NEW FRONTIERS IN PRIVATE ORDERING—AN INTRODUCTION

Jean Braucher*

Any democratic, capitalist society uses a mix of public and private ordering.[1] Contract law itself is a mixture of the public and the private, a means by which the state supports private ordering with remedies for breach of some promises.[2] Contract law thus recognizes the value of decentralized decision-making, but many types of contracts—such as for consumer products, financial services, and airline travel—are subject to a great deal of governmental regulation, trying to smooth the rough edges produced by the market. Informal private ordering, not involving contracts, also receives some measure of state support, ranging from leaving private actors alone, and thus able to pursue their own ends, to shoring up the material conditions under which they make and carry out plans.

Private ordering, both contractual and non-contractual, is conventionally understood as a means to achieve freedom of choice and association. This is why, for example, we speak of "freedom of contract," which paradoxically means freedom to limit one's future freedom.[3] But we also think of public ordering as involving freedom—the ability of a free people to make collective, democratic

---

* Roger C. Henderson Professor of Law, University of Arizona James E. Rogers College of Law and 2006 Chair, Section on Contracts, Association of American Law Schools. Thanks to Martha Ertman for the idea for this symposium and to the authors of the articles and the editors of the *Arizona Law Review* for making it a reality.

1. ALBERT O. HIRSCHMAN, RIVAL VIEWS OF MARKET SOCIETY AND OTHER RECENT ESSAYS 105–39 (1986) (discussing dialectical theory that markets both promote and undermine social order, so that regulation is necessary for self-preservation of a market society).

2. *See* Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 585–86 (1933) (stressing that contract law has a public law dimension, involving public policy choices, because it requires exercising the sovereign power of the state to enforce a contract against a now unwilling party, something the state does for some promises but not others).

3. E. ALLAN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS 20 (1998) (discussing the desire in some instances to have "the freedom to renege"). Furthermore, legal obligation does not always line up with lay understanding. *See* Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 467–68 (noting that business cultures' practices about what should be done when something goes wrong with a deal are often different from what the law would dictate and that parties recognize a much broader range of excuses than does the law).

decisions and to influence how their government acts to ensure their welfare and the common good.

Both public and private ordering are often presented in idealized terms, but of course the reality is that neither sphere works perfectly to ensure human happiness.[4] For example, the powerful and the crafty may capture more of the benefits of either kind of ordering for themselves,[5] leaving the weak and unsophisticated exploited (or, what may amount to the same thing, feeling exploited).[6] Nonetheless, using two methods of ordering gives us ways to compensate for failings in each sphere, so that when one method of ordering seems to have gone awry, it is possible to try the other. The hopeful turn to private ordering marked by this symposium no doubt stems in part from pessimism about the current state of representative democracy and from negative appraisals of the effectiveness of governmental institutions to address an array of social problems, from invidious discrimination to lack of access to health care. A sense of powerlessness to effect governmental change leads to thinking about private ordering alternatives, perhaps more localized within particular communities.

The Section on Contracts of the Association of American Law Schools organized this symposium as its annual meeting program, held in Washington, D.C., on January 5, 2007. The editorial board of the Arizona Law Review agreed to publish the resulting papers. A central purpose of the symposium is to explore ways in which contracts, real or metaphorical, might be used to deal with problems that public law could address but is not doing so effectively. A "new frontier" in private ordering could pursue an unusual purpose using contracts, or it might mean making contracts to trade in unusual subject matter. Two recent books exemplify use of new private ordering in areas normally thought of as spheres for public law—fighting employment discrimination and regulating the supply of organs for transplant. The authors of these books agreed to contribute articles to this symposium.

One of the two invited articles is a co-authored piece by Professors Ian Ayres[7] and Jennifer Gerarda Brown,[8] elaborating on the proposal in their book,

---

4. *See* Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 463, 467–68 (1974) (criticizing Richard Posner for viewing the market and market-supportive law as being "almost flawless in achieving human happiness" while seeing the political process as "apparently almost wholly pernicious" and discussing the possibility that government and economic systems are complementary to and corrective of each other).

5. *See* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1529–39 (1983) (discussing how reformers' efforts to improve the status of women run up against power imbalances in both market and domestic spheres, whether under private or public law).

6. IAN MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS 102–03 (1980) (discussing the psychology of exchange, when experienced positively, as involving a sense of solidarity among contracting parties, but paired with an opposite psychology, in which exchanges are seen not as involving good for both sides but "as trading in harm rather than in good," which occurs "whenever one side is seen as hogging the exchange-surplus or otherwise misusing power").

