Uncovering the Latent Disunity of Property Law?

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Abstract

This essay questions Alan Brudner’s central claim about the unity of property law by subjecting his account of property to an immanent critique. While Brudner attempts to resolve the contradictions of formal right in the dialogical state, his account falls short of demonstrating the unity of property law because it preserves the institutional mechanisms that give rise to self-estrangement. Unless the material conditions that give rise to self-estrangement are themselves overcome in the dialogical state, property law will reveal disunity. I show a possible way out of this predicament by making a conceptual distinction between individual property and productive property.

I. Introduction

One might think it ill-advised for a political theorist such as myself to tackle the topic of private law, which is broad in scope and demands an ambitious engagement in terrain that would seem to fall outside the purview of political theory. One might think it even less advisable to question Alan Brudner’s central claim about the unity of property law by offering a critical evaluation from a position that can loosely be described as Marxist—a position that has long lost its vogue in most academic circles. Yet there could be no better means of critically analyzing Brudner’s bold attempt at demonstrating the unity of property law in particular than by drawing on a political-theoretical tradition inspired by aspects of the Hegelian method that Brudner skillfully employs in The Unity of the Common Law (Unity).

Two caveats inform my critical reflections on Brudner’s account of property law. First, the eager Marxist critic cannot readily dismiss Unity as yet another uncritical endorsement of capitalist private property, because Brudner himself so carefully identifies the various contradictions of formal right; indeed, he even demonstrates the logical necessity of superseding formal right with a more adequate conception of property that is said to vindicate the end-status of individuals without—and this is critical—annihilating formal right as such. Second, although I am influenced by Evgeny Pashukanis’s critique of the legal form, I do not share his conviction that the legal form

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is bound for the dustbin of history, and so I will take the future of law, including property law, seriously in the comments that follow.

My critical assessment of Brudner’s account of property will take the form of an immanent critique, by which I mean an assessment of Brudner’s account of property on its own terms. I first lay out Brudner’s account as he presents it and then subject it to criticism. I begin with Brudner’s presentation of property in the paradigm of formal right. As I will show, Brudner’s preliminary misgiving about transposing formal right to all historical epochs is later eclipsed by his claim that formal right achieves the status of moral necessity in the liberal polity. This postulation is misguided once it is abstracted from the specificity of social relations that historically give rise to such paradigms as formal right and welfare. After echoing Brudner’s conclusion that the paradigm of formal right subverts the end-status of individuals, I question whether formal right’s supersession in the dialogical state can demonstrate the unity of property law if this conception preserves the institutional mechanisms that enable the unilateral exploitation of propertyless laborers. Unless certain features of formal right, such as self-estrangement, are radically transformed or negated in the dialogical state, property law will reveal latent disunity rather than unity, for it will end up subverting the very end-status it claims to vindicate. Nor is the doctrine of equity sufficiently equipped to address this latent disunity, because it does not alter the basis of asymmetrical relations of domination between owners and non-owners of private property. I suggest a possible way out of this predicament that requires distinguishing between individual property and productive property. These insights then lead me to a critical discussion of Brudner’s concluding remarks about the prospects for a democratic form of industrial property. This view of property, while theoretically illuminating, will pose far greater risk to the interests of capital than Brudner may be willing to acknowledge, especially amidst growing attacks on unionization, collective-bargaining, and workers’ rights in capitalist democracies.

II. Property Law and the Promise of Human Dignity

Brudner begins his chapter on property law by explaining how property is conceived in its most rudimentary formulation, that of formal right, which he occasionally refers to as the “libertarian” conception. Formal right is based on the liberal conception of the isolated individual, who possesses an inborn capacity for free will and whose life unfolds in a (hypothetical) pre-political context detached from public life and communal bonds. Relations between persons are mediated by their market transactions where persons are respected in their status as owners of their bodies and of their property, while their property takes the form of commodities that carry definite exchange value. The starting point

