

1990

Understanding Unger

John W. Van Doren

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

Van Doren, John W. (1990) "Understanding Unger," *William Mitchell Law Review*: Vol. 16: Iss. 1, Article 2.
Available at: <http://open.mitchellhamline.edu/wmlr/vol16/iss1/2>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

UNDERSTANDING UNGER

JOHN W. VAN DOREN†

It has been three years since an issue of the William Mitchell Law Review presented an article on the subject of Critical Legal Studies jurisprudence. In Vol. 13, No. 4 (1987), Professor Russell Pannier, of William Mitchell College of Law, offered an overview of the works of Roberto Mangabiera Unger, a leading proponent of CLS. In the same issue Professor Andrew Haines, of William Mitchell College of Law, presented an article that examined the CLS response to racism.

With the following article by Professor John W. Van Doren, we return again to the subject of CLS jurisprudence and again to the works of Roberto Unger. Professor Van Doren first reviews the CLS critique of western jurisprudence and then examines Unger's latest conception of what a better world is and how to achieve it. Professor Van Doren concludes with his own insightful observations on Unger's contribution to modern legal thought.

INTRODUCTION	58
I. JURISPRUDENTIAL CONTEXT OF UNGER'S THOUGHT ..	60
A. Positivism	60
B. Competing Views Obscure Transformative Social Theory	69
1. Legal Realism	69
2. Natural Law and Policy Science	70
C. Competing Views: Historical Jurisprudence	72
D. Unger's Approach to Politics and Traditional Jurisprudence	72
II. BACKGROUND OF UNGER'S THEORIES	76
A. Short Summary	76
B. Unger's Theory	79
1. The Knowledge Problem	79
2. Unger's Social Theory	80

† Professor of Law, Florida State University; A.B., Harvard College, 1956; L.L.B., Yale University, 1959. This article was made possible by research support provided by the Florida State University College of Law, which the author gratefully acknowledges. I also wish to thank my research assistant, David Lonigro, a third-year student at Florida State University College of Law for help with footnotes, ideas and editing.

a.	<i>Attack on Marxist Theory—Inexorable Progression and Functionalism</i>	81
b.	<i>Functionalism and Deep Structure</i>	83
c.	<i>Attack on Functionalist Theory of Liberalism</i> ..	84
C.	<i>Military History Analogies—Historical Developments Not Subject to Law-Like Constraints</i>	86
1.	<i>Attacks on Positivist Social Science</i>	87
2.	<i>Unger's Affirmative Program</i>	89
a.	<i>Historical Content: Property, Contract and Classical Liberalism</i>	90
b.	<i>Revised Capital Allocation</i>	92
c.	<i>Normative Priorities</i>	93
d.	<i>Rights</i>	94
III.	UNGER'S AFFIRMATIVE PROGRAM: EVALUATION	96
A.	<i>Summary of Evaluation</i>	96
B.	<i>Knowledge Problems</i>	96
C.	<i>To Participate or Not to Participate: Piecemeal Activity as Legitimizing</i>	100
D.	<i>Models of Human Association</i>	102
	CONCLUSION	105

INTRODUCTION

In this article, I will set the jurisprudential context, review Professor Unger's program for socio-political change as set forth in his recent trilogy, *Politics*,¹ and evaluate it.

As noted by Critical Legal Studies (CLS), Western jurisprudence has served political purposes to provide a false sense of closure or necessitarian constraint in the arena of judicial decision making.² By closure, I mean some objective resolution of dispute, whether based in rules, policy, morals, rights and principles or tradition. Most Western jurists have, in that process, obscured questions of transformative social theory. In his recent trilogy, *Politics*,³ Professor Roberto Unger

1. See R. UNGER, *POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987). There are three volumes: 1) *SOCIAL THEORY, ITS SITUATION AND ITS TASK* [hereinafter *SOCIAL THEORY*]; 2) *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* [hereinafter *FALSE NECESSITY*]; and 3) *PLASTICITY INTO POWER: COMPARATIVE HISTORICAL POLITICS* [hereinafter *PLASTICITY*].

2. See *CRITICAL LEGAL STUDIES 2* (A. Hutchinson ed. 1989) [hereinafter *Hutchinson*] (noting that disputes in modern jurisprudence are devoted to justifying the judiciary in liberal democracy).

3. UNGER, *supra* note 1.

has revived important questions of social theory in the context of law as taught in the law schools. He has continued to extend his arguments beyond the law school context to formulate a theory of social change that serves as a background for his affirmative program for institutional change.

In *Knowledge and Politics*⁴ and other works, Unger explored the knowledge problem and developed a critique of Western liberalism based on it. He and other CLS advocates have been claiming successfully that the professed goals of liberalism cannot be met within the theory of liberalism.⁵ Unger has identified as a major problem of classical liberalism the pretense of closure, i.e., the pretense that legal disputes can be handled through appeal to neutral or other objectively derived rules or principles.⁶ By focusing on the legal system, Unger continues to assert that classical liberals had as an objective the prevention of the polis falling prey to a particular faction.⁷

In the United States, liberalism took the form of a separation of powers, a structuring of government thought capable of curbing the development of power pockets.⁸ To prevent special privileging, we were to be ruled by an impersonal or neutral law through the legal system.⁹ However, legal liberalism attains neither goal. The legal system and law are not impersonal, and a relatively small faction has used the legal system and political institutions to cement in or freeze a social reality, thereby perpetuating its control.¹⁰

Unger, and the CLS Greek chorus, are persuasively undermining the neutral claims of legal Positivists, rights theorists and others who attempt to provide neutral and objective referents to meet claims of contradiction in the legal order.¹¹

4. See R. UNGER, *KNOWLEDGE AND POLITICS* 5–7 (1975).

5. See *id.*; see generally, R. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

6. See Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 TEX. L. REV. 915, 965 (1986) (otherwise critical of Unger's views).

7. See FALSE NECESSITY, *supra* note 1, at 449 (faction of society has inordinate control over human and material resources).

8. *Id.* at 449–50.