7. William K. Townsend Professor of Law, Yale Law School.

Straightforward: How to Mobilize Heterosexual Support for Gay Rights,[9] which suggests ways for people to contract around homophobia by buying products with the "Fair Employment Mark,"[10] used by sellers to indicate that they do not discriminate on the basis of sexual orientation. The other invited article is by Professor Michele Goodwin,[11] further developing themes in her book *Black Markets: The Supply and Demand of Body Parts*,[12] which raises race and class issues concerning the regulated exchange of human organs for transplantation.

Both books explore the positive side of commodification. Ayres and Brown have created a form of intellectual property to promote promises of non-discrimination and to make them more credible and thus valuable. Goodwin has urged more openness about the possibility of allowing organ donors to become organ sellers, increasing the supply and thus satisfying more of the unmet transplant demand. She particularly emphasizes the potential power of minority communities to help solve a life-and-death social problem with the aid of incentives.

To add to the conversation, the AALS Section on Contracts also issued a call for papers and chose two other scholars, Rachel Arnow-Richman[13] and Daniela Caruso,[14] to participate in the Section's annual meeting program and this symposium.[15] Their articles help to round out the range of perspectives presented on new private ordering and its relation to public ordering. The resulting spectrum of views includes ones that are celebratory, critical, specific to particular problems, and theoretical (and combinations of those approaches).

In their article *Privatizing Employment Protections*,[16] Ayres and Brown continue to refine the case for use of their "Fair Employment Mark," which makes employees and applicants third-party beneficiaries of the contract between the employer and the authors, who license their mark to provide a private means to make up for a lack of federal nondiscrimination legislation protecting gays and lesbians.[17] Private demonstration projects have long been a way to suggest what public regulation might achieve. For example, credit unions in Chicago have

---

8. Professor of Law, Quinnipiac University School of Law.

9. IAN AYRES & JENNIFER GERARDA BROWN, STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS (2005).

10. For information about the mark, see Jennifer Gerarda Brown, Fair Employment Mark FAQs, http://islandia.law.yale.edu/fairemploymentmark/fe_faq.asp (last visited Aug. 9, 2007).

11. Visiting Professor of Law, University of Chicago Law School. Everett Fraser Professor of Law, University of Minnesota Law School.

12. MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS (2006).

13. Associate Professor of Law, University of Denver Sturm College of Law.

14. Associate Professor of Law, Boston University School of Law.

15. The members of the selection committee were Professors Martha Ertman (University of Utah, now of University of Maryland) and Robert Hillman (Cornell University), members of the section Executive Committee, and me.

16. Ian Ayres & Jennifer Gerarda Brown, *Privatizing Employment Protections*, 49 ARIZ. L. REV. 587 (2007).

17. *Id.* at 587–88.

developed alternatives to payday lending in the form of short-term loans at reasonable rates (below 20 percent APR), projects that—if sustainable and replicable—would call into question deregulation of interest rates, leading to triple-digit payday loan interest rates in the for-profit sector.[18]

An important innovation of the Ayres and Brown project is to give the third parties most affected by discrimination enforcement powers. Enforcement is not limited to the licensors of the mark, as in more conventional certification programs, and in fact the licensors of this mark do not have enforcement powers.[19] By giving employees and applicants enforcement rights, the mark also gives adopters' promises more force and is intended to make the mark a more powerful tool to attract customers, recruit employees, and comply with the demands of accreditation organizations and unions, while also confining liability within more certain boundaries.[20] The authors report that they have heard a great deal of skepticism that employers would agree to liability to employees for violations of the mark program. Ayres and Brown argue that by doing so—with well-defined license terms—employers can both better enhance their reputations and do a more effective job of containing risk than is possible with a nondiscrimination policy that is not spelled out in detail.[21]

Yet another important aspect of the mark is that it commits adopters to compliance with proposed federal legislation barring discrimination on the basis of sexual orientation.[22] It is thus a mechanism for producing precedent about a statute before enactment, allowing the statute to be refined if necessary. A focus of the Ayres-Brown article is to address the problem that arbitration clauses in employment contracts could undermine the mark's ability to test openly the impact of proposed nondiscrimination legislation on employer liability.[23] Ayres and Brown describe a revision of the mark's license to provide that if an employer requires arbitration of a claim under the mark, "the arbitrator will produce a written opinion that will be available to the public."[24] The authors concede that this feature of the license could lead to more frequent and generous awards to employees (produced by anxiety among arbitrators "not to appear to favor the employer, a repeat player") than might occur in arbitration where results are not made public.[25] They respond that results of arbitration of claims under the mark,

