarding law. Despite being premised upon the coexistence of a plurality of normative regimes within one geopolitical unit, this model essentially views each of these systems as a cohesive whole in itself — as a single type of object unified by its distinct foundation.⁵⁹

The privatization model, for its part, is premised upon limited-purpose affiliations. Bundling remains a viable option but is not conceived of as a normative ideal.⁶⁰ Under this model, voluntary associations may be formed for specific enterprises and can supply a partial ordering of narrow spectrums of

51 Leslie Green, *Rights of Exit*, 4 LEGAL THEORY 165, 168 (1998).

52 Will Kymlicka termed this a "societal culture": a society that "provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational and economic life . . ." WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY* 76 (1995).

53 Gardbaum, *supra* note 45, at 741.

54 Eduardo M. Penalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1946 (2005).

55 Of course, there are other sorts of cultural communities, such as the Francophone community in Quebec, whose normative systems are narrower in scope. However, even in such communities, normative precepts are typically bundled together.

56 For a similar discussion with regard to territorial jurisdiction, see Ford, *supra* note 39, at 844.

57 Dagan & Heller, *supra* note 43, at 571.

58 Gardbaum, *supra* note 45, at 741.

59 For further discussion of the singularity ethos, see Margaret Davies, *The Ethos of Pluralism*, 27 SYDNEY L. REV. 87, 88 (2005).

60 Under the privatization model, the barriers to cross-cutting affiliations are solely economical, emanating from the transaction costs involved.

human interaction. Ideally, individuals can choose to de-bundle the normative packages and services offered by such associations. Indeed, the privatization model facilitates and normatively promotes simultaneous affiliations with numerous parallel communities. It thus advocates a plurality ethos in the deepest sense of the word, for, from a conceptual point of view (as opposed to what occurs in practice), there is no objective of totality or coherence in the legal regime one is subject to.

It should be stressed that the difference in this regard is one of degree rather than substance. The claim being made is not that all cultural communities are, by definition, mutually exclusive or that the multiculturalism model allows only such an all-encompassing view of communal life. Likewise, I do not contend that the privatization model promotes maximal flexibility with regard to multiple affiliations. Transaction costs, for one, are likely to limit the viability of endless cross-cutting membership. My claim is far less presumptuous, namely, that cultural communities are more likely to offer all-embracing *nomoi* (and that the multiculturalism model tends towards such a conceptualization of communal life), whereas the privatization model tends to envision voluntary associations that are relatively limited in scope and are constituted by reciprocal normative commitments amongst members who simultaneously commit to a plurality of normative regimes.

3. *Status-Like Relations Versus Contractual Relations*

The privatization of law paradigm and the multicultural model also vary with regard to the nature of the relationship between community members and the community association at large. This divergence is manifest both at the entry and exit levels of the interaction.

Under the privatization model, entry into the community is contingent upon explicit contractual consent.⁶¹ The community is formed through the express mutual agreement of all members to associate with each other and is maintained strictly by contract.⁶² The ideal community is one that is freely entered into and easily abandoned.⁶³ In contradistinction, under the multiculturalism model, the notion of entry is less material.⁶⁴ Most cultural communities are bound together by shared characteristics that are essentially not chosen or that are elected in only a very weak sense. The paradigmatic

61 FOLDVARY FRED, PUBLIC GOODS AND PRIVATE COMMUNITIES 97 (1994) (distinguishing between explicit contractual consent and "simply living in a sovereign community").

62 Alexander, *supra* note 48, at 3.

63 Penalver, *supra* note 54, at 1894.

64 Green, *supra* note 51, at 172.

way of joining most cultural or identity communities is by virtue of birth, as is the case with many ethnic and religious groups, families, and linguistic communities.⁶⁵ Joining such groups during adulthood may entail high costs⁶⁶ and, in certain cases (such as the ethnic community) may be utterly impossible. Beyond the fact that cultural communities are not constructed contractually, they are also not sustained by contractual means.⁶⁷ Community affiliation under the multiculturalism paradigm is typically characterized by an element of involuntariness⁶⁸ or choicelessness,⁶⁹ and the relations between community members and the community resemble, at least in part, a status-based relationship.