9. See SOCIAL THEORY, *supra* note 1, at 147; see generally SHKLAR, *LEGALISM* (1964), as quoted in W. REISMAN & A. SCHREIBER, *JURISPRUDENCE, UNDERSTANDING AND SHAPING LAW* 349–55 (1987) [hereinafter REISMAN & SCHREIBER].

10. See FALSE NECESSITY, *supra* note 1, at 33, 265.

11. See Hutchinson, *supra* note 2, at 2–4.

Traditional Western jurisprudence has concealed, either consciously or not, important questions of social theory.¹² The most important of these is how law and social institutions get to be the way they are, and how they remain frozen. Much of Western jurisprudence is apologetics aimed at creating a false sense of closure of the legal and political process.¹³

I. JURISPRUDENTIAL CONTEXT OF UNGER'S THOUGHT

A. Positivism

The Western jurisprudence of Positivism, for example, serves as a vehicle to cement, rationalize, and indicate the necessity for existing social arrangements. "Positivism" is a term used to refer to a view of law in which stresses that preexisting rules are what determine results in law cases.¹⁴ Positivists may conclude that there is a discretionary area in law in which rules do not govern, but the impression left is that it is not a very significant area.¹⁵ Positivists hold that the judge resolves the case based on the application of a preexisting rule because it is a rule. Thus, Positivist judges do not "peek over" to see what moral or social result the rule will have on the society.¹⁶

Positivist judges apply the rule because it is a rule in the society,¹⁷ and perhaps because they think that it is difficult to have a society unless it is governed by rules. An example is what I call the Monopoly game approach. If there is a dispute as to how many houses it takes to earn a hotel, we refer to the rule book, find the answer to be "four," and the problem is solved. We do not get into debates as to whether it should be three or five, much less whether Monopoly is a fair game that brings out the best in us.

Since Positivism stifles disputes about the "game," it can be used by elites to mask the extent to which the law is in fact used to perpetuate their interests.¹⁸ By reference to the al-

12. *Id.*

13. *Id.*

14. *See, e.g.,* H.L.A. HART, *THE CONCEPT OF LAW*, 130-32, 253 (1961) (life of the law is determinant rules).

15. *Id.* at 132 (wide areas of conduct controlled by rules with only a fringe of open texture).

16. *See* REISMAN & SCHREIBER, *supra* note 9, at 292 (noting that policy factors are disregarded by the positivist approach).

17. *See* H.L.A. HART, *supra* note 14, at 136-37.

18. *See* Hutchinson, *supra* note 2, at 3, 4.

leged need for rules, Positivists are able to rationalize the exclusion of ideological elements from the top of the iceberg of legalism.¹⁹ In this way, Positivists seek to avoid political controversy. The term “public policy,” for example, may be used as a judicial technique to rationalize a decision at the outer limit of the boundary between controversial political dispute and what is represented as established law. But the “public policy” admission is as far as the Positivist goes. Positivist oriented judicial opinions do not admit that they may involve choices from controversial, ideological or political alternatives.

Positivism is the reigning model.²⁰ In this respect it is surprising to read in Unger: “Just about everyone has agreed that you cannot adequately understand the law as a system of rules that provides determinant answers to particular problems of choice.”²¹ If positivism reigns, is there really such an agreement? “But,” continues Unger, “many believe that doubts can be settled through an appeal to impersonal policies and principles.”²²

Though it makes little difference for Unger’s purposes, Unger has missed the point that most professors in law schools use the formalist, Positivist model. Positivists create closure, certainty and false necessity where there is none by suppressing dissonant material. How many of us, for example, brush aside a dissenting opinion? But, just because law is not like a Monopoly game in which one can easily find rules to resolve controversies does not mean that law is necessarily uncertain. Actually, the legal process contains some certainty, but it is often falsely assumed that this is because of the application of a preexisting rule because it is a rule, or because of a belief by officials and others that society could not operate without rules.

The legitimating myth of liberalism is that law is a neutral and objective process which resolves disputes. As mentioned above, formalists stress that preexisting rules resolve controversies because they are rules and because society cannot function without rules. Positivism, which may produce formalist

19. See FALSE NECESSITY, *supra* note 1, at 271.

20. See, e.g., Kaye, *Natural Law Theory and Legal Positivism: Two Sides of the Same Practical Coin?*, 14 J. LAW & SOC’Y, 303, 317 (1987).

21. See SOCIAL THEORY, *supra* note 1, at 147.

22. This is no doubt a reference to Professor Dworkin. See SOCIAL THEORY, *supra* note 1, at 147.

results, has the effect of maintaining the ruling order whether it be in South Africa²³ or the United States. Once the law has been enunciated, the moral question fades and obedience is demanded. But rules or principles often travel in opposing pairs (e.g., caveat emptor vs. breach of warranty),²⁴ and since there is no rule to determine when stare decisis is to apply,²⁵ how can the formalist emphasis on rules controlling decisions be true? We hardly even get to other kinds of objectivism²⁶ which provide alleged closure: Policy Science, Natural Law, Rights and Principles, Law and Economics, or some elite power theories. Today, in the law school world, all of these are perceived as marginal.

Positivism, at its inception, was laudable enough to break us free of a Natural Law used to perpetuate existing elitist divisions of wealth and power.²⁷ It was the voice of emerging classes challenging privilege, and is an appropriate reminder of the possibilities of judicial tyranny. But it is a chameleon. Positivism can be the voice of any status quo, whether tyranny or democracy. And Positivism in America, while claiming a false neutrality, provides a cloak of legitimacy to support class stratification, the suppression of women, Blacks and other minorities.²⁸

Positivism has not remained static. As Positivism or "modern Positivism"²⁹ moves to accommodate critics, the distinctions formerly alleged between Positivism and Natural Law are increasingly blurred.³⁰ Modern Positivists thus collapse the distinctions between an older Positivism and Natural Law. Some Positivists now assert that they are as willing as any to address the question of morality of a legal regime. They are,

23. See Dugard, *Some Realism About the Judicial Process and Positivism—A Reply*, 98 S. AFRICA L.J. 372 (1981); Van Doren, *Critical Legal Studies and South Africa*, 106 S. AFRICA L.J. 648 (1989).

24. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (car manufacturer liable in tort; caveat emptor rejected in favor of implied warranty).