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3 Indeed, Brudner himself acknowledges the value of immanent critique in Unity. Brudner, supra note 1, at 29.
4 Id. at 95.
of formal right, then, is personhood, which confers a capacity for negative rights, as well as the expectation that these rights will be respected by other persons.\(^5\)

There is scarcely anything misleading about the way Brudner presents formal right at this stage of his argument. Even the fiercest critics of formal right, such as Evgeny Pashukanis, would agree that formal right finds its natural expression in the domain of private law, which takes as its focal point relations between formally free and equal persons, whose intercourse is mediated by the exchange of commodities on the market.\(^6\) However, Pashukanis would rightly insist, contra Brudner, that formal right is the necessary by-product of historically specific social relations. Nor is the juridical person championed by formal right a trivial feat if one considers that human beings were not deemed naturally free, equal, or independent in earlier historical epochs. It would therefore be a mistake to treat the juridical person of formal right as a natural and timeless fact, a point that Brudner acknowledges when he remarks that “to claim that transactional law ought always and everywhere to be private law would be folly.”\(^7\) However, as he approaches the modern liberal polity, Brudner seems to shift from a historically-informed account of the origins of formal right to an argument about the moral necessity of private property within a liberal polity.\(^8\) This line of reasoning begins to treat a specific formulation of property, as well as its subsequent transformation, as a moral necessity, rather than a concrete product of changing political and economic circumstances. Brudner thus treats a particular formulation of property as an absolute, one that evades critical scrutiny and risks leading to the kind of un-historical folly that he seeks to avoid. The same issue arises with respect to Brudner’s formulations of welfare\(^9\) and democratic property\(^10\) when these formulations are abstracted from the concrete political-economic circumstances in which they either take hold or are thwarted.

Perhaps Brudner might respond that he simply means to present property law as it is understood in the paradigm of formal right. This approach would be in keeping with

\(^5\) Id. at 110.

\(^6\) According to Pashukanis,

> It is [in private law] above all that the legal subject, the “persona,” finds entirely adequate embodiment in the real person of the subject operating egoistically, the owner, the bearer of private interests. Juridical thought moves most freely and confidently of all in the realm of private law; its constructs assume perfect and well-ordered forms.

Pashukanis, supra note 2, at 80. Despite his evident disdain for bourgeois jurisprudence, Pashukanis’s theory of the legal form is itself centered on private law and the transactions between individual proprietors.

\(^7\) Brudner, supra note 1, at 25.

\(^8\) Id. at 28, 98.

\(^9\) I have in mind post-war reconstruction, the development of the welfare state, as well as the sustained pressures of workers and unions in pushing for social protections against the exigencies of the capitalist market.

\(^10\) I will show in Part III of the essay that Brudner’s theorization of “democratic property” exhibits similar problems because it abstracts from existing political-economic arrangements that thwart the very prospects for a democratic property.
his recourse to immanent critique, which begins by inquiring if a central pillar underpinning a particular paradigm, in this case formal right, realizes or contradicts its essence. However, Brudner goes further than immanent critique, because he intends to show that property law reveals an internal unity that is necessary for realizing a life sufficient for human dignity: “I argue that property law’s internal unity is justified as a necessary part of the set of conditions sufficient for the realized end-status (dignity) of the human individual. It is justified, that is, for the kind of polity aimed at that end—namely, the liberal polity.”

The ultimate goal of property law, as of all divisions of transaction law, is the realization of a life sufficient for human dignity. To the extent that property law is an integral division in the totality that comprises transaction law, its unity rests upon securing human dignity. If property law fails to secure human dignity, then the unity of property law is brought into question along with the edifice of transaction law. Brudner therefore sets out on an ambitious task, especially since he is aware of the skeptical legacy left behind by the critical legal studies tradition. The central question is whether or not property law ultimately reveals a unity, and more specifically, whether it realizes a life sufficient for human dignity. I now turn to this question.