These distinctions between the models are also present at the exit level. The privatization model fosters open boundaries⁷⁰: it places strong emphasis on exit, on each individual's ability to dissociate herself or himself from a relationship with other members and to leave the effective jurisdiction of the community.⁷¹ 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.⁷² The utilitarian strand of the privatization decentralization model is similarly deeply committed to exit and regards the ability to exit as a vital component in the liquidity of the market for law, insofar as it insures market efficiency. Under the multiculturalism model, in comparison, the commitment to effective exit is significantly weaker. The models' differing approaches to the role of exit are manifested at a number of levels, as I explain below.

65 BRIAN BARRY, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM 148 (2001).

66 "The nuances of common cultures are costly and time-consuming to learn, and the lack of familiarity in them is easy to detect." Amitai Aviram, *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 YALE L. & POL'Y REV. 1, 1 (2004).

67 See Note, *Lessons in Transcendence: Forced Associations and the Military*, 117 HARV. L. REV. 1981 (2004).

68 Locke expressed a contrary view. He perceived the Church as a "voluntary society of men" since, in his eyes, "nobody is born a member of any church." JOHN LOCKE, A LETTER CONCERNING TOLERATION 163 (John Horton & Susan Mendus eds., Routledge 1991) (1689). I beg to differ. With the exception of adult converts, people most certainly do inherit their religious faith, for they internalize religious sentiments from the day they are born.

69 Alexander, *supra* note 48, at 27.

70 For further discussion of the centrality of the notion of exit and open boundaries in the liberal model, see Dagan & Heller, *supra* note 43, at 568.

71 See ALBERT HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970).

72 See Dagan & Heller, *supra* note 43, at 558.

The privatization model stresses the *role of exit* as a benefit-generating mechanism that enhances the utility individuals can derive from communal affiliation. Members' unencumbered ability to exit their community's jurisdiction is considered the central incentive-creating mechanism for such communities to *comply with consumer demand* and ultimately enhances the benefits members can derive from membership in the various voluntary associations. The multiculturalism paradigm, on the other hand, stresses the *tension* between easy exit and the benefits of community life, enabling the claim that it is actually difficulty to exit from certain communities that enhances the benefits of membership. Discernible in the multiculturalism model is an underlying assumption that those communities that are easiest to leave and discard are of the least value to their members and vice versa, with the family unit serving as an acute example.⁷³ The multicultural conception thus stresses *barriers to exit* as a weighty factor in the unique goods and benefits derived from communal affiliation. Again, the difference described here is one of degree or emphasis rather than kind. The privatization model acknowledges the role that restrictions on exit play in preventing opportunistic behavior, enabling effective social cooperation for the attainment of mutually desired ends. Likewise, within the multicultural tradition, there is strong commitment to social mobility and to the effective ability of individuals to exit their communities. My claim, however, is that the former model stresses the role of exit as a mechanism for generating benefits, whereas the latter stresses the role of barriers to exit as a benefit-generating device.

The second distinction in the exit context, from a slightly different perspective, relates to the fact that the privatization model emphasizes the role of exit both with regard to the individual consumer and the social association at large, in the sense that ability to exit is also conceived as an important mechanism for transforming the normative apparatus of the relevant voluntary community and bringing it in line with consumer demand. The multiculturalism paradigm, in contrast, stresses exit in terms of its effect on the individual and underplays its effect on the community *nomos* at large, highlighting instead the role of voice mechanisms in group *nomoi* transformation. In other words, under the privatization model, exit (or non-consumption) is acknowledged as the dominant mode of registering consumer dissatisfaction as compared to voice. The a priori preference of exit over voice stems from the model's conception of individuals as consumers,

⁷³ Penalver, *supra* note 54, at 1911. For a critique of this view, see Dagan & Heller, *supra* note 44, at 56.