25. See, e.g., E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 3 (1949).

26. See, e.g., Collins, *Roberto Unger and the Critical Legal Studies Movement*, 14 J. L. & SOC'Y 387, 396-98 (1987).

27. See, e.g., REISMAN & SCHREIBER, *supra* note 9, at 281. See also Kaye, *supra* note 20, at 308 (noting that dominant theory in feudal times was reactionary natural law).

28. See Hutchinson, *supra* note 2, at 2-4 (system supports white male power).

29. See Mirfield, *In Defense of Modern Legal Positivism*, 16 FLA. ST. U.L. REV. 985 (1989).

30. See Kaye, *supra* note 20, at 318.

or say they are, as willing as natural Lawyers to assess the morality of law once the law itself is ascertained. Thus, the Natural Law theorists' assertion that Natural Law may be used to veto a Positive Law on moral grounds is to some extent blurred, or merged, with the modern Positivist's willingness to assess the morality of the same law.³¹

The Positivist H.L.A. Hart posits a certain minimal Natural Law content to a society which claims to have a legal system.³² This content includes the protection of persons, property, and enforcement of promises. But is there any stable government in the world that does not do that? Thus, the basic minimal Natural Law content of Positive Law posited by Hart can coexist with numerous combinations of virtue and vice. Positivists specifically do not concern themselves with the morality of a given legal system in determining whether it is a legal system.³³ The criteria of validity is the criteria which the system itself posits.³⁴ What then is the position on a regime such as that of South Africa which has volumes of Positive Law duly enacted by representatives of about four million persons, but which excludes from that process another twenty-four million persons who are nonetheless bound by those laws?³⁵ What is the duty to obey law in such a situation? Positivists may view this as a separate question, to which they purport to attach significance. Positivists may also claim that it is even a separate and important question as to whether a citizen should be civilly disobedient in any regime.³⁶

Is law in a society such as South Africa's *prima facie* valid? Positivist answers vary. The question of whether Positivist law is *prima facie* valid, maybe what remains of the controversy between Natural Lawyers and Positivists.³⁷ But as the major Western jurisprudential theories merge, what becomes clear is that they rest on a false sense of closure, a false necessity, and

31. See, e.g., H. HART, *supra* note 14, at 104 (we may question the morality of rule of recognition, and whether there is a duty to obey).

32. *Id.* at 189–95.

33. See *id.* at 111–114 (only official need accept the criteria of validity—whatever it is—to have a legal system).

34. *Id.*

35. See Van Doren, *supra* note 23.

36. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 618 (1958).

37. See J. HARRIS, LEGAL PHILOSOPHIES 19, 128–38 (1980); see also REISMAN & SCHREIBER, *supra* note 9, at 335.

none of them address major concerns of social theory.³⁸ Western jurisprudence often serves to suppress these concerns and thereby isolate law from politics. The effect of suppression is that few persons ask the question of how law gets to be the way it is; or are encouraged to create useful models for change.

The relationship of these major jurisprudential theories to social theory is thus obscure. Positivists allow that law—conceived as rules—may come from the morality of a society. Some Positivists say, equally, that law may come from “immorality.”³⁹ Morality is a non-legal source which becomes legal when duly created according to the way law is created in the society. But, other than to stress that law may have some origin which can be observed, namely what is enacted through authorized sources, the Positivist affiant sayeth not.

Perhaps we should follow the suggestions of one author and not concern ourselves with the epicycles and other fancy footwork of modern “sophisticated” versions of legal Positivism. In his attacks on Positivism in the context of South Africa,⁴⁰ Professor Dugard excludes modern sophisticated versions of Positivism from his concern. While there is a discussion of open texture in “modern” Positivism (“open texture” loosely meaning a more flexible area of law where decisions depend less on preexisting rules), that part gets left out when judicial decisionmakers rationalize their conclusions in opinions. The judicial opinion presents the face of positivism as rigid and unyielding. Lost are the qualifications about open texture, and the allegedly open questions about the morality of regimes, and individual rules and principles. What remains is the mind set of official judicial decisionmakers whose decisions sustain the status quo. Thus, Dugard finds the more important subject to be the mindset of official judicial decisionmakers when they rubber stamp the basic elements of the status quo.⁴¹

The important question becomes how much does the Positivist view of law, that law is rules (thereby downplaying the

38. See Kaye, *supra* note 20, at 303 (jurisprudential arguments tend to be abstract; there is a tendency to “talk past” other disputants and avoid addressing genuine disagreements; and legal philosophy often shuns sociological analysis, lest it be “taken into the forbidden realms of real life”).

39. See H.L.A. HART, *supra* note 14, at 253 (no necessary relation between law and morals).

40. See Dugard, *supra* note 23, at 373.

41. *Id.* at 373–74.

moral element), make Positivists responsible for political consequences. First, Positivists must not deny that their approach is ideological and political. Some Positivists may offer the dodge that they are only describing, and are not making, normative judgments in picking and choosing what to stress in the socio-legal arena.⁴² When pressed, however, the Positivists stressing that the legal arena is composed of rules must admit that the statements they make are normative. Rules conflict, principles are ambiguous or indeterminate. Here, the Positivist may counter with the open texture description. Positivists may say that rules have a clear area of application and an open textured area. Even though open texture exists, the rule is still there.⁴³ Open texture is what CLS advocates call indeterminacy.

The next question is how much of the legal arena is open textured. The open texture, in degree of importance and frequency, may tend to reduce the closed area to insignificance. If Positivists admit the presence of too large an area of open texture, we must then welcome the Positivists to Policy Science, Legal Realism and CLS. At this point, the Positivist may switch to the normative claim that Positivism is an ideal, and if the system does not operate that way, it should.⁴⁴

However, the degree of uncertainty or indeterminacy in the system should not be overstressed. As Professor Greenawalt has reminded us, there is a degree of certainty provided by our commonly accepted cultural understandings.⁴⁵ Even though language is potentially uncertain, it may be made certain by a community of interpreters (lawyers and judges), who agree on what potentially ambiguous language, rules or principles mean in specific contexts.⁴⁶ A degree of "objectivity" is created by

42. See H.L.A. HART, *supra* note 14, at 104–05 (distinguishing between a rule of recognition as a fact, and whether it is a good rule).

