

1989

## The Crisis of Private Law is Not an Ideal Situation

Kenneth M. Casebeer

*University of Miami School of Law*, [casebeer@law.miami.edu](mailto:casebeer@law.miami.edu)

Follow this and additional works at: [https://repository.law.miami.edu/fac\\_articles](https://repository.law.miami.edu/fac_articles)

 Part of the [Labor and Employment Law Commons](#)

---

### Recommended Citation

Kenneth M. Casebeer, *The Crisis of Private Law is Not an Ideal Situation*, 10 *Cardozo L. Rev.* 1001 (1989).

This Article is brought to you for free and open access by the Faculty and Deans at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# THE CRISIS OF PRIVATE LAW IS NOT AN IDEAL SITUATION

*Kenneth Casebeer\**

Professor Alan Brudner's paper presents an extraordinarily detailed explication of the *Philosophy of Right* in terms of contemporary private law jurisprudence.<sup>1</sup> I admire and would adopt his superb deployment of Hegel as critique of the incoherence and instability of libertarian justifications of the morality and content of rights, and of liberal-Kantian views of public good in tension with pluralism. I do not intend to follow him through the briars of Hegel's paragraphs; rather, I will take issue with the aims of his paper and the claims made for his results.

Professor Brudner intends to show how Hegel's definition of the good as self-realization assumes and subordinates an understanding of individual rights, generating both negative rights of noninterference and positive duties of mutual care.<sup>2</sup> Further, it turns out that the public version of this good appears dialectically in the constitutive individual wills which manifest their freedom in the form of correctly understood contemporary North American private law doctrine.<sup>3</sup> This happy circumstance solves the current conceptual crises wrongly imposed on private law, restoring the autonomy of its discourse. According to Professor Brudner, these crises are first, the reduction of doctrine to surface rhetoric built on the ideology of microeconomics, and second, the indeterminacy of case law demonstrated by Critical Legal Theory which is caused by a continuous shifting between the opposed goods of self-interest and community welfare. These arguments represent conceptual crises for private law—in the first instance by removing law's conceptual autonomy, in the second instance by rendering law morally incoherent, and in both instances by destroying

---

\* Professor of Law, University of Miami School of Law. A.B., 1971, Georgetown University; J.D., 1974, Harvard University Law School.

<sup>1</sup> Brudner, Hegel and the Crisis of Private Law, 10 *Cardozo L. Rev.* 949 (1989)

<sup>2</sup> See *id.* at 975:

The right to self-determination implies a right to the goods needed by everyone to ensure that action realizes self-chosen projects. Conversely, welfare becomes the object of moral concern not as the satisfaction of contingent preferences but as the realization in each individual of the human capacity for intentional action. This synthesis of welfare and abstract right Hegel calls the good.

<sup>3</sup> "Hegel's philosophy of private law seems to account for the evolution of common-law rights of welfare in a way that coherently preserves the transactional basis of private law." *Id.* at 998.

the separation of law and political choice necessary to justify and guide neutral adjudication.

The important question is not whether Professor Brudner's argument adequately represents Hegel, but whether *contemporary* Hegelian analysis can and should adopt these positions. Professor Brudner's enterprise is Hegelist. He argues that Hegel in some sense anticipates and legitimates the contemporary evolution of private law doctrines. Yet a Hegelist position need not, and should not, be congruent with Hegelian ideas and agendas.<sup>4</sup> I argue that the legal theory we have been offered (by Professor Brudner) is not the legal theory we need. Therefore, the quest for the legitimation of private law as the archetype of law is a mistaken and harmful Hegelian enterprise.<sup>5</sup>

I will make three arguments: First, the proposed resolution of the conceptual crises in private law assumes an individualist will that searches for confirmation in exchange. This assumption is counterfactual to the modern human condition of interdependence. Thus, while it may be true that Hegel locates reciprocity in contract, contemporary notions of mutual constitution cannot be so restricted.<sup>6</sup> Second, since the crises of private law are a set of crises rooted in the material conditions of society, they cannot be resolved in ideal terms. Third, the separation of law and politics necessary to preserve adjudicative neutrality cannot be maintained either as a matter of form—the limitation of bilateral disputes based on legalized relations—or as a matter of substance—the opposition of public and private realms of self-realization. Thus, all three arguments can be stated as “Neo-Hegelian” objections to the Brudner/Hegel justification of private law.

I will develop these arguments in reverse order and in service of a quite different, modernist worldview than Professor Brudner's. In capsule, this view holds that the legal theory we need should respond to the modern, human condition of an artificially constructed social life, in which, in principle, the world can be explained in innumerable ways. The tendency to radical subjectivity in such a world negates

---

<sup>4</sup> This form of distinction is more explicit and familiar between Marxist and Marxian arguments. To the extent some marxian terminology employed in the Comment calls for further reference, see T. Bottomore, *A Dictionary of Marxist Thought* (1983).