as well as from the ideal non-exclusivity of a single association in the lives of its members and the plurality of competing voluntary communities serving the same essential functions as suppliers of social ordering services. In other words, since consumers are not conceived of as attributing intrinsic value to affiliation with a particular association, dissociating from it and switching to a competing group may be more appealing than trying to impact and change the community apparatus from within. In accordance with the privatization vision, if the package of legal services offered by a particular voluntary community is not appealing to consumers, they may simply opt out and join a competing association. In the multiculturalism model, however, voice plays a more prominent role.⁷⁴ It offers the possibility of gradation and does not necessitate binary on-off decisions, characteristic of exit mechanisms. In a world in which detachment from the group carries with it intrinsic loss, members may opt a priori to remain in the community and change it from within rather than switch to an altogether new community.⁷⁵

Finally, the *particular characteristics* of cultural communities stand in stark contrast to the ideal of voluntary communal associations endorsed by the privatization model. Exit's less commanding position is reflected in the constraints on exit in the cultural community, by means of cultivating group solidarity and loyalty. These mechanisms constitute a deliberate external interference in individuals' lives, whose object is to bind them more closely together. The presence of loyalty mechanisms alters the character of exit, and transforms it from the legitimate rational mode of behavior of the alert consumer to illegitimate and dishonorable defection.⁷⁶ The weaker role of exit is also exemplified by the ascriptive nature of certain cultural communities. In certain cases, individuals can never leave the effective jurisdiction of the group and are considered members irrespective of their personal will to exit. For instance, under Jewish Law, one cannot convert out of Judaism. Moreover, in certain cases, one's ability to exit is rejected not only within the community but also outside the community walls. Such was the case with converted and secular Jews in Nazi Germany, who discovered that their attempts to exit their religious community were regarded as irrelevant by the Nazi regime.⁷⁷

Differences in the nature of the restrictions on exit further deepen

74 For a similar argument made with regard to the typology between social and economic property institutions, see Dagan & Heller, *supra* note 44, at 48 ("The closer a property institution is to the social pole, the greater the emphasis is on voice . . .").

75 See Green, *supra* note 51, at 170.

76 See Alexander, *supra* note 48, at 29.

77 Green, *supra* note 51, at 173.

the distinction between the multiculturalism model and the privatization paradigm. Barriers to exit under the latter model are impersonal and purely economic in nature, constituted by various forms of market costs. The strongest impediment emanates from pure monopoly situations, with other barriers including exit taxes, cooling-off periods, and mechanisms of delayed reward (options), as well as impairment to one's reputation as a market player (bad credit). In the cultural community, on the other hand, the individual's capacity to exit is limited by social costs⁷⁸ that derive from the socialization processes of community members and include sanctions aimed at harming the reputation of the individual as a social agent (as opposed to a market player).⁷⁹ These costs can be considerable, due to the all-encompassing nature of community affiliation and the link between religious, linguistic, or cultural affiliation and personal identity.⁸⁰

In addition to such direct social costs of exit, the cultural community typically imposes indirect costs, by impairing the individual's ability to derive benefits from potential affiliation with competing communities. Extreme examples include certain Jewish Ultra-Orthodox communities where members are raised in secluded environments, communicate solely in Yiddish, and do not acquire elementary secular education. Such individuals' ability to support themselves and lead high-quality lives outside of their community, should they choose to leave it, is dramatically impaired. These indirect costs exist above and beyond the direct familial and social costs entailed in separation from the Ultra-Orthodox community.

Another major point of distinction between existing forms of cultural communities and the ideal of social association under the privatization model relates to the choice-making process itself. Cultural communities tend to limit the information available to their members regarding alternative ways of life. This, too, can be exemplified in the Jewish Ultra-Orthodox community, through the significant isolation of its members from outside

78 These costs may also include costs to the community itself. According to Albert Hirschman, "In deciding whether the time has come to leave an organization, members, especially the more influential ones, will sometimes be held back not so much by the moral and material sufferings they would themselves have to go through as a result of exit, but by the anticipation that the organization to which they belong would go from bad to worse if they left . . ." HIRSCHMAN, *supra* note 71, at 98.

79 According to Hirschman, the social sanction may be directly imposed, but in most cases it is internalized. The individual feels that leaving the cultural community carries a high price, even though no specific sanction is imposed by the group. *Id.* at 98.