To the extent that the paradigm of formal right takes the atomistic person as its starting point, it is based on the direct relation between a person and a thing, and this relation takes the exclusive form of private property. Brudner explains that formal right rests on the agent’s capacity for unrestricted free will, which includes the capacity to transform nature into the object of one’s free will. Persons have the capacity for free choice, whereas things do not. To put it in Hegelian terms, a person must translate their free will into an external object, which finds its most rudimentary expression in the immediate act of possession, in the use of objects, and culminates in the exchange of objects between mutually disinterested commodity owners. Exchange confers the greatest degree of ownership because it demonstrates the willingness of persons to alienate objects, of their own will, through the voluntary exchange of equivalents on the market. Aside from being a medium of intersubjective recognition, the exchange of commodities affirms a person’s simultaneous independence from things, as well as dominion over them—or so it is assumed by the paradigm of formal right.

III. Self-Estrangement as the Undoing of Property Law

At a very basic—one might say formal—level, property law as expressed in formal right honors the end-status of individuals insofar as it rests on relations of respect between commodity owners who freely enter into an exchange. However, because it relies entirely

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11 Id. at 98.
12 Id. at 2.
13 Id. at 35, 52.
14 Id. at 113.
15 Id. at 132.
on a person’s capacity to exercise free will and to affirm cold respect, formal right is blind to how property ownership is allocated in society, just as it overlooks voluntary, albeit exploitative, contractual agreements between owners and non-owners of private property. It is in this context that Brudner identifies the various contradictions afflicting formal right, particularly an agent’s newfound material dependence on the arbitrary will of another individual. However, as I will show in the paragraphs that follow, Brudner’s attempts at superseding the contradictions of formal right in the higher stage of the dialogical state fall short of demonstrating the unity of property law. Whereas possession and use are defined by a person’s direct relation to a thing, exchange takes the form of a legal relation between persons that is now mediated through things. Formal right honors the individual’s end-status insofar as it recognizes her abstract capacity for free choice and her rights as a commodity owner. However, the matter is complicated when human labor and life itself become commodities that are alienated on the market, though never for an indefinite period, for this would constitute a form of slavery that is outlawed—logically and historically—in formal right. The logic of exchange produces its corollary, the phenomenon of self-estrangement, which Brudner describes as “a process by which the person, in giving objective reality to its claim of final worth, makes itself dependent for confirmation on an external will indifferent to its worth and dominating it, though not necessarily with the coercion outlawed by formal right.” Self-estrangement poses a particular problem for the justificatory basis of property law, in that a person’s decisive claim to being master of their body, acquisitions, and life-plans is effectively undermined by material dependence on the arbitrary will of a property owner who remains indifferent to the material needs of the non-owner. Self-estrangement becomes an instrument of domination over propertyless laborers because, while they are legally “free” to sell their services to individual property owners, the structural imperatives of competitive accumulation compel them to alienate the only commodity at their disposal, namely, their labor power. A person’s direct mastery over a thing has transformed into a social relation in which the propertylessness of a vast majority facilitates the material means for the enrichment of a few propertied individuals. The status of private property has also changed at this stage of formal right. If private property was formerly recognized as a person’s exclusive ownership over a thing, it now takes the form of exclusive ownership of productive assets by a class of individuals, thereby facilitating a process of exploitative production, all within the parameters of formal right.