---

18. *See* National Credit Union Administration, Providing Alternatives to Payday Loans, http://www.ncua.gov/PALS/BP/PALSDocs/21550-30.htm (last visited August 9, 2007) (concerning one such program offered by the North Side Community Federal Credit Union at 16.5 percent APR but noting lack of return to the credit union at that interest rate, although the program is reaching the target market of persons with very low credit scores and few alternatives for emergency loans); Center for Responsible Lending, Alternatives to Payday Loans, http://www.responsiblelending.org/issues/payday/briefs/page.jsp?itemID=29573161 (last visited August 9, 2007) (outlining alternatives to payday lending, including credit union emergency loan programs at 18 percent APR or less).

19. *See* Brown, *supra* note 10 (website for the mark).

20. Ayres & Brown, *supra* note 16, at 590–92.

21. *Id.* at 591–92.

22. *Id.* at 588–89.

23. *Id.* at 593.

24. *Id.* at 595.

25. *Id.* at 594.

with a public availability requirement, would suggest the outer limits of potential liability under the proposed statute.[26]

With their mark, Ayres and Brown envision a new kind of interaction between private and public law. We have long been aware that bargaining occurs in the shadow of the law, but they imagine testing proposed public law, producing precedent in advance of enactment, or "law in the shadow of bargaining."[27]

Sometimes public ordering clearly fails to serve adequately all those it should help, and regulation of organ donation is a dramatic example. Michele Goodwin's article for this symposium, *The Body Market: Race Politics & Private Ordering*, seeks to open up the debate about whether altruism should be the only motivation for individuals to transfer their body parts.[28] Her paper develops the case for negotiated sales of body parts as a means to better serve the interests of both donors, who lose income and take on risks,[29] and recipients, who currently lack an adequate supply under a system of enforced altruism by individuals (although not by businesses that trade in organs).[30] She answers the argument that a market in organs would exploit African Americans and equate to slavery by pointing out that African Americans are not just potential donors but potential recipients of organs, which might be supplied in greater numbers by allowing incentives.[31]

African Americans disproportionately need organ transplants and wait longer for them, with more deaths while on the waiting list,[32] so that as a group they have more to gain than to lose from an increased supply. More importantly, private ordering need not be exploitative if organized, for example, through churches and sororities with care to make trades expressions of solidarity as well as ways to save a loved one; nonprofit organizations could set up matches of two pairs of donors and recipients to get two compatible sets of donors and recipients not found within each pair's affective circle.[33] The existing regulatory system has failed to produce an adequate supply of donated organs, and Goodwin argues that private ordering should be given a chance to harness the energy of communities and groups to benefit those who are being shut out by public ordering.[34]

Ayres and Brown, on the one hand, and Goodwin, on the other, are optimistic about private ordering's potential, particularly where the government has not stepped up to address injustice. Rachel Arnow-Richman, in her article, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment*

---

26. *Id.*
27. *Id.* at 597–98 (crediting several other scholars for the turn of phrase).
28. Michele Goodwin, *The Body Market: Race Politics & Private Ordering*, 49 ARIZ. L. REV. 599, 602 (2007).
29. *See id.* at 601.
30. *See id.* at 600.
31. *See id.* at 604–08.
32. *Id.* at 615–616.
33. *See id.* at 626.
34. *Id.* at 635.

Agreements,[35] turns to what might be considered a new frontier in old private ordering, taking a critical perspective on it. The law generally conceives of the employment relationship—outside certain spheres such as those of entertainment and sports, high-level executives, academia, and union shops—as non-contractual and at-will, with limited rights for workers provided by statutes and the common law.[36] Employers have recently discovered the strategy of attempting to extract waivers of these rights, doing so with delayed terms presented after the employee has started work.[37] The two most common types of clauses, discussed in *Cubewrap Contracts*, are those augmenting duties of loyalty using noncompete covenants and those limiting access to the courts for discrimination and other claims by requiring arbitration instead.[38]