43. See *id.* at 130 (only a fringe of open texture in a "wide area" governed by rules).

44. At least one "Positivist" has indicated this in conversation with the author. See also Miller and Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 663 (1960) (neutral impersonal model is idealized); H.L.A. HART, *supra* note 14, at 136 (judges who do not follow the rules will be criticized); Cf. SHKLAR, LEGALISM, as cited in REISMAN & SCHREIBER, *supra* note 9, at 351 (Positivism is an ideology which makes a choice of political values).

45. See Greenawalt Lecture, Objectivity and Law 12–17 (Feb. 11, 1989) (unpublished draft) (Professor Greenawalt is presently using this and other writings as a basis for his manuscript of a book to be published by Oxford University Press).

46. REISMAN & SCHREIBER, *supra* note 9, at 351–52.

common understandings. Objectivity here means that there is substantial agreement in a given society on what is meant. Thus, Professor Greenawalt's example that when a subordinate is asked to close a door, common understandings make the request knowable.⁴⁷ Unger's point would be: note that it is the subordinate that is asked to close the door! Professor Greenawalt's pronouncements on achieving common understanding via substantial agreement coincides with Unger's thesis that there may be a social framework in which routine activities are performed that may be at any given moment uncontested.⁴⁸ In a different society, however, there might also be substantial agreement, but of the opposite meaning, or a competing social framework.⁴⁹ As CLS observers maintain, language and communication are society specific and arise contingently.

At this point, several problems may arise. To begin with, the reason why certain expressions have "objective" content is not necessarily because language itself has given rise to rules which carry some objective meaning. Due process, equal protection, freedom of speech or property may mean one thing in one era and something else in another. The language itself has not changed. At this extreme, all "objective" can mean is what societal actors say it means at a given time and place. Jurisprudents are thus seen to move to other forms of objectivism such as the seeking of closure through consensus.⁵⁰ But while it is possible to look for a consensus (of whom? the people? the elite? which people? which elite?) at a given time, this is a far cry from finding something enduring in the language of a legal standard. Presumably, such "agreements" and "traditions" are subject to a continuous process of erosion and flux. While such an area can be referred to as open textured, this takes us back to the unanswered question in Positivism: how much is open textured, and how much is rule determined.

Legal texture thus reflects the ambiguity of framework.

47. See Greenawalt, *supra* note 45.

48. See FALSE NECESSITY, *supra* note 1, at 58-61.

49. See, e.g., Van Doren, *Death African Style: The Case of S.M. Otiemo*, 36 AM. J. COMP. L. 329 (1988).

50. See Greenawalt, *supra* note 45. But see REISMAN & SCHREIBER, *supra* note 9, at 337 (quoting from The Wolfenden Report (Co-authored by Professor Hart), which stated that the writers reached conclusions for themselves, rather than basing them on a "public opinion," which is "often transient and seldom precisely ascertainable").

There is a dominant ideology or framework, and a counter dominant framework expressed in counter rules and principles, the applicability of which is uncertain.⁵¹ The question then arises, why do decisionmakers adopt the mode of rule-oriented decision making? Focusing on the rule and suppressing a counter rule may be done because the decisionmaker thinks that his/her duty is to find rules and at least appear to use them to decide. A further explanation may be that adherence to the doctrine of separation of powers requires that judicial decision makers appear to interpret. When judges decide, allegedly on rules, a serious and unresolved question surfaces: do they lack candor, i.e., have “scienter” that they are deciding between competing standards and misrepresenting the process?

Thus, a fundamental problem of Positivism is the perception of the legal arena as though there were only a single rule for each situation. The real reason why judges accept a rule may be moral approval of it, and the place that the rule or principle holds in maintaining the social framework in which the routine of production and life occur. Reliance, although a factor in some cases,⁵² may be relatively unimportant. Where reliance is or is not a factor, it becomes impossible to tell whether the rule is accepted because it is a rule or because the decisionmaker approved the morality or the social result of it. Even the judge may protect herself from such knowledge.

The critic of rule oriented positivism can confirm that a society has a predominant ideology, and it is that submerged water table that the objectivist has reached in his/her search for objective referents. Let us concede that there is some determinacy. Let us leave the question of whether “due process” (or Shakespeare) has any inherent meaning. Why should we not be able to decide that it shall have a certain meaning, look to a stable group of appropriately oriented interpreters, and plan accordingly, H.L.A. Hart’s designated officials have this internal point of view. They think that the rules, and presumably the methods and sources from which rules are derived, are appropriate.⁵³ They have this “internal point of view,”⁵⁴ just as

51. See Collins, *supra* note 26, at 406–07.

52. See, e.g., *Shell Oil Co. v. Ouellette & Sons Co.*, 352 Mass. 725, 731, 227 N.E.2d 509, 512 (1967) (court states that reliance was important; otherwise it might have ruled differently).

53. See H.L.A. HART, *supra* note 14, at 111–14.

one who plays squash thinks that those rules are appropriate.

But the Positivist move to agreed upon interpretations may only be uncovering the dominant ideology (and the same is true of the policy approach which stresses community policy). All they show is that there is a dominant ideology and a social framework which manifests itself in law. Whether it is moral or immoral is a question reserved by modern Positivists. We do not know why the Hartian "officials" who deploy rules think the rules are appropriate. Officials in South Africa may think the rules and the sources are appropriate because they do very nicely under apartheid.

The morality of dominant ideologies may be opposed from society to society just as their dominant rules and principles may be. The question of legitimacy remains. In other words, one can find a determinacy and even have decisionmakers simply follow rules because the society needs rules to function. Such Positivist decisionmakers may not concern themselves with the morality or the social effect of such rules, and the resulting society may not be one that anyone would approve of or want to live in. In short, determinacy need bear no relationship to legitimacy.

Similarly, one could have decisionmakers who continually change the rules, believe in what they are doing and alter rules because of morality and social effect. They may do so openly, and still not have a society that one would wish to live in. The question remains, in what direction are rules being changed, and according to what values? As long as there is some stability and some change, determinacy and indeterminacy may be morally neutral in a given context.