16 Id. at 131, 134.
17 Id. at 132.
18 Id. at 134.
19 It should also be noted that this freedom did not exist in pre-capitalist political-economic formations, where direct relations of coercion prevailed as the basis of production.
20 I will show in the final parts of the essay why the distinction between individual property and productive property, which Brudner does not draw explicitly, has important implications for the fate of property law.
Whereas formal right is paradigmatically blind to the consequences of unilateral exploitation for its promise of securing a life sufficient for dignity, Brudner cannot overlook these consequences because they risk subverting the unity of property law and its justificatory basis in the liberal polity.\textsuperscript{21} While Brudner subjects formal right to immanent critique and demonstrates in the process that formal right contradicts its own essence, he also cautions against dispensing with formal right, because doing so would mean overlooking its elementary contribution to realizing a life sufficient for human dignity.\textsuperscript{22} Moreover, the looming contradictions of formal right are actually anticipated, according to Brudner, when courts invoke equity to outlaw transactions that would otherwise result in the unilateral domination of non-owners. He cites a series of historical cases in which courts have rejected property-owners’ claims when validating them would have undermined the basis of contract.\textsuperscript{23} These insights lead to Brudner’s assertive conclusion: “[E]quity revokes the person’s self-estrangement in formal right—its subjection to an external power—for the sake of the autonomy of the moral subject. The subject’s end-status requires that it be free from subjection to a law embodying another’s good and to whose obligatory force it could thus not rationally assent.”\textsuperscript{24} The prospect for unilateral domination pushes formal right to its contradictory limits, demonstrating that the isolated rights-bearer of formal right cannot support an adequate account of freedom and property. However, this inadequacy also points to a necessary transition, according to Brudner, from the paradigm of formal right to welfare, where individuals now have the capacity for free choice along with the positive rights for realizing their autonomy in the context of a political community.\textsuperscript{25}

One would think that the prospects for unilateral domination would have been resolved with Brudner’s recourse to equity, as well as his insistence that formal right is not the final word on property law. The rule-of-law skeptics would seem to have been silenced as well. Yet the immanent critic might nevertheless argue that the superseded account of property in the dialogical state reveals disunity, while failing to create the conditions for a life sufficient for dignity. I am not claiming that Brudner’s account of property concludes with formal right, nor am I suggesting that formal right should be annihilated en route to a richer conception of property, for this would mean reverting to direct relations of domination where human beings do not even possess elementary formal rights. Nor am I making the reverse claim that Brudner’s account of property culminates in welfare; indeed, he shows that the welfarist paradigm carries with it the specter of tyranny together with the dissolution of private property. Rather, I maintain that property’s manifestation in the dialogical state does not vindicate the end-status of

\textsuperscript{21} Id. at 135.
\textsuperscript{22} Id. at 111.
\textsuperscript{23} Id. at 134-38.
\textsuperscript{24} Id. at 142.
\textsuperscript{25} Id. at 143.
individuals because it preserves the institutional mechanisms that enable unilateral domination over propertyless laborers.

Recall that Brudner invoked equity to neutralize the dangers of self-estrangement. Formal right is shown to have reached its contradictory limits on route to a richer conception of property that finds its ultimate expression in the dialogical state. Notwithstanding the strengths of Brudner’s account of property, its fundamental weakness lies in an inability to address the institutional mechanisms that give rise to self-estrangement. By institutional mechanisms, I mean the concentrated ownership of productive assets by a class of individuals that enables them to profit at the expense of propertyless laborers, whose only commodity on the market is their labor power. While equity is said to nullify transactions that would result in unilateral domination, it does nothing to alter the basis of asymmetrical relations of domination between owners and non-owners of private property. Otherwise, equity would transform courts into arenas of political struggle, a result that Brudner wishes to avoid because it would thwart the unity of property law and resurrect the battle between formalism and functionalism.26 Recall that each division of transaction law—property, contract, negligence, and public insurance—is indispensable for the unity of transaction law as a whole, and each of these divisions aims at realizing a life sufficient for human dignity.27 If property law fails to secure human dignity in light of the contradictions stemming from self-estrangement, then the alleged unity of property law falls into disunity together with transaction law as a whole. Accordingly, if a court of equity cannot alter the basis of asymmetrical relations of domination between owners and non-owners of private property,28 then this asymmetrical relationship is preserved in the supersession of formal right. To be sure, the supersession of formal right is not actualized in the paradigm of welfare, for this paradigm also risks subverting the end-status of individuals with its one-sided fixation on the common good. At its extreme, such a fixation leads to the totalitarian state, where “the political community annuls the very independent self whom it acknowledges as essential to the confirmation of its authority as natural. In the result, the supposed natural authority of the political community turns round into a cataclysmic human violence.”29 It is only in the higher stage of the dialogical state, according to Brudner, that the extreme poles of formal right and welfare are synthesized into a dialectical totality that embraces both private law and public law as necessary parts for realizing a life sufficient for human dignity: “[S]uch a community separately recognizes in free will [the ideal of formal right] and in self-determination [the ideal of welfare], each of which is necessary to the life sufficient for dignity.”30 The dialogical state is therefore present-