<sup>5</sup> This Comment is generally directed at many of the papers presented at the Hegel and Legal Theory Symposium, particularly those of Professors Weinrib and Benson. See Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 *Cardozo L. Rev.* 1077 (1989); Weinrib, *Right and Advantage in Private Law*, 10 *Cardozo L. Rev.* 1283 (1989). For a fuller development of this criticism, see Hyland, *Hegel: A User's Manual*, 10 *Cardozo L. Rev.* 1735 (1989).

<sup>6</sup> For an example of a nontransactions-based notion of such Hegelian constitution, see Casebeer, *Work on a Labor Theory of Meaning*, 10 *Cardozo L. Rev.* 1639 (1989).

itself in the recognition of selves in mutual interdependence of meaning and of material conditions. Further, given such mutuality, the production of meaning or knowledge under circumstances of action no different from the production of material conditions destroys the ability to separate civil society from the realm of politics, and thus the ability to save the judges from responsibility for their own subjectivity. Under such assumptions, judges must either assume a duty to emancipate the individual from legal forms of alienation or abdicate their claims to legitimate social practices through adjudication.

### I. LEGAL POLITICS

Professor Brudner begins his paper by lamenting the standard postdepression publicization of the contract or exchange basis of private law—for example, strict liability and socialization of risk in tort law, unconscionability and mistake in contract law, and public welfare easements on property rights of various kinds. Publicization destroys the distinctiveness of private law discourse which appeals “exclusively to a commonality between persons who recognize no good or end as uniformly theirs, and whose interactions are therefore those of self-interested monads.”<sup>7</sup> It is precisely this bleeding of public good or distributional concerns of the welfare state into actualization of private will, that destroys the ability of judges to avoid political choices in private law or to believe that adjudication can be limited to a test of bilateral interests. Professor Brudner blames this development on the conceptually doomed attempt to begin legal argument with an understanding of the public good, whose purpose is to ground a morality of private right—which in turn can account for a communal regard for the rights of other’s formally equivalent opportunities.

The public good argument attempts to prevent a collapse of social behavior into the war of “all against all,” or the subordination of natural rights into the interests of the stronger, which a purely individualized self-regarding moral system eventually produces. While laudable in intent, the resulting conceptual problem is the instability of the system’s teleology. The relation of the independently defined public good to the interests of the rights holders continuously vacillates between public and private interest. Worst of all, according to Professor Brudner, “instrumentalist theories of law, while entirely comfortable with legal doctrines imposing positive duties of social responsibility, have no principled means of stopping them from bursting

---

<sup>7</sup> Brudner, *supra* note 1, at 950.

the transactional framework of private law."<sup>8</sup> Professor Brudner, however, believes a more adequate notion of public good—that is, self-realization—can subordinate a notion of individual rights manifest in transactions under the shadow of a private law, in which the good never appears but is known by its necessary absence. In this way, positive duties of regard for the projects of others exist insofar as transactions are promoted, but stop short of requiring the sacrifice of one's own programs for the pure benefit of another or an amorphous community. Thus, while under present doctrine the publicized notions of mistake or unconscionability fail to gain stability and are extended in tension with transactional norms, Professor Brudner's reprivatized notions claim to escape both consequences.<sup>9</sup>

Initially, as a description of the present state of private law discourse, notice that Professor Brudner has created precisely the same straw figure as some critical legal scholars, who have been content just to demonstrate the indeterminacy of the public-private distinction.<sup>10</sup> The dominant liberal legal theory centers on the separation of a universal citizenship in the shared sphere of public good from the personal maximization of private interest. However, both the critics and the target share the identity implied in their combined assumptions. Whether the aim is Professor Brudner's depiction of a contaminated private law, or the critical theorists' demonstration of the dependence of private interests on public legitimation and subsidy, the public-private distinction is also a necessary fiction. Professor Brudner wishes to reestablish the separation of civil society from the political state on a nonliberal basis, whereas some critical legal arguments aim to redefine or politicize it. Both, however, conceptually depend on the meaningfulness of the public-private distinction as that by which their argument is known.

---

<sup>8</sup> *Id.* at 997.

<sup>9</sup> See *id.* at 999:

From the perspective of Hegel's thought, these principles [of self-determination] represent, not a break with contract, but rather the bringing closer to its own notion of an institution whose initial shape contradicted the project it was intended to realize. That is to say, the enforcement of these principles actualizes the self-determination of the agent by revoking on various fronts the alienation of self that was sanctioned under the regime of abstract right. Such an enterprise in no way entails the subordination of contract to amorphous considerations of communal solidarity, for rights of intentionality, no less than the formal rights they subsume, actualize the causality of the individual agent.

<sup>10</sup> See *id.* at 949 n.2, 955 n.22. For criticism of indeterminacy, see Yablon, *The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation*, 6 *Cardozo L. Rev.* 917 (1985). Like all glib reductions, this tendency has few specific examples. Traces of the position may be found in *A Symposium—The Public/Private Distinction*, 130 *U. Pa. L. Rev.* 1289 (1982).