The main problem concerning indeterminacy from the point of view of those who wish to legitimate a social order in the West is that it is not in accord with the ruling mythology. The major role played by the alleged application of rules is to reinforce the existing social, political and economic order.⁵⁵ Part of the ruling mythology is that law is certain and preexisting, and not in flux. CLS adherents and Legal Realists claim to have upset the royal lie. The closed textured area functions in part to uphold the dominant ideology. It does so because often, decision makers approve of and benefit by it. The the-

54. *Id.* at 114.

55. See Hutchinson, *supra* note 2, at 2-4.

ory that decision makers necessarily affirm rules on the notion that rules must be followed is at best empirically unproven. The Western judge is not permitted the luxury of open law making. The myth must be maintained that judges interpret and do not make law. It is thought that people cannot be told about the truth behind the myth. If this truth got out, that the legal and social order are up for grabs, stability of current social class arrangements might be jeopardized.

The concept that alleged continuity, preexisting rights mythology, judicial power and legitimacy are all linked scarcely needs comment, or so one would have thought. On the other hand, there is the vehemence of the denial which Professor Dugard acutely points out of actors in the judicial arena.⁵⁶ There is the Positivist form of virtually every legal opinion, and the indoctrinated ideology in the United States. There is the attitude of the Bar and its spokespersons, the tongue-in-cheek quality of which liberals partake as much as conservatives; the virtual loyalty oath that a potential United States Supreme Court justice must make that he/she would not engage in judicial lawmaking even if forced at gunpoint.⁵⁷

Positivism then has a political content. At the same time, Positivism could be used to ensure the continuation of an essentially just system, or as in South Africa, the existence of an unjust one. Natural law could yield rights for a revolution, or could ensure the gains of a well-founded system, or could be the basis of unjustified privilege.⁵⁸ However, Unger argues that privilege inherently gets built into social arrangements.⁵⁹ Positivism, or any other necessitarian jurisprudence, could be the enemy of “empowered democracy.”

B. Competing Views Obscure Transformative Social Theory

1. Legal Realism

There are Western jurisprudential views which compete with Positivism, but such views may also obscure social theory. Legal Realism is one such competing view. A basic idea of

56. See Dugard, *supra* note 23, at 383–86.

57. See, e.g., the Senate confirmation hearing of Justice Kennedy in which he was led through a series of questions to deny that he would engage in “result oriented” decision making.

58. See Kaye, *supra* note 20, at 311.

59. See FALSE NECESSITY, *supra* note 1, at 33, 225, 265–66.

Legal Realism is that law is determinate and rules are given as an excuse to cover up a decision made on moral or social grounds. Thus, Legal Realism, like Positivism, does not address social theory in any direct manner. Rather than advance new views of social theory, Legal Realists have been more concerned with indicating that the legal system does not work as Positivists say it does.

To the extent that Realists had a program, it was generally social-science oriented.⁶⁰ Unger criticizes such an approach in his attack on Positivist social science, accusing that approach of taking for granted the social framework within which its findings are made.⁶¹ If Legal Realists (with the exception of Professor Myres McDougal)⁶² had a transformative program, it did not clearly emerge. Generally, then, Legal Realists made no sustained effort to develop a transformative program, but instead critiqued Positivism.

2. *Natural Law and Policy Science*

Two jurisprudential theories which arguably have a transformative social program are Natural Law and Professor McDougal's Policy Science. However, there are significant criticisms which can be made against either approach.

Natural Lawyers, for instance, may support necessitarian arguments. If one assumes, as Natural Lawyers often do, that there are certain practices which are natural, or which reflect unchangeable social arrangements (e.g., slavery), constructive change may be hampered.⁶³ My students sometimes express these naturalistic beliefs. For example, they argue that there is natural inequality because some persons have more skills than others. They advise me: elites therefore will always emerge, so there is no use trying to do anything about it through law or politics. Other students advise me that social Darwinism is properly at work: those who fall by the wayside *deserve* their fate. Such necessitarian arguments may inhibit appropriate transformative potential. Natural lawyers also often have conflicting programs, and it may be difficult to pick and choose

60. See Van Zandt, *The New Legal Realism*, 33 YALE L. REP. 2, 3 (1987).

61. See *infra* notes 174–186 and accompanying text.

62. See *infra* notes 66–68 and accompanying text.

63. See REISMAN & SCHREIBER, *supra* note 9, at 169–222 (referring to these arguments as structural naturalism; reference to slavery is at p. 173).

between conflicting moral tenets. Natural Law, or moral argument, did not settle the Hart-Devlin debate over the criminality of homosexuality and prostitution.⁶⁴

Sociological or Policy Science jurists who identify law with social, political or economic interests also suffer from the problem that there is no theory that links appropriate interests together, or that indicates which interests should be preferred over others. The McDougal inspired Yale School of Policy Science, a kind of sociological jurisprudence, is linked to a social theory of democratic values. However, it seems to hover between having a democratic program, and emphasizing a method for goal clarification. Policy Science has not been widely accepted. The primary reason for non-acceptance of the policy approach is that it too closely identifies law and politics which, from the view of the ruling elite, lets the cat out of the bag and incorporates undesired controversy. In Unger's terms, such an approach too clearly reveals that the judicial arena is one of open ideological conflict, rather than closed predetermined rule-bound decisionmaking.⁶⁵

When Policy Science theorists identify important interests such as wealth and dignity, this represents an advance.⁶⁶ In a recent valiant attempt, Professor Luther McDougal used a policy approach in his property casebook.⁶⁷ While it was an important advance over Positivism, it led, as inevitably it must, to a series of policy judgments by the author. While I might agree with those judgments, they did not come from any enumerated social theory or system of values that was cogent or of sufficient determinacy⁶⁸ to provide more than window dressing for the pre-judgment of the author (and largely myself).

For example, the idea of the widest possible sharing of

64. See REISMAN & SCHREIBER, *supra* note 9, at 336-46. H.L.A. Hart believed that the law should not affect all forms of social behavior, and that, specifically, the law ought not cover consensual and private homosexual acts. *Id.* at 336-37. Lord Devlin, in defense of such laws, argued that morals are appropriately regulated by the law. *Id.* at 338-46.