80 Green, *supra* note 51, at 172.

influences: The spiritual leadership prohibits owning television sets and other forms of home entertainment, bans the reading of secular newspapers, and forbids connecting to internet services. Working or being educated outside the community is also socially sanctioned. This produces a general lack of knowledge regarding the alternative ways of life outside the community, thus severely limiting community members' choice-making process.⁸¹ In other words, barriers to exit in cultural and identity communities are, in many cases, twofold: they both narrow the range of viable options open to community members and restrict actual choice-making.⁸² Of course, these two features are not conceptually linked to the theory of multiculturalism, nor are they internal to the paradigm. Nonetheless, they can be attributed, if only marginally, to the vision of legal decentralization endorsed by multiculturalism, since they tend to be de facto characteristics of many cultural communities.

B. Ontology of Law

The privatization of law model and the multicultural paradigm represent two opposing approaches to the essence of law, its sources, and its boundaries. As in previous sections, I apply in the following discussion of the law Lon Fuller's all-encompassing definition of the term: "the enterprise of subjecting human behavior to the governance of rules."⁸³ "Law" thus includes, inter alia, community norms, religious law, and the law of voluntary associations.

1. Law as an Instrument for Furthering Individual Ends Versus Law as a Locus of Moral Life

The privatization of law model advances a "market chosen"⁸⁴ vision of law. Law (or the portion of law subject to privatization) is conceptualized as a

81 Another acute example is the Amish community. Since the 16th century, members of the Amish community have remained consistent in their opposition to all forms of mass media — television, radio, and external newspapers, as well as to automobiles and other forms of transportation. This allows for the seclusion of followers from outside influences and for their isolation from information concerning competing ways of life. See JOHN A. HOSTETLER, *AMISH SOCIETY* (3d ed. 1980); DONALD B. KRAYBILL, *THE RIDDLE OF AMISH CULTURE* (1989); Rebecca Redwood French, *From Yoder to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law*, 41 *ARIZ. L. REV.* 49, 60 (1999).

82 Often, it is the weakest subgroups within the cultural community, such as the women, who face the strongest barriers to exit. For further discussion, see Susan Moller Okin, *Mistresses of Their Own Destiny: Group Rights, Gender, and Realistic Rights of Exit*, 112 *ETHICS* 205 (2002).

83 See FULLER, *supra* note 26.

84 Edward Stringham, *Market Chosen Law*, 14 *J. LIBERTARIAN STUD.* 53 (1999).

consumer good, as the contractual product of voluntary, individual choice. The legal norm that is formed to govern a certain human interaction embodies a coincidental meeting-point between converging choices that are singular and individual by nature, choices that are fundamentally structured around the dichotomy of "to consume or not to consume." Legal rules are perceived as analogous to other economic goods, such as clothing or credit services, the demand for which constitutes an aggregation of detached, atomistic converging choices. Moreover, under privatization of the law, individuals would choose among alternative legal regimes by employing a logic similar to consumer choice logic. The privatization paradigm conceives law as "facilitative," and the infusion of "value" into the law as solely transactional: law is conceptualized as a product of preference and as a realm for the expression of subjective particularistic visions of the good life, however idiosyncratic. Law is not considered a sphere for the collective elucidation of conflicting notions of justice. It is end-neutral in the sense that it does not seek to promote collective conceptions of the good life. In choosing a legal regime, each individual is guided by his own preferences, idiosyncratic ends, or subjective morality, and his interactions with others are analogous to "foreign affairs" relations.⁸⁵ In other words, under the privatization model, law is perceived as an institutional embodiment of the individual's sovereignty and as a sphere for individualistic decision-making, based upon a utilitarian calculus of self-interest or subjective particularistic notions of the good life.

Under the multiculturalism paradigm, in contrast, law is conceived of not only as an institution delineating or demarcating the lives of individuals together, but also as a locus of collective moral judgment. Law is conceptualized as a sphere for the communal elucidation of conflicting visions of the good life and the expression of the shared judgment.⁸⁶ The enterprises of adjudication and legislation — the creation of a normative world — are considered collective processes under this paradigm; they are components of the "communal life"⁸⁷ of the community. This is not to say that the multicultural understanding of law demands that jurisgenesis result from a democratic, deliberative, and reasoned decision-making process by community members (or by their vast majority). The source of law may very well be tradition or may translate from a particular spiritual leader's "revelation" with regard to "the will of god" or the good life. However, the

85 For a similar description with regard to liberalism, see Mark V. Tushnet, *Following the Rules Laid Down*, 96 HARV. L. REV. 781, 783 (1983).