In making my third argument, that law and politics cannot be separated, I argue that both Professor Brudner and some critical theorists have identified a surface rhetoric, or conventional wisdom, as the critic's target or the obstacle to a regained purity. What appears as impurities in the system or indeterminacy, however, defines only a rhetorical surface of legal relations. This is not to suggest that legal reasoning is in fact determinate or can be made so, but rather that locating the source of indeterminacy in the public-private distinction is mistaken because such criticism yields—and lends credibility to—reform attempts along the lines of Professor Brudner's. To the contrary, structuring the relational surface is the rationalizing of an underlying social structure or structures. Rather than a public-private distinction, contemporary law *already* embodies a private-public unity serving as a discursive arena in the reproduction of a particular social type—the capitalist democracy. To be clear, social conflict over the structuralization of such a society appears derivatively in the social relations articulated in the legal surface. However, these indeterminacies are known and bounded by their appropriateness to the struggle constructing the particular social type. If this conceptual unity, perhaps one of many, beneath the surface of doctrinal rhetoric can be illustrated, a bounded indeterminacy is reestablished. First, even if Hegel's self-realization could provide a determinate idealization of transactional autonomy, judges would still choose between that autonomy and the autonomy of a private-public unity in the service of reproducing a particular social type; hardly an idealized project, and certainly political.

The indeterminacy of private interest and communal good would simply have been replaced by the indeterminacy of self-realization within a civil society separated from the state by which it is known, which is Professor Brudner's position, versus the reproduction of capitalist organization within the state. Indeterminacy and the politics of legal reasoning are just kicked upstairs. Second, since the autonomy of private law depends on a reinvention of its determinacy, competing visions of private law which supercede the conceptual stage of public good priority over libertarian private interest suggest a third alternative possibility of self-realization knowing itself in a mutuality outside private bilateral transactions. Autonomy of discourse at a higher level of abstraction does not necessarily reduce the politics of competing visions of free action.

Regarding the first objection, American work law<sup>11</sup> illustrates

---

<sup>11</sup> By "work law" I am referring to all of the doctrine related to the employment of individuals, not simply doctrine dealing with collective bargaining.

the present unity of private and public interest—a unity which both predates and postdates the so-called sea change in the publicization of American law during and following the 1930s, and therefore cannot be explained by that change. Further, if only the relational surface of law—which is doctrine—changes, but not the normative functional connection between the social meaning embedded in the conceptual structure of law and the social actions constituting the history of a particular society, two additional results are implied: First, if doctrinal analysis remains relational then political opposition to present law is rendered legally more manageable. Whether the reform of liberal legal doctrine stems from an ideology of rights or communal good, the seduction in the legal surface of social relations promises to subsume the reform in new indeterminacies of relational rhetoric. Second, the contribution of legal consciousness to repressive conditions is underestimated by a double mask: First, the liberal public good-private right distinction is too easy a target. Its deconstruction is like exploding a barrage balloon, insofar as few employers deny that the public subsidy of private investment represents a public sphere defined by competition of interests for the imprimatur of common good. Second, the linkage of legal-social relations and self-realization as the fulcrum of change ignores the barriers to reconceiving social relations absent social control over the construction of power which appears as the conceptualized social structure antecedent to selves in relation. This is important because the dialectical surface opposition of private and public, or civil society and state, by failing to explain its own deeper consciousness prevents a reimagination of the actual opposition of individual and social wills.

To proceed, it is first necessary to define the difference between the relational surface defined by the liberal public-private distinction and the underlying structure of legal consciousness defined by a private-public unity.<sup>12</sup> The modern American constitutional law scholar uses *Coppage v. Kansas*<sup>13</sup> or *Lochner v. New York*<sup>14</sup> as the classic statement of the public-private distinction—that is, the model of an airtight separation of private law and public law. Professor Brudner describes this argument as the libertarian or private-rights generated morality attacked by Hegel's critique. The *Coppage* of the casebooks stands for the premises of the traditional liberal political system: (1) Personal liberty and property should be pursued within the self-

---

<sup>12</sup> For a more detailed initial development of this argument, see Casebeer, Teaching an Old Dog Old Tricks: *Coppage v. Kansas* and At-Will Employment Revisited, 6 Cardozo L. Rev. 765, 768-783 (1985).

<sup>13</sup> 236 U.S. 1 (1915).

<sup>14</sup> 198 U.S. 45 (1905).

interested control and alienation consistent with preserving a like liberty for all, (2) public interferences with private resource allocation through contract are therefore the minimum interventions necessary to preserve like liberty for all and constitute the duties of universal citizenship, and (3) it is perverse to suppose that a deployment of public rules would aim at redistribution of privately acquired property interests.