Arnow-Richman analogizes the new delayed-term "cubewrap" strategy in employment (leaving the contract in the employee's cubicle to be signed the first day) to shrinkwrap mass-market contracts, which also have been used to attempt to take away protections for customers of digital products, such as their end-use rights under intellectual property law or their rights to sue in court.[39] She notes the controversy about delayed terms in consumer and other mass-market transactions and makes the case that they are even worse in the employment context. Because of the high stakes involved in taking a job and the potential for job applicants to ask questions, she argues that employees are more likely than consumers in general to read terms provided in advance and also are less able to "reject" a job already taken than a consumer is to return a product.[40] Employees often quit one job to take a new one and may also relocate. These are two common forms of reliance.[41] Arnow-Richman takes the position that any terms that "could have been provided as part of the hiring process" should not be enforceable if "withheld until after the employee's acceptance of the initial offer."[42] She recognizes that the procedural protection of advance disclosure may not be sufficient to deal with all unfair terms (for reasons discussed below), so that substantive regulation may be necessary, too.[43] Still, she argues that disclosure is worth insisting upon, because it will help some employees with bargaining power and put pressure on employers not to use unfriendly terms likely to adversely affect applicant morale if they must be raised during the recruiting process.[44]

Arnow-Richman's article reminds us that private ordering is too often manipulative and exploitative and can move us away from the social justice goals

---

35. Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637 (2007).
36. *Id.* at 637–38.
37. *Id.* at 639.
38. *See id.* at 638–39.
39. *See id.* at 639–40, 644–45.
40. *Id.* at 653–54, 656.
41. *Id.* at 653.
42. *Id.* at 657.
43. *Id.* at 660–61.
44. *Id.* at 661.

of public ordering. At a bare minimum, allowing misleading framing strategies[45] such as delayed disclosure and use of terms that are complicated and contingent, with surprising, harsh results in some cases, undermines the validity of supposed choices made in private-ordering arrangements. Disclosure regulation is least threatening to the idea of private ordering. Its use is easiest to justify when disclosure has the realistic potential to make choices informed. For example, job candidates can fathom the potential impact of unreasonable noncompete clauses, so that good advance disclosure of them could cause some candidates to turn down jobs, introducing market policing.[46] On the other hand, some terms are so complicated that meaningful disclosure to unrepresented parties is essentially impossible. A perfect example is pre-dispute clauses providing for mandatory arbitration, governed by complex private rules (such as limited discovery, prohibitions on punitive damages and class actions, and lack of public reporting of results).[47] Information asymmetries and transaction costs stand in the way of a working market in such terms, thereby justifying public ordering.[48] In addition, private dispute resolution means there is no production of publicly available precedent to guide others or to permit evaluation and debate about the fairness of results,[49] points underlying Ayres and Brown's requirement that arbitrators deciding cases under their mark publish written opinions.[50]

A hard question touched on in Arnow-Richman's article is whether contract law has a role to play in redistribution, addressing systemic inequalities even in instances where the less powerful understand quite well the harsh bargains they are getting. In the employment context, for example, the concern would be that substantive regulation to require or bar particular terms would just result in lower pay and fewer jobs.[51] In consumer transactions, the argument is that customers will pay higher prices and be closed out of deals altogether at the margin. In *Contract Law and Distribution in the Age of Welfare Reform*, Daniela Caruso takes as her subject the recent intellectual history of contracts scholarship and its debates over the desirability of attempting, or even the possibility of accomplishing, redistributive goals using contract law.[52] She also tests the accounts of scholars against the behavior of courts. She seeks to complicate the

---

45. *See* Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 136–37 (2003) (explaining that situations influence human behavior more than pre-existing preferences).

46. *See* Arnow-Richman, *supra* note 35, at 661.

47. *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1641–42 (2005).

48. *See id.* at 1648–49 (concerning lack of informed consent to use of arbitration).

49. *Id.* at 1661–65.

50. Ayres & Brown, *supra* note 16, at 594.

51. M. J. Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L. J. 359, 382 (1976) (making this point about invalidation of employment terms on the basis of inequality of bargaining power).

52. Daniela Caruso, *Contract Law and Distribution in the Age of Welfare Reform*, 49 ARIZ. L. REV. 665 (2007).

story of "un-making law,"[53] a narrative of a conservative political pendulum swing that has not only reduced redistribution through public law by repealing welfare, but which also has made courts less willing to use contract policing doctrines and other common law principles on behalf of the weak.[54]