86 ROBERT NOZICK, *THE EXAMINED LIFE: PHILOSOPHICAL MEDITATIONS* 286 (1989).

87 Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 492 (1989).

process of lawmaking is engaged in by such individual members only by virtue of their capacity as "representatives of the community personified."⁸⁸ Lawmaking is not something individuals carry out in their private capacities.⁸⁹ The roles individuals play within the community's lawmaking enterprise may be singular in character, but they are pieced together by the collective normative commitments of the community at large.⁹⁰ According to the multicultural conception of law, the social and collective nature inheres in its ontology. In addition to its innate collective quality, law is also conceived by the multicultural tradition as an object of value. The sine qua non of law is the fact that it expresses the community's constitutive morality. Of course, the assertion that infusion of value is a constitutive feature of law is a normative, rather than descriptive, claim. The argument is not that law actually reflects the social value scale or that it expresses communal morality standards, but that such reflection is a central feature in the ontology of law. Thus, in sum, there is room to understand the multiculturalism paradigm as conceptualizing law ultimately as an embodiment of the community's sovereignty and as a sphere for collective judgment of the good life.

2. *Law as Meaning Versus Law as Order*

The multiculturalism model rejects the notion of law as a product of individual choice in yet another respect: from the multicultural perspective, law, in its broad sense, cannot be conceptualized as the subject of individual choice, for it conceptually precedes such choice. The underlying assumption is that without law, there would be no meaningful categories of choice. Law creates categories of meaning such as "theft," "sin," and "breach of contract" and categories of identity such as "husband-wife" and "landlord-tenant." By asserting significance with regard to certain human and social interactions (and disregarding others), law creates a conceptual framework within which human consciousness and categories of choice are formulated. Law defines the individual subject, functions as "the unexperienced basis of experience,"⁹¹ and thus serves as a prerequisite for the intelligibility of individual choices. Law is perceived as a constitutive component of the human consciousness toolkit and serves as a setting without which individuals would not have the capacity to choose, feel, or judge. Since it is the frames of legality that set

⁸⁸ Gardbaum, *supra* note 45, at 743.

⁸⁹ *Id.* at 743.

⁹⁰ For a similar claim, see Cover, *supra* note 40, at 10.

⁹¹ Robert Justin Lipkin, *Can Liberalism Justify Multiculturalism?*, 45 *BUFF. L. REV.* 1, 23 (1997).

the ground rules for human cognition and generate categories of meaning and choice, law cannot be said to be the sheer product of such individual choice.

From a wider perspective, it can be argued that, within the multicultural paradigm, beyond being a system of rules, law is conceptualized as a system of meaning. Law is perceived as a mechanism for merging sporadic, diverse, occasionally conflicting fragments of narratives and normative schemes into a meaningful comprehensible *nomos*.⁹² Law organizes the complexity of normative commitments and integrates them into a coherent voice, thereby endowing them with meaning.⁹³ In addition, as discussed above, under the multicultural paradigm, not only does law consolidate and reflect the community's shared value scale, but it also plays a central role in constituting human cognition and serves as a filter through which human beings, subject to the rule of law, understand and experience the world around them.⁹⁴

Under the privatization of law paradigm, however, law is conceived of as merely a system of rules to be observed, not as a normative world that one inhabits.⁹⁵ The privatization model rejects the very assumption underlying the "law as meaning" argument, according to which human ordering can be reduced to any sort of unity.⁹⁶ The privatization model promotes modes of social interaction in which people may simultaneously be subject to a rule prohibiting a particular form of action and to a rule permitting that conduct. A possible scenario under the privatization model is that a woman is prohibited from terminating her pregnancy with regard to *A*'s fetus, but permitted to abort with regard to *B*'s fetus, for she can arrange her relations vis-à-vis *A* by one set of rules and her interaction with *B* by another. Likewise, the privatization paradigm allows for one set of rules that relate to interaction with community members, while interaction with non-members is subordinated to a strikingly different legal rule. It is, however, precisely this ability to effectively choose each legal rule and dismantle the bundles of social ordering that negates the meaning-creating capacity of law. The de-bundling mechanisms embedded in the law, under the privatization conceptualization, relieve of the need to prioritize — to create a clear hierarchy between different sets of normative

92 Anna-Maria Marshall, *Communities and Culture: Enriching Legal Consciousness and Legal Culture*, 31 *LAW & SOC. INQUIRY* 229, 237 (2006).