In fact, Justice Pitney in *Coppage* structures his reasoning quite differently. The nature of his social vision revolves around four different premises which define natural social relations as the quintessential at-will employment contract. In this type of employment relationship, each side is and should be free to quit at any time for good reason, bad reason, or no reason at all.<sup>15</sup> Pitney's four premises define two pairs, each with an economic and a legal content. The micro-relation pair holds: (1) Each side of a social relation must be permitted the maximum mobility of their labor and their capital (the economic principle of free labor) and (2) Maximum mobility is preserved by legal enforcement of contracts of mutuality of obligation. This is the legal recognition of the first principle. The macro-social interest pair holds: (3) The public interest lies in maximized production at minimal cost, which occurs by private exchange organization of social relations and yields maximum consumption (the economic principle of a consumption oriented division of labor) and (4) Strict enforcement of the mutual and express obligations of contract is distributionally neutral, given and in service of social interest. This is the legal recognition of the first and third principles. There is nothing of universal citizenship driving this social vision, and no public-private *distinction*. The public interest is simply derivative of aggregate or generalized private interest, and civil society does not represent a separate sphere in which the individual will manifests its partiality from the universal.

Oliver Wendell Holmes, a supposed precursor of the modern sea change of constitutional law, and therefore all doctrinal categories defined by the public-private distinction, dissented from the Massachusetts bench in 1896 in *Vegeahn v. Guntner*, a union civil conspiracy case, writing: "One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital,

---

<sup>15</sup> On the origin of the at-will discharge rule, see H.G. Wood, *A Treatise on the Law of Master and Servant* 157-58 (1877 & photo. reprint 1981); *Payne v. Western & Atl. R.R.*, 81 Tenn. 507 (1884), overruled, 179 Tenn. 527, 179 S.W. 134 (1915).

to get his services for the least possible return."<sup>16</sup> Understood in this way, Holmes's celebrated *Lochner* dissent does not argue for an independent public good from which to critique the avarice of private right, but rather the recognition that the private-public unity can be equally pursued through individual contract, collective contract, or via voting interests, that is, through social contract. Thus, the landmark of the constitutional change, *West Coast Hotel Co. v. Parrish*,<sup>17</sup> defines less the primacy of the good over the right—Professor Brudner's source of modern private doctrine impurities—but rather the extension of Holmes's version of *Coppage*.

*West Coast Hotel* begins with public good rhetoric: "[T]he liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. . . . [R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."<sup>18</sup> Although this seems to document Professor Brudner's case, the key question of community interest translates into the extension of private interest—specifically, that employers should not exploit the temporary oversupply in the labor market to drive wages below the "bare cost of living," that is, the cost of reproducing the labor supply:

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers.<sup>19</sup>

The problem with some rogue employers is that by physical or economic force they coerce bargains inconsistent with free labor and free capital mobility, destroy mutuality, and interfere with the long term ability to organize an exchange relation division of labor for maximized social consumption.<sup>20</sup> What we have is less a sea change than the same conceptual private-public unity of *Coppage*. Thus, constitutional law does not provide a clear source of public-good values to infuse into private transactional law. Further, even this derivative public good fails to make the same mark in work law that it seemingly

---

<sup>16</sup> *Vegeahn v. Guntner*, 167 Mass. 92, 108, 104 N.E. 1077, 1081 (1896) (Holmes, J., dissenting).

<sup>17</sup> 300 U.S. 379 (1937).

<sup>18</sup> *Id.* at 391.

<sup>19</sup> *Id.* at 399.

<sup>20</sup> C.B. MacPherson, *Political Theory of Possessive Individualism* 194-262 (1962).

does in the context of unconscionability and mistake within contract doctrines for sales of goods.

Contract doctrine is now less contract doctrine with a capital C, than a set of contract doctrines memorialized, for example, in the different articles of the Uniform Commercial Code translating the separate customs of the different product and service markets into separate doctrines. Yet, the contemporary work law continues to reject the Restatement of Contracts in employment contracts, rejects strict liability, and maintains various discarded assumption of risk doctrines in torts involving work and workers. The law of work, no matter what assumptions are conveyed by first-year law school curricula, is simply not a law of contracts or torts or property simpliciter. Moreover, work law's basic doctrines continue virtually unscathed before and after the supposed publicization revolution. This must prove an embarrassment to any Hegelist argument which attempts to gain currency by fitting contemporary private law.<sup>21</sup> First, there is more than one private law of transactions. Second, the difference is not explained by the differential or partial acceptance of various arguments of public good overriding libertarian right.

A prominent example of the difference between contracts for goods and labor concerns the interpretation of permanent employment contracts or contracts for life. Section 79 of the Restatement (Second) of Contracts is basic first-year law—"If the requirement of consideration is met, there is no additional requirement of a) a gain . . . to the promisor or . . . detriment to the promisee; b) equivalence in the values exchanged, or c) mutuality of obligation."<sup>22</sup> Yet, a permanent employment contract is indefinite and therefore at-will unless all three banished elements are present. From *Rape v. Mobile & Ohio Rail Co.* in 1924:

It may be said to be the established rule that want of mutuality of obligation will not render a contract of employment unenforceable if it is supported by an independent consideration, that is, a consideration other than the obligation of service to be performed on the one hand and wages to be paid on the other; but we think the correct rule . . . is that a contract for permanent employment which is not supported by such independent consideration is terminable at

---

<sup>21</sup> At times it is unclear whether Professor Brudner's normative argument depends upon vindicating the evolution of modern private law from classic private law. However, the example of work law at least destroys a determinate evolution of private law even if Professor Brudner's reconceptualization is not dependent on fitting any particular version of private law. It seems quite clear that this example greatly damages the argument of Professor Benson. See Benson, *supra* note 5.