65. See FALSE NECESSITY, *supra* note 1, at 271.

66. See REISMAN & SCHREIBER, *supra* note 9, at 19 (identifying eight "outcomes" desired by persons: power, wealth, enlightenment, skill, well-being, affection, respect and rectitude).

67. See L. MCDUGAL & M. MCDUGAL, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT (2d ed. 1981).

68. The eight categories, enumerated in note 66, *supra*, also do not lead to determinative results. They conflict and are subject to manipulation because of their high level of generality.

wealth consistent with the deployment of individual effort is one standard used by the New Haven Policy Science view.⁶⁹ But the conservative Law and Economics advocates might agree with that, at least if the market, as constituted, is the measure. That is the problem. What social arrangements lead to the widest possible sharing of, for example, wealth? Attempts to decide cases based on these vague criteria are fraught with the difficulties of indeterminacies of conflicting values, without a megarule to resolve them.

C. *Competing Views: Historical Jurisprudence*

Historical jurists may stress the static quality of aspects of human nature. If they have a social theory, it would be a "natural" one: a necessitarian approach that basic elements of human nature are unchangeable and cannot and should not be changed by law superimposed on custom.⁷⁰ Thus, adherents of historicism may reinforce necessity arguments: the alleged presence of constraints that prevent change through law or otherwise.⁷¹ Accordingly, historical jurisprudence is often a source of negation of a transformative social theory.

D. *Unger's Approach to Politics and Traditional Jurisprudence*

In using one sentence in *Politics* to get rid of Legal Positivism, Unger underestimates the hold that it has.⁷² He has more to say about other closure attempts. In *Politics*, Unger has again taken issue with the rights and principles analysis of Professor Ronald Dworkin. Producing a phenomenon incredible in itself, Dworkin and Unger had, until recently, gone their merry ways, ignoring each other. Finally, however, the issue between Dworkin and Unger is being joined.

Dworkin maintains that there is deducible from law in the West a defensible form of human association.⁷³ Unger rejects

69. See L. McDUGAL & M. McDUGAL, *supra* note 67, at 3 (stating the basic goal of democratic society is "the greatest possible production and the widest possible sharing of all values without differentiation other than on the basis of individual capabilities or contribution to society . . .").

70. See REISMAN & SCHREIBER, *supra* note 9, at 224-32.

71. *Id.*

72. See SOCIAL THEORY, *supra* note 1, at 147 (stating that "[j]ust about everyone has agreed that you cannot adequately understand the law as a system of rules that provides determinate solutions to particular problems of choice").

73. See COLLINS, *supra* note 26, at 396-98.

this allegedly defensible form, describing it instead as a series of compromises which cement, for a time, the place where the fighting stopped.⁷⁴ Thus, in Unger's view, such a scheme does not represent a defensible form of human association. Unger states: "But the one thing we should not do is to pretend that the materials of the law add up to an intelligible and defensible order."⁷⁵ Unger argues that law represents "a confused and contradictory mass."⁷⁶ He argues that law is too much of a hodgepodge, a series of results in particular cases which lack an organizing element.⁷⁷ Since a clear pattern of decision making never emerges from the rules and principles applied, a defensible scheme of human association is not deducible. The more law is viewed as legislative will, the more it lacks a defensible character,⁷⁸ presumably because of the zig-zag, crazy quilt pattern of legislation.

In the Unger-CLS version of the liberal model, there are separate sets of presuppositions for three separate arenas: public, private and business.⁷⁹ The private arena includes the family, and has presuppositions of trust. The arms length/stranger quality of business relations plays little part. In the public constitutional arena, principles of democratic process and accountability prevail. The business and commercial arena, or market, is characterized by the absence of democratic accountability. In other words, the Board of Directors and President of IBM are not popularly elected. Those who own or control property—what Unger calls the consolidated property right⁸⁰—control investment decisions without democratic constraint.⁸¹

How can disputes within the state, family and market be resolved by a government of laws and not men? Unger (and CLS) point out that the doctrinal area is not a fruitful source of resolution because it is indeterminate. One must then move to the policy level where conflicts present more indeterminacy.

74. See FALSE NECESSITY, *supra* note 1, at 265. SOCIAL THEORY, *supra* note 1, at 148.

75. SOCIAL THEORY, *supra* note 1, at 148.

76. *Id.*

77. *Id.*

78. See FALSE NECESSITY, *supra* note 1, at 302.

79. See Collins, *supra* note 26, at 398–399.

80. See, e.g., FALSE NECESSITY, *supra* note 1, at 70, 196.

81. *Id.* at 370.

One then moves to what Dworkin calls background rights, or a concept of the defensible form of human association posited by liberalism.⁸² This level allegedly resolves the conflict, with the separation into the three spheres of state, family and market.⁸³

But Unger points out that this demarcation is inherently unstable.⁸⁴ Arguments from one arena can be used in another. Enforceability of pre-nuptial contract is indeterminate in the divorce or dissolution context because of the tension between state imposed duties (i.e., child support, alimony and property division) and consensual liability. In another context, free speech may be brought from the political arena to protect "whistle blowers" in industry.⁸⁵ Similarly, anti-discrimination, or equality of opportunity provisions from the public constitutional arena are carried over into the business or market arena. In sum, then, the unstable nature of these arenas leaves the liberal concept of human association unclear.

This brief survey has indicated that traditional western jurisprudential approaches have avoided explicit revelation of underlying social theory. Either the social theory has been implicit, or else, as is more usually the case, the Western approaches have served to obscure major questions: are the basic social and personal arrangements, fostered by law and the framework it reflects, appropriate? Are these arrangements transformable, and if so, to what vision?

It might be objected that it never was the purpose of jurisprudential study to deal with social theory (we must not fault a glove for not being a hat). Law then could be considered as another positive social science which accepts rather than questions framework. But to the extent that this is true, it shows the obsolescence, the irrelevance, or the political bias of traditional Western jurisprudence.⁸⁶ Moreover, it is not as though jurisprudence were some description of a phenomenon (law) which is politically neutral. It is charged with politics, and the attempts to isolate law into some form of politically neutral

82. See Collins, *supra* note 26, at 396-97.

83. *Id.* at 398.