93 Thus enabling those subject to it both to communicate with others and to distinguish themselves from others (law as identity).

94 Marshall, *supra* note 92.

95 Lipkin, *supra* note 91, at 6.

96 See Andrew J. Cohen, *Does Communitarianism Require Individual Independence?*, 4 *J. ETHICS* 283, 297 (2000) (citing ALASDAIR MACINTYRE, *AFTER VIRTUE* 213 (2d ed. 1984)).

choices. In the absence of such a prioritizing process, it is impossible to derive a clear narrative pattern from any set of eclectic normative choices. Law remains fragmented and pluralistic in nature, irreducible to a single consolidated meaningful discourse.

C. The Human Subject

1. *Constituted Self Versus Choosing Self*

The multiculturalism model and the privatization of law paradigm also diverge in terms of their respective conceptions of the impact of people's social relationships on their constitution as subjects or agents. The multicultural paradigm posits a vision of the individual as inherently bound to others, not merely out of explicit choice. This vision is broadly premised upon a metaphysical assumption regarding the nature of personhood, that the very existence of human life is contingent upon a social matrix. Absent social structures, one loses one's personhood — one's capability to lead a life that is human — and cannot constitute a person or a self.⁹⁷ A central axis of this social constitution thesis is the notion that the unique quality of human life originates from humankind's distinctive mode of communication: articulate language. Language can only be acquired through social interaction. The unique capacity of human life thus depends on social relatedness. Human existence and human consciousness are inconceivable without social interaction and cannot arise in a social vacuum.⁹⁸ Based on this view, multiculturalism sees social life as operating under a logic of "associative obligation."⁹⁹ Community members are conceived of as prizing certain moral obligations or religious duties towards fellow community members by virtue of the former's social roles in the community and irrespective of actual deliberate consent. According to Dworkin, role obligation is a constitutive feature of a "true community" and includes the following conditions: members regard group obligations as holding specifically with regard to community members, as opposed to the public at large. These obligations are perceived as personal; they emanate from the responsibility one bears for the general well-being of fellow community members.¹⁰⁰

In contrast, the protagonists in the privatization of law model are consumers; in other words, they are agents of choice.¹⁰¹ Individuals are

97 *See id.* at 285.

98 Cox, *supra* note 38, at 405.

99 Gardbaum, *supra* note 45, at 745.

100 Dworkin, *supra* note 87, at 488.

101 Cohen, *supra* note 96, at 287.

considered, or usefully conceptualized, as "antecedently individuated,"¹⁰² as not inherently bound to others. The model emphasizes the choice-making capacity of individuals¹⁰³ — agency rather than structure — prizing the extra-linguistic and extra-social essence of individuals, merely reflected (as opposed to created) by their language and community affiliation.¹⁰⁴ In the privatization paradigm, social duties and obligations emanate from express choice only. The model basically reduces social obligations between individuals to the market-driven reciprocity expressly built into their relationship, as opposed to notions of group solidarity.¹⁰⁵ It offers a distinct way of piecing society together, different from the social relations and mechanical solidarity advocated by the multiculturalism model.¹⁰⁶ Social life is conceived in a contractual manner, with human interconnectedness conceptualized as deriving from the division of labor and the interdependence of the utility functions of various individuals and community members.¹⁰⁷ In this model, each individual regards all other members (and the association at large) as a useful means for attaining her personal ends¹⁰⁸ and is armed with rights to shield herself from fellow members.