<sup>22</sup> Restatement (Second) of Contracts § 79 (1981).

the pleasure of either party.<sup>23</sup>

Despite the constitutional revolution and the accompanying publicization of commercial contracts, the post-*West Coast Hotel* permanent employment rule has remained unchanged.<sup>24</sup>

What is to be made of this bifurcation in contract law? Professor Brudner might argue that this example shows only that the priority of the good over the right displaces the libertarian collapse gradually and imperfectly, and fails to provide a determinate solution to social conflicts across differing relational conflicts.

Professor Brudner's argument is an unlikely explanation for two reasons. The first is because of the uniformity of doctrinal divergence between contracts of work and contracts for goods. Once legal theory in Professor Brudner's terms has evolved a publicization of contracts for goods, the sphere of contracts for work which has been *systematically* left untouched must be known by virtue of the role of contracts of work within a new legal totality: synthesis cannot return to past thesis. Contracts for goods are enforced largely with the welfare and consumer interest overrides characterized by contemporary "public" law, while contracts for work reject this form of public interest. Work law rejects any public, prescriptive property right of easement in a particular job based on seniority or implied investment.<sup>25</sup> Work law preserves assumption of risk defenses on the theory that wages include risk compensation—sometimes even in states whose comparative fault system has rejected assumption of risk in all other tort settings.<sup>26</sup> Work law constructs postdepression federal regulations of employment such as minimum wage, collective bargaining, and unemployment compensation, not to cover employees as the class of individuals necessary to accomplish the benefit defined by an independent public good, but rather to cover those employees who are not independent contractors.

Federal regulation of employment maintains and facilitates private organization of work by either distinguishing between workers who provide wealth for themselves under the conditions of risk from workers who produce wealth for others,<sup>27</sup> or by regulating rogue employers whose discrimination disrupts the mobility of the labor pool.<sup>28</sup> Even the so-called revolution of individual employment contract—the

---

<sup>23</sup> *Rape v. Mobile & Ohio Rail Co.*, 136 Miss. 38, 42-43, 100 So. 585, 588 (1924).

<sup>24</sup> See, e.g., *United Sec. Ins. Co. v. Gregory*, 281 Ala. 264, 201 So. 2d 853 (1967).

<sup>25</sup> *Charland v. Norge Div., Borg-Warner Corp.*, 407 F.2d 1062, cert. denied, 395 U.S. 927 (1969).

<sup>26</sup> *George v. Beggs.*, 1 Kan. App. 2d 356, 564 P.2d 593 (1977).

<sup>27</sup> *NLRB v. Associated Diamond Cabs*, 702 F.2d 912 (1983).

<sup>28</sup> *Spirides v. Reinhardt*, 613 F.2d 826 (1979).

public policy exception to at-will discharge, supports this singularity. With the aberrant exception of California, jurisdictions which have adopted public policy exceptions, first, generally sound the action in contract, limiting damages; second, limit the exception to the rogue employers whose personal abuse of workers reduce the social benefit of maximum production, or who cover-up illegal activity; and third, retreat from broad public policies as soon as they are established to a position consistent with maximum mobility of free labor and free capital, at best including Holmes's long range view of efficient labor markets.<sup>29</sup> Moreover, the perpetuation of the at-will contract as the primary legalization of the employment relation is facilitated by removing the need for employers to protect themselves, contractually, against fluctuations in the labor market. This is done by publicly gearing the eligibility standards of unemployment compensation to changing skill needs in relation to a reserve labor pool, and by the advantage of the at-will contract in a segmented labor market in which secondary and tertiary labor pools are increasingly satisfactory to the division of labor inside the firm.<sup>30</sup>

The second reason Professor Brudner will find the partial transition from right to good based norms unsatisfactory to explain the divergence in contract law, is that the indeterminacy of surface or relational rhetoric in work doctrine—or between work and goods contracts—is itself structured as a manifestation in legal consciousness of social structure. Legalization of the division of labor necessarily assumes the insulation of the legality of investment decisions from employment relations. To the extent that legal discourse is semi-autonomous, this is what actually represents the conceptual autonomy “private law” never lost. With the reproduction of a particular social type, differences in the organization of transactions is contingent and derivative of social and political practices. Thus, the partial infection of the law of exchange relations is not random or lagging, but is related to differences in market structures organizing social resources. Justice Lewis Powell in *International Brotherhood of Teamsters v. Daniel* explicitly rejects the possibility that the legal regime of public interest in capital forms applies to employee interests despite the fact that pension plans possess every element of a security:

---

<sup>29</sup> See Casebeer, *supra* note 12, at 784-89.