26 Id. at 139, 140.
27 Id. at 2.
28 My point is that the basis of this asymmetrical relationship is not transformed. Uncompensated transfers do not transform the basis of what remains an asymmetrical relationship between owners and non-owners of private property.
29 Id. at 155.
30 Id. at 158-59.
ed by Brudner as that higher form that ostensibly supersedes the defects of both formal right and welfare.

Now that the dialogical state has been outlined as concisely as possible, does Brudner’s account of property law reveal an internal unity that realizes a life sufficient for human dignity? According to Brudner’s own account, the answer to this question hinges on whether or not the dialogical state overcomes the contradictions of self-estrangement that plagued formal right.31 Insofar as Brudner’s superseded account of property preserves private ownership of productive wealth, it is compatible with a society in which the majority of propertyless laborers remain subject to unilateral domination by property owners and the imperatives that flow from capitalist accumulation. Yet property law cannot claim to vindicate the end-status of individuals unless the material conditions that give rise to self-estrangement are radically negated or transformed in the dialogical state. A political-economic formation that subjects the majority of individuals to the arbitrary will of property owners and to impersonal market forces cannot then claim to realize the dignity of these individuals.

If the justificatory basis of property law rests on the individual’s claim of being decisive master of their body, acquisitions, and life plans, then property law contradicts its own essence. Barring starvation and the social-psychological stigma associated with unemployment, the propertyless laborer is still compelled to sell labor power for a market price, remains dispossessed of productive assets, and is objectively dependent on the arbitrary will of property owners along with the imperatives of the capitalist market. Yet none of these contradictions are superseded in the context of the dialogical state. It follows that Brudner’s synthesized account of property law reveals latent disunity, because property law does not deliver on its promise of realizing the end-status of propertyless laborers. To the extent that property law reveals disunity, the unity of transaction law as a whole is now brought into question. This is precisely the conclusion that Brudner’s account of property sought to refute.32

Yet property law would not need to succumb to such latent disunity if Brudner would make a conceptual distinction between private property in objects (individual property) and private property in productive assets (productive property). Recall that the basis of private property in formal right rests on a person’s exclusive ownership of a thing and its acknowledgement by other persons. The justificatory basis of private property, then, is a person’s claim to be the exclusive owner of this or that object. This is not the same logic that follows for capitalist private property, where the owner of capital assets can exploit the propertyless laborer precisely because the latter does not own productive property, which is distinct from individual property. Whereas private property in objects is based on a direct relation between a person and a thing, private property in productive assets facilitates the material conditions for the unilateral domination of one person by another,

31 Id. at 157.
32 Id. at 96-97.
which is why this form of property fails to realize a life sufficient for dignity. Brudner could very well avoid the conclusion that the capitalist’s claim to be the exclusive owner of productive assets has the same justificatory force in the dialogical state as an individual’s claim to be the master of their body, acquisitions, and life-plans. These two forms of property need not be conflated into one.

Whereas Brudner shows the dialectical transformation of property from its earliest expression in formal right to its synthesized realization in the dialogical state, Marx—the self-declared enemy of capitalist private property— theorizes that capitalist private property will be replaced historically with social ownership of the means of production, while individual property will be preserved in superseded form:

The capitalist mode of appropriation, the result of the capitalist mode of production produces capitalist private property. This is the first negation of individual private property, as founded on the labour of the proprietor. But capitalist production begets, with the inexorability of a law of Nature, its own negation. It is the negation of negation. This does not re-establish private property for the producer, but gives him individual property based on the acquisitions of the capitalist era.