84. *Id.* 398-99.

85. *Id.* at 406.

86. See Kaye, *supra* note 20, at 303 (disputants "talk past each other" and avoid sociological and other awkward inquiries).

Positivism do themselves have political purposes.⁸⁷

In sum, then, traditional Western jurisprudence has indicated a false closure, and subordinated the question of how law gets to be the way it is. Such jurisprudence has often coupled these stances with a false necessitarian imperative.⁸⁸ For example, the claim is made that there are cases out there which “*must*” be followed, or that Natural Law, social policy, or background rights dictate or provide one right answer for legal disputes (which, in fact, they do not).

In this context, Professor Unger’s focus on social theory becomes most relevant. In *Politics*, Professor Unger addresses the basic stories which rationalize the current state of Western society. Unger presumes, quite properly, that most traditional jurisprudence has nothing to offer except foot dragging and false idols. He views such jurisprudence as examples of necessitarian imperatives used to defend a status quo. Unger expands the conceptual arena to include a theory of historical development, a theory of knowledge, human nature, and a transformation of institutions to maximize human potential.⁸⁹

Unger wishes to establish a position for plasticity, that is, social and economic arrangements that are open for continued, though not necessarily constant, restructuring.⁹⁰ He concludes that there is substantial room to maneuver toward a societal model in which social roles and hierarchies could become blurred or indistinct, and yet still be capable of attaining goals of productivity and military might. His basic theme is that familiar psychological, organizational and economic constraints,⁹¹ of which the Western adjudicative rationalizations which allege closure are an example, in reality are techniques used to protect a privileged order.⁹²

In the course of establishing his theme, Unger attacks the notion that the particular institutions we have in 20th century United States are necessary for maximum productive capabil-

87. See *id.* at 312–16.

88. See *id.* (as currently envisioned, both natural law and positivism reinforce the status quo).

89. See generally PLASTICITY, *supra* note 1, at 208–12; FALSE NECESSITY, *supra* note 1, at 480–91.

90. See PLASTICITY, *supra* note 1, at 208–12; FALSE NECESSITY, *supra* note 1, at 484; SOCIAL THEORY, *supra* note 1, at 22–23, 172–73 (reality of constraint affirmed).

91. See FALSE NECESSITY, *supra* note 1, at 277.

92. See *id.* at 33, 70–71 (control exercised through property rights produces constraining force on change).

ity. Such "functionalist" claims as these he dismisses as fables.⁹³ Alternative arrangements have existed and do exist other places.⁹⁴ The historical path to present arrangements appears to be a one way street only in retrospect, for it could have been otherwise.⁹⁵ We may, to a degree, freely remake our environment once we get over the idea that we cannot.⁹⁶ It is this idea that is Unger's major contribution: since we have ourselves created the world view or constructs that represent the framework, (as, for example family, market and state) we can remake it.⁹⁷

In making this point that we construct our own social reality, Unger alludes to the idea that "everything is politics." From this springs the further idea that there is a struggle for power over the ruling mechanism in a society which is unproblematic. He then states that since we invent politics, and since we invent the institutions and attitudes that produce our concept of a political order, we can remake that order by recombining factors to produce other arrangements that are better.⁹⁸ Implicit in Unger is the idea that the particular set of arrangements known as liberalism is, in reality, a construct made or defended because it serves the interest of those at the top to the detriment of those at the bottom.

II. BACKGROUND OF UNGER'S THEORIES

A. Short Summary

The basic human problem is how to achieve self assertion in a community (what other choice is there?) whereby the terms upon which one is available to others do not cause undue submission, subjection, dependence and loss.⁹⁹ In the realm of individual relationships, there is the problem that persons will betray our trust. In the arena of work, those who control can require us to be in the undignified position of undue subjec-

93. See, e.g., *id.* at 212-13 (market system which in fact prevailed in West not necessarily desirable).

94. See, e.g., *id.* at 223-28.

95. See *id.* at 332-37.

96. See *id.* at 37-40.

97. See Symposium, *Roberto Unger's Politics: A Work in Constructive Social Theory* 589-951, 81 Nw. U.L. REV. 589-951 (1987) (passim).

98. See FALSE NECESSITY, *supra* note 1, at 44.

99. See *id.* at 351-52.

tion.¹⁰⁰ The justification for subjection in the workplace is usually based on necessitarian arguments which stress psychological, organizational and economic constraints. Routine activities, often involving undue subjection, exist in a framework which is substantially implicit. New associates or law students working in law firms will, I think, be able to think of examples from their own relations with faculty or partners. In any event, our problem is that we do not often question the framework within which these routine activities take place.¹⁰¹

Unger defines “negative capability” as meaning the opportunity to make changes of framework in a system.¹⁰² Negative capability is the extent to which a framework is malleable in the direction of empowerment of individuals, or, put another way, one in which it is possible to lessen the rigidity of power of some over others.¹⁰³ More possible in some systems than in others,¹⁰⁴ these efforts in the direction of individual empowerment (or “small rebellions”) have the potential to snowball. This negative capability should be used. Lawyers, through a process referred to as “deviationist,” for example, may use the countertendencies in the legal system (e.g., unconscionability doctrine in contracts) to encourage a counter vision.¹⁰⁵

To loosen the effect of perceived constraints, Unger argues that change is not necessarily caused by a short list of laws or processes. The only law concerning the results of change is that there is no law controlling what results from change. Change may occur in response to an environment, argues Unger, as an unwilling and unintended consequence of other apparently willed acts.¹⁰⁶ As an example, consider the creation of the executory interest in English law following enactment of the Statute of Uses. That the executory interest would be used to create an indestructible interest was not foreseen.

In any event, the one point that Unger insists on again and again is that there is no one cause of change, and no short list of causes.¹⁰⁷ There is also no assurance that the changes made

100. *See id.* at 69, 263–64.

101. *See id.* at 61.

102. *See id.* at 36–37; 164–170.

103. *See, e.g., id.* at 36–37 (aimed at subjugation, depersonalization).

104. *Id.* at 36–37.