<sup>30</sup> “The development and preservation of worker skills and the advancement and utilization of employee training are of general public concern. . . . Employment which may be unsuitable in a period of full employment may be suitable in a period of depression or of falling wages.” *Dubkowski v. Administrator, Unemployment Compensation Act*, 150 Conn. 278, 282-83, 188 A.2d 658, 660 (1963) (quoting *Pacific Mills v. Director of Div. of Employment Sec.*, 322 Mass. 345, 350, 77 N.E.2d 413, 416 (1948)).

Only in the most abstract sense may it be said that an employee "exchanges" some portion of his labor in return for these possible benefits. He surrenders his labor as a whole, and in return receives a compensation package that is substantially devoid of aspects resembling a security. His decision to accept and retain covered employment may have only an attenuated relationship, if any, to perceived investment possibilities of a future pension. Looking at the economic realities, it seems clear that an employee is selling his labor primarily to obtain a livelihood, not making an investment.<sup>31</sup>

The conceptual need to separate investment from employment relations<sup>32</sup> not only structures the indeterminacy of employment relations between time frames of interest maximization, but also does so in a way in which Hegel's and Brudner's grounding of the moral good in self-realization is irrelevant. The realization of the self takes the *form* of contract but the *content* of the common will is the agency of multiple social roles. Professor Brudner claims:

In contrast [to the indeterminacy of the liberal public-private distinction], a theory of justice that offers a dialectical synthesis of private right and public good will reveal the inner unity of classical and modern phases of the common law, and will thus advance the most persuasive claim to be the law's indwelling and original principle. . . . [Hegel] provides the only possible response to those who assert a fundamental indeterminacy at the heart of legal reasoning.<sup>33</sup>

Professor Brudner's unity derives private right from a universe of self-realization, ordering the self's relation to the partial projects of other selves. Yet, the unity which appears in work law orders public good as the extension of a social structure of private power, which is conceptually prior to relational forms of action. Further, the common good of work law already appropriates the "property, talents, and energies of the agent" in the *appearance* of mutuality of right to realize self-interest.<sup>34</sup> This appearance of mutuality in the mobility of labor and capital, however, is subordinate to a legalized division of labor which requires the differentiation of social roles. In *form*, this is precisely the subordination of the right to the good in the *appearance* of right independent of the good, which is Professor Brudner's goal for a reautonomized private law. Rather than a law of transactions which embodies the "concealment of the priority of the good that is required

---

<sup>31</sup> 439 U.S. 551, 560 (1979).

<sup>32</sup> See J. Atleson, *Values and Assumptions in American Labor Law* (1983).

<sup>33</sup> Brudner, *supra* note 1, at 955.

<sup>34</sup> *Id.* at 983.

by the objective realization of the good itself,"<sup>35</sup> a private law unified by the hidden good, the unity of classic and modern phases of common law actually subordinates the good by a hidden private empowerment of management of investment.

The idea that the good subordinates an ideal of right, which demands mutual respect and some positive regard for the realization of the projects of others in the legitimation of the self's partiality, does not, and cannot, stabilize incompatibilities generated by the employer's dual interest in minimizing the short term costs of the wage bargain, as against contributing to the long term shared social interest in structuring the system of investments to support maximum consumption. Mutual regard for the contract interests of both sides of the wage bargain must be discounted by the discipline of the investor's need to lower production costs. On the other hand, the employee is torn between the citizen's interest in consumption which internalizes the costs and risks of the labor factor of production into wages, limits the legally cognizable interest of workers to monetized wages, and minimizes interest in the wages of others; all in opposition to the worker's producer interest in the personal return on labor. In no other exchange context does consumption or use value cut against production value. What appears as an unsolvable indeterminacy between contract doctrines for goods and contract doctrines for labor, from the standpoint of both the Hegelian good and the liberal public-private distinction, is thus conceptually structured by the investment/employment dichotomy in service of private-public unity. Because this indeterminacy stems from the interpenetration of civil society and state, its manifestation in the surface rhetoric of private law does not reduce to the opposition of libertarian entitlement and the public good of wealth maximization. This indeterminacy thus shares with Hegel's argument a conceptually more advanced stage than either private right or its public good successor.<sup>36</sup> This is a distributional indeterminacy independent of the morality of individual or relational goals because it is specific to a particular historical form of social organization.

## II. MATERIAL ROOTS OF PRIVATE CRISES

My second argument locates this conflict simultaneously in material and ideal conditions. Professor Joel Rogers has demonstrated

---

<sup>35</sup> *Id.* at 994.