Marx draws this important distinction between capitalist private property and individual property because he thinks that property relations under communist production would effectively negate the unilateral exploitation stemming from self-estrangement without—and this is critical—annihilating individual property. Such a conclusion it is not entirely at odds with Brudner’s broader theoretical aims.

To be sure, Brudner is not an uncritical champion of capitalist private property. In many respects, his account of property law anticipates the dangers associated with concentrated ownership of productive assets, as well as the tension between the individual’s quest for self-determination and the reality of self-estrangement under capitalist production. It is no accident that Brudner’s chapter on property concludes with a pithy discussion of the prospects for a “democratic form of industrial property.” It is here that Brudner emphasizes the need for an expanded form of property, whose “ultimate fruition must be worker participation in management within each workplace where a concentration of capital would otherwise leave labour in a permanent state of subjection.” This is a persuasive conclusion, although the devil remains in the details. Brudner cites the de facto separation of ownership and managerial control of corporate property (as well as the

33 Pashukanis appears to hint at this conceptual confusion in the following passage:

While there is a direct morphological connection between these two institutions: private appropriation as the precondition for unlimited personal usage, and private appropriation as the condition for subsequent alienation in the act of exchange, nonetheless, logically speaking they are two different categories, and the word “property” used to describe both, creates more confusion than clarity. Capitalist landed property, for example, does not presuppose any kind of organic bond between the land and its owner.

Pashukanis, supra note 2, at 126-27.


35 Brudner, supra note 1, at 159.
practice of code-determination in countries like Germany) as signs that such a democratic
form of property is not outside the realm of empirical possibility.36

These examples are few and far between; Brudner thinks that it is possible to re-
concile the collective interests of labor without compromising the interests of capital.
However, the legal and political pendulums have swung further away from the interests of
laborers, who rely ever more desperately on the arbitrary will of capitalists for their liveli-
hood and self-expression. Far from broadening the managerial capacity of workers, the
current wave of neo-liberal capitalism has witnessed growing attacks on unionization and
collective bargaining, as well as an overgrowth of precarious working conditions across
the globe. The welfare state, tasked with maintaining the common good, has also been
under attack by the interests of capital, especially after the global financial crisis of 2008
and the wave of austerity that followed. If there is to be any realistic prospect for a demo-
cratic form of property, it will require far greater risks to the boundless reach of capital. In
this regard, Brudner’s normative argument in favor of democratic property cannot be
made cogently by abstracting from existing political-economic arrangements, especially
when these arrangements thwart the realization of more democratic forms of property.
Thus the moral necessity of democratic property cannot be indifferent to the empirical
reality of contemporary capitalist politics.

IV. Conclusion

Brudner remarks in the opening pages of his chapter on property that his central aim is to
uncover property law’s internal unity and to show that property law is necessary for realiz-
ing a life sufficient for dignity. My immanent critique of Brudner’s account of property
law has shown that his superseded account of property in the dialogical state preserves the
institutional mechanisms that enable the unilateral domination of propertyless laborers.
Unless the material conditions that give rise to self-estrangement are themselves supe-
rseded in the dialogical state, property law will contradict its essence by subverting human
dignity. While I have not claimed that formal right should be annihilated en route to a
richer conception of property, I remain a committed skeptic about the internal unity of
property law. However, I will leave it for Brudner to demonstrate why my skepticism
might be mistaken. Here, it is fitting to recapitulate Brudner’s Aristotle-inspired proverb
that the duty owed to truth is greater than the one owed to teachers and friends,37 espe-
cially when the truth concerns human freedom.

36 Id. at 159-60. Incidentally, Marx also discusses the separation of ownership from managerial functions in
capitalist joint-stock companies and in worker co-operatives, giving rise to a “social property” that is distinct
from capitalist private property. Of course, Marx sees this phenomenon as a transitional phase to social
ownership of the means of production. 3 Karl Marx, Capital: A Critique of Political Economy 440 (Samuel
37 Brudner, supra note 1, at 360.