In sum, the privatization model depicts individuals as bound together by their efforts at realizing individual ends, while kept apart by their rights as members of voluntary associations (since such rights are essentially perceived as mechanisms that preserve their ability to disassociate from others). The multicultural paradigm, on the other hand, views the rights of community members essentially as mechanisms of association with others (for they correlate with communal duties),¹⁰⁹ while members' individual, subjective ends are seen as factors that tear them apart.

2. *Instrumental Versus Intrinsic Value to Human Interconnectedness*

From the multicultural perspective, social interactions are considered valuable not simply due to the widening of the individuals' spectrum of choice or the goods that they enable individuals to acquire, but because such

102 MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 152 (1996).

103 *See id.* at 12.

104 Lipkin, *supra* note 91, at 34.

105 Alexander, *supra* note 48, at 42.

106 For further discussion of the "organic solidarity" versus "mechanical solidarity" dichotomy, see EMILE DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* 37 (1893).

107 Parchomovsky & Siegelman, *supra* note 47, at 80.

108 For a similar distinction, see Dworkin, *supra* note 87, at 484.

109 RONALD DWORKIN, *LAW'S EMPIRE* 199 (1986).

interactions pave the way for engagement in self-expressive activity that cultivates and enriches the individual.¹¹⁰ In other words, social interaction and the participation in common undertakings are regarded as intrinsically good. They are conceived as ends in their own right, as benefits irreducible to the singular contributions of individuals, distinct from the individual purposes they facilitate.¹¹¹

Under the privatization of law model, on the other hand, social life is conceived in instrumental terms. Social collaboration is considered a tool for attaining ends that are primarily exogenous and individual, not as an end in and of itself.¹¹² It bears no value beyond the individual contributions of particular people. Individuals do not ascribe inherent value to social interaction in general, nor to any particular social attachment. They lose nothing intrinsic by achieving certain ends individually as opposed to by collective means, and likewise, there is no intrinsic loss entailed in trading one social attachment for another.¹¹³

CONCLUSION

In the framework of this Article, I have sought to lay the preliminary groundwork for a normative dialogue between two possible models of legal decentralization — the multiculturalism model and the privatization of law paradigm. I have attempted to sketch the analytical boundary lines setting these two decentralization schemes apart, and to ground the claim that they represent two antithetical ontologies, insofar as their fundamental conceptions of the law and the subject are concerned, as well as in terms of their notions of which social agent should be delegated the state law-producing function. The path is still long, but in my opinion, comparing, confronting, and conducting a dialogue between these two models are most crucial when considering legal decentralization. As I have sought to stress throughout, the question is not only one of decentralization versus centralization of the law, but, also, decentralization to what entity, to what sort of legal agent?

Another possible direction the comparison of the extreme forms of

110 See NOZICK, *supra* note 86, at 287.

111 The value of cooperation is synergistic rather than aggregative. See Dagan & Heller, *supra* note 43, at 572 n.99.

112 Penalver, *supra* note 54, at 1900.

113 Mautner, *supra* note 28, at 546 (quoting MICHAEL LUNTLEY, REASON, TRUTH AND SELF 151, 152, 173 (1995)).

the two decentralization paradigms can take is to stimulate a process of internal reflection within each school of thought, by addressing their more moderate versions — namely, communitarian libertarianism and individualistic communitarianism.

Finally, contrasting the two models sheds light on the problematic nature of private social coercive systems and on the relative lacuna in this context in libertarian literature: Libertarians have focused primarily on the coercive power of the state while marginalizing the coercive power of cultural communities. Due to the fact that cultural communities are typically characterized by an element of choicelessness, alongside the additional characteristics hereto discussed, such social groups pose a threat to the individual's freedom no less than the state agent does. Thus, another path of research that the discussion in this Article facilitates touches upon the question of integrating the state into the picture: Assuming that restraining the cultural community and the private-social coercive power at its base mandates a more sweeping application of state coercive force, it is necessary to reflect on the appropriate balance between private and state coercion, and to define the role of the state and its margin of operation in this context.¹¹⁴ In other words, the comparison between the two alternative visions of legal decentralization offered by the privatization of law model and multiculturalism is not restricted in its application to the question of which decentralization scheme is preferable, but rather also brings us back to the preliminary "decentralization versus centralization" debate.

¹¹⁴ See also Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 220 (1937).