<sup>36</sup> Compare Epstein, in *id.* at 950 n.8 with Paul, *Searching for the Status Quo* (Book Review), 7 *Cardozo L. Rev.* 743 (1986) (reviewing R. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985)).

that post-war collective bargaining law reinforces institutional practices which, while locally rational for workers, also subjects groups of workers to prisoner's dilemmas, which in the aggregate decrease the social power of labor.<sup>37</sup> Professor Rogers demonstrates that this is typical of social organization under capitalist democracies. For the same reasons the structure of such democracies creates material divisions which render the opposition and mediation of the interests of investors and workers—a perpetual dilemma. They can neither be merely contractors, nor both workers or both investors, and are thus denied the universal commonality Professor Brudner must find to regenerate a determinate private law of self-realization to which individual wills are motivated. This separation of investment and employment divides the system of production (labor time) from distribution (use values), and divides the direction or end of the division of labor (consumption) from the reproduction of social life. Both divisions are accomplished by preventing control of society's resources from depending on the process of specific decisions regulating the allocation of jobs to workers, and by definition separating such resource decisions from democratic processes of welfare determination and social wage. Therefore, the indeterminacies which Hegel's civil society cannot overcome when located in modern welfare states are material and not simply ideal. Such indeterminacies of opposed interests, of course, are not limited to the relations of the labor pool and labor market. Other social structures such as the family, or communities of religion or spirituality, undoubtedly manifest their material reproduction in similar conceptual structures and relational surfaces in part organized by the state, complicating the relationship of the realization of individual partiality and universal or conceptual totality.

The relations of historical individuals imbricated in the modern form of the state partially constitutes the commonality of individuals. Once economic structure and the structure of legal consciousness simultaneously, but not derivatively, codetermine each other, the boundary of law and politics which for Hegel allowed the universal will to know itself as the partial interests of self-realization in civil society, disappears. For us, the freedom of the law constitutes itself in dominant and repressed wills captured in conflicting legal relations, then synthesized in *social* realization. Professor Brudner cannot acknowledge this content of law because Professor Brudner, following Hegel, needs the good to subordinate private interest. To him, the

---

<sup>37</sup> J. Rogers, *Divide and Conquer: The Legal Foundation of Postwar U.S. Labor Policy* (doctoral dissertation, Princeton University, 1984).

“universal good was conceived precisely by abstraction from material content,” and “there is no possibility . . . of an immanent specification from the good of a content adequate to its universal form. A will whose essence is to be devoid of content cannot spontaneously determine itself without self-negation.”<sup>38</sup> On the other hand, a will need not be devoid of content if the good of self-realization is grounded in the emancipation of material interests from the hierarchic private control that prevents integration of work and self. Work and self remain literally alienated in a transactional world.

Overcoming the self-estrangement of self-alienation should become the Hegelian project. This would be especially true if the production of ideas and social meaning were thought to be no different in principle from the production of material conditions. It seems unlikely that Professor Brudner would disagree. On the contrary, a contrasting of meaning and conditions, and thus the ability to separate a sphere of morally authentic conduct from which to criticize unalloyed self-interest either in material acquisition or in strategic argument, depends on a criterion of truth seemingly stronger than coherence or pragmatism. Truth must rather consist of the correspondence of a form of realism. Such a belief seems unlikely when coupled with modernity’s assumption of socially constructed meaning.<sup>39</sup> Even the familiar resort to dialogism or communicative rationality as a moral standpoint within a constructed reality, seems inapposite to the kind of self-realization which Professor Brudner has in mind. First, any communicative rationality opposed to material conditions and relations seems difficult to sustain in stronger than an aspirational sense. How do strategic actors recognize a nonstrategic rationality in other than conventional terms? Second, conventions would seem to be the only sense in which Professor Brudner means for the good of self-realization to provide a positive duty of minimal regard for the projects of others in a transactional world. That is, we should treat the individual particularity of wills with respect and support when not inconsistent with our own. His mutual recognition is only recognition of an equal opportunity of self interest.

### III. INTERDEPENDENCE NOT EXCHANGE

The construction of social meaning leads to the third argument against the regeneration of private law—the counterfactual nature of individualized experience. Professor Brudner also aims at an under-

---

<sup>38</sup> Brudner, *supra* note 1, at 984.

<sup>39</sup> See, e.g., Taylor, *Overcoming Epistemology*, in *After Philosophy: End or Transformation* 459 (K. Baynes, J. Bohman & T. McCarthy eds. 1987).

standing of the individual that breaks the finitude of the atomistic self, but fails to recognize that self-consciousness has already set itself against an *empirical* reality that denies the opposition of individual and community. "The standard of right is the actualization of the causality of this concept [that each sees in the other, not an indifferent or hostile object, but its own confirmation and support]."<sup>40</sup> If the empirical reality, captured in private law, has already burst the bounds of transaction—conceptualized independently of political organization—the concrete individual agent who asserts herself represents the self already and imperfectly mutual. Many contemporary accounts of communicative rationality such as those of Professors Drucilla Cornell<sup>41</sup> and Seyla Benhabib<sup>42</sup> describe the experience of decentralized or interdependent subjects who recognize the mutual constitution of the self in the constitution of the other. Thus, the familiar interdependence of material conditions in modern society suggests an interdependence in the construction of social meaning as well. Under such circumstances, the partiality of individual wills continues to point in the direction of self-realization, but not within a civil society "of self-interested monads" manifest in private law.