105. *See Collins, supra* note 26, at 402–07.

106. *See SOCIAL THEORY, supra* note 1, at 188–99.

107. *See generally id.* at 200–15.

will cause the society that adopts them to win out in the race for productivity and military might.¹⁰⁸ Nothing is inevitable in societal development. The products of societal movement are underdetermined in part because there is a lack of identifiable causes that produce them.¹⁰⁹

Adopting the goals of liberty, equality and fraternity, Unger argues that it is he who is really following the liberal tradition. He sees himself as the real liberal who wishes to push the goals of liberalism, socialism and communism beyond the place where they are stuck.¹¹⁰ In his view, the classical liberal conception results in betrayal of the liberal course. There are no significant democratic controls of the economic sphere in which we spend our working lives. The result is a rigid hierarchy which separates task definition from task execution.¹¹¹ If this seems abstract, think about who tells whom to do what in society. Consideration of this relationship should, as I mentioned earlier, make the concept immediately clear to law students and associates in law firms, since these persons are often in the role of receiving the task definition and performing the task. In the market context, this power relationship may be degrading to the ideals of community and fraternity. Social roles are rigidified, and the terms upon which persons are available to each other are distorted.¹¹² Vanguard industry and military operations have broken down this distinction between ordering and obeying to achieve the aims of liberalism,¹¹³ but these are isolated phenomena.

In elaborating his views, Unger addresses four basic problems. First, how do social arrangements get to be the way they are, or, in other words, what social theory best explains social arrangements. Second, what theory of knowledge complements or is necessary to support his social theory. Third, what values should be promoted in existing and future institutional arrangements and human interactions.¹¹⁴ Fourth, by what means can the goals be obtained. In addressing knowl-

108. *See id.* at 213 (nothing guarantees we will properly combine practical capability and improved human relations).

109. *See id.* at 105-09, 200-15.

110. *See* FALSE NECESSITY, *supra* note 1, at 10, 20-23.

111. *Id.* at 75-76.

112. *See id.* at 75-79, 263-64.

113. *See id.* at 154-58.

114. *See infra*, notes 187-249 and accompanying text.

edge problems, Unger considers the fact-value dichotomy, that is, the problem of what truth claims can be made to support the values or normative commitments he adopts.¹¹⁵ In developing an affirmative program, Unger breaks ranks with the Critical Legal Studies movement. Most CLS advocates have largely confined themselves, as had Unger, to criticism of existing liberalism in the Western world, and the United States in particular.

B. Unger's Theory

1. The Knowledge Problem

For Unger, the knowledge problem is fundamental. As mentioned in Part I of this article, Unger and CLS have successfully attacked the underpinnings of Western legalism by undermining the claims of closure through objective knowledge. In developing his own position, Unger asserts that the only "objective" knowledge is that there is no invariable element in what we understand. Thus, our tentative truths must be subject to constant revision.

In developing his position on knowledge, Unger produces a series of provocative comparisons to what are thought of as hard sciences. He makes the important point that the search for an invariable element in our knowledge is illusive.¹¹⁶ With reference to the disciplines of mathematics, cosmology (here, the origin of the universe), geometry, mineralogy, evolution and others, he shows that any "invariable" element of knowledge is relative to the organizing scheme developed to understand a particular science.¹¹⁷ The assertions within these disciplines hold only until the next or an opposing scheme is imagined. Because we cannot say that further insights will not be made, it is impossible to contain within one description the possible extent of insight and understanding.

To give one illustration, Unger traces the fall of the Euclidean approach in natural science. That approach gave rise to the idea that there were self-evident truths, e.g., of space and time.¹¹⁸ But ideas of space and time have obviously since been revised (for example in the work of Einstein) as have many of

115. See FALSE NECESSITY, *supra* note 1, at 366-68.

116. See SOCIAL THEORY, *supra* note 1, at 172-99.

117. *Id.*

118. See *id.* at 80-81, 84, 177-80.

the other natural science propositions once deemed self evident.¹¹⁹ In this manner then, Unger rejects a basic premise of positive social science that there can be found once and for all an invariable, unchangeable or objective element in our understanding.¹²⁰ Such an approach to knowledge also undermines a Marxist deep logic approach that through human agents or otherwise, perceived causal relationships make for an invariable pattern.¹²¹

Unger does not wish to argue that all phenomenon are contingent on the particularities of the circumstance of occurrence. There are constraints in Unger's world, for example, constraints of matter.¹²² The problem he finds is that those constraints are blown out of proportion to develop assumed psychological, organizational and economic constraints and other naturalistic theory that retard change.¹²³

Rather than abandon objectivity and fall prey to the seduction of nihilism, Unger defines what can be salvaged as objective, namely, the notion of constant revisability itself.¹²⁴ This involves the negation of naturalistic approaches which impose organizational, psychological and economic constraints. These are and were used to create an objective model of hierarchy, deviation from which was said to be inappropriate.

2. Unger's Social Theory

Unger warms up for his attack on naturalistic approaches by considering two major targets: first, deep logic, or deep structure Marxism, and second, Positivist social science.¹²⁵ The Marxist theory he wishes to decimate is one which sees historical development as inexorable or subject to law-like constraints.¹²⁶

119. *Id.*

120. See SOCIAL THEORY, *supra* note 1, at 176; see generally *id.* at 80–87, 172–99.

121. See *id.* at 96–120, 176 (discussion of Marx's "evolutionary deep-structure social theory").

122. See *id.* at 193–94.

123. See *id.* at 172–99.

124. See *id.* at 85–87.

125. See, e.g., *id.* at 176.

126. *Id.*; See also FALSE NECESSITY, *supra* note 1, at 14–19.

a. *Attack on Marxist Theory—Inexorable Progression and Functionalism*

Unger's basic point is that the individual can make a difference in producing social change. Unger therefore opposes Marxist theorists who may claim that there is a flow of history in determinate stages, e.g., from feudalism to capitalism to socialism to communism.¹²⁷ If, as some Marxists suppose, these movements obey law-like constraints, individuals may play a relatively minor role in social change. Much of Unger's exposition is spent attacking the idea that historical development is subject to such constraints. This opposition brings out