Her challenge to the "un-making law" account is to some extent factual. First, she finds that courts deciding contracts cases have used the reduced social safety net as a new reason to protect weaker parties, thus showing that public and private law do not necessarily move in the same direction at once.[55] Second, she notes that state courts in particular seem to be willing to do battle with the zeitgeist, for example reinvigorating the law of unconscionability in resistance to the U.S. Supreme Court's efforts to protect adhesively imposed arbitration chosen by repeat players.[56] She also notes the scholarly turn to an interest in private ordering in favor of progressive agendas, as in the Ayres and Brown project and Goodwin article.[57] Reviewing several decades of scholarly literature about whether contract law can be redistributive, given the possibility that businesses will just pass along increased costs of legal rules to their customers or employees, she concludes that the scholarly debate "cannot be considered settled."[58] She compares Richard Posner's argument that it is an illusion to think that contracts can be redistributive[59] with the work of Richard Craswell and Christine Jolls, who have suggested that the question is more complicated and that redistribution is possible in some consumer and employment contexts.[60]

Caruso also considers changes in the nature of contracts discourse, particularly a resurgence of rhetoric favoring formalism and autonomy.[61] In the courts, this tends to mean that while paternalism and redistribution are still pursued, this is done *sub rosa*, dressed up as promoting self-reliance.[62] Furthermore, contract doctrine can normalize individualist thinking by softening it at the margins with some aesthetically-pleasing but cosmetic judicial niceties.[63] On the other hand, Caruso ends by building the case for engagement with contract law as a way to pursue social justice. She bases her position less on the possibility of empirically demonstrable, direct effects than on the indirect effect of redistributive discourse on other policy contexts. Specifically, she argues that concern about

---

53. *See generally* JAY M. FEINMAN, UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW (2004).

54. *See* Caruso, *supra* note 52, at 666.

55. *See id.* at 669–677.

56. *See id.* at 674–76.

57. *See id.* at 667, 684–85.

58. *Id.* at 683.

59. *Id.* at 681–82 (discussing Judge Posner's opinion in Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 282 (7th Cir. 1992)).

60. *See id.* at 682–83 (discussing Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 361–62 (1991), and Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 229 (2000)).

61. *Id.* at 683–84.

62. *See id.* at 688.

63. *Id.* at 689.

redistribution in the contracts realm keeps alive resistance to the political decline of solidarity reflected in ongoing welfare reforms, particularly in Europe.[64] The final section of her article describes European scholars' engagement in an open debate about contract law, a field in which harmonization efforts are underway, as a proxy for concerns about the future of welfare benefits and social security, where unification of legal regimes is not yet in sight.[65] The debate over autonomy versus solidarity in contract law thus rehearses a political battle to come over a European social vision of the role of states and to what extent they should continue to be welfare states. The resolution of contract issues may have puny redistributive effect,[66] but the nature of contract discourse could have profound impact if and when Europe eventually addresses harmonization of its social safety net programs.[67]

In her Afterword, Martha Ertman emphasizes that "[n]ew private ordering includes but is not limited to contract."[68] She sees the possibilities for more flexibility and plurality in private as opposed to public ordering, which tends to use on/off approaches.[69] An example is parenthood for zygote donors or those who take on affective relationships with children; these persons need not be either full parents or total strangers under private arrangements in which they can take on a range of in-between roles as far as their involvement and responsibility.[70]

Ertman is particularly interested in private ordering to benefit have-nots, whether in resources or rights. She proposes a social justice test for whether new private ordering is a good thing: does any given initiative benefit have-nots and give them more control?[71] On the whole, Ertman wants to celebrate the potential of private ordering. But she introduces skeptical, realist notes by likening private ordering to purgatory, somewhere between a heaven of full public law rights and social equality and a hell of debased status and exploitation.[72] Purgatory has different theological meanings, making it an apt metaphor; private ordering might be a stage on the road to heaven or a state of permanent limbo and marginalization.[73]

At the AALS program in January 2007, Ian Ayres urged other legal scholars to come up with their own experiments in private ordering in service of social justice objectives. The pieces in this symposium can be a source of inspiration, with cautionary notes, too. New private ordering involves a twist on the concept of self-regulation, in the sense of efforts by industries to adopt best

---

64. *See id.* at 689–94.
65. *Id.* at 690–92.
66. *See id.* at 690–91.
67. *Id.*
68. Martha M. Ertman, *Mapping the New Frontiers of Private Ordering: Afterword*, 49 ARIZ. L. REV. 695, 698 (2007).
69. *Id.* at 700–01.
70. *Id.*
71. *Id.* at 703.
72. *Id.* at 707.
73. *Id.* at 696.

practices and stave off public regulation.[74] Among other possibilities, self-regulation using new private ordering can demonstrate what progressive public regulation in a democratic society might accomplish.

74. *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION—TRANSCENDING THE DEREGULATION DEBATE (1992) (generally discussing interplays between state regulation and private ordering); JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 29–34 (2002) (summarizing responsive regulatory theory).