Professor Brudner is partially correct in seeking a legal discourse "no longer based on the presumed reality of a natural will unmediated by self consciousness; rather, it is now rooted in the inward and rational articulation of self-consciousness itself, in the conceptual requirements of freedom."<sup>43</sup> He is right to seek self-consciousness in mutual constitution.<sup>44</sup> However, he is partly wrong in seeking such a discourse in an autonomous private law.<sup>45</sup> It is possible to agree with Professor Brudner that the judge's duty in addition to enforcing rights

---

<sup>40</sup> Brudner, *supra* note 1, at 987.

<sup>41</sup> Cornell, *Dialogic Reciprocity and the Critique of Employment at Will*, 10 *Cardozo L. Rev.* 1575 (1989).

<sup>42</sup> S. Benhabib, *Critique, Norm, and Utopia: A Study of the Foundations of Critical Theory* (1986).

<sup>43</sup> Brudner, *supra* note 1, at 993.

<sup>44</sup> *Id.* at 991:

Consequently, the person's activity will consist in confirming his certainty of final worth by receiving it back from another self whose finality and hence validating power he reciprocally constitutes. This activity will belie the presumed naturalness of the atomistic individual as well as the connected claim to self-sufficiency of abstract personality. The latter will be revealed as requiring confirmation of its finality through the mutual self-renunciation of empirical individuals in contract.

<sup>45</sup> *Id.*:

Accordingly, instead of dissolving private law in a monochrome and static idea of community, philosophy will reveal community in the determinate (that is, legal and abstract) shape peculiar to persons who spurn community, thereby simultaneously reclaiming the state of nature for the Idea and explicating private law from its own point of view.

of personal security and the externalization of the person's work, includes a positive right to that externalization against the egoistic indifference of other agents. "[T]hat courts view private law as the set of conditions under which the intentionality of one agent may be reconciled with the intentionality of another under a universal law."<sup>46</sup> The mistake in Professor Brudner's argument is to assume that the intentionality and the causality of the agent remains atomistic rather than decentralized or interdependent. For this reason the judge must be directed neither by abstract right nor abstract community, but by actual connectedness. The moral integration of personality strives to overcome the self-estrangement of pure manipulation, by overcoming the alienation of the self demanded by the investment-employment dichotomy of capitalist-democracy. Such integration opposes the inauthenticity of a self attempting to will itself in isolation or contrast to the other. The motive of the self is authentic recognition of the self. That legalized versions of the self in activity will continue to have the appearance of the individual does not require private transactional law. Free action requires reconstruction of a consciousness of social experience which is capable of becoming continuously less false than any predecessor to the modern human condition of inescapable interdependence in material conditions and social construction. Given such interdependence, reconstruction demands the equal warrant of each to understand, that is participate, in the continuous explanation of those conditions.<sup>47</sup> Adjudication oriented to the actual equal warrant of participation represents a coherent role of law, if not a determinate content. This type of adjudication thus incorporates a critical perspective within right, without depending on the static oppositions of individual and community which Professor Brudner claims criticism presupposes.<sup>48</sup>

The experience of democracy in a form capable of overcoming alienation or self-estrangement, makes salient an expressivist or labor oriented social being. The other needs to be reduced to property only in a society of individual monads. It is true that the other is reduced to an object of labor in the mutual construction of meaning. However, at the same time this labor is also the externalization of the self

---

<sup>46</sup> *Id.* at 70.

<sup>47</sup> For a more developed exposition of this argument, see Casebeer, *supra* note 12.

<sup>48</sup> Brudner, *supra* note 1, at 986:

What this [critical] consciousness fails to see is that radical indeterminacy was the *result* of a particular way of conceptualizing the good. Specifically, it was the result of conceiving the good in such a way as to exclude from its essence the very action and knowledge of the individual agent upon which it depended for self-confirmation.

in mutuality, whereas transactions confirm mutuality only by abandonment or alienation. The political individual whose actions constitute interdependence gains mutuality in the further act of strategy, and thus gains the self in the negation of the individual interests. But this is a negation or absence which does not deny the empirical basis of the individual in the social web. For this reason, the forces of production in their most abstract form constitute an inescapable politics in the form of the division of labor. An unalienated existence integrates a social experience characterized by the interdependence of conditions and interaction of persons, and the equal warrant of each to participate in social construction—which is simply labor.

The legal theory we need now translates the good of self-realization into a mode of social existence which dissolves the separation of private and public, and more—a self-realization which also accepts the political character of law, and which understands the division of labor as inherently political and constitutive of individual partiality. This partiality perpetuates false consciousness if deflected from its mutually interdependent nature, and therefore makes of adjudication an arena of social meaning construction which exposes conflict as alienation by virtue of immanent critique. Contrary to Professor Brudner's Hegel, the contemporary Hegelian good of self-realization thus points the direction pragmatically toward the reproduction of society under conditions of authentic equal warrant and participation. In short, the legal theory we need now *participates* in an articulation of the experience of democracy, not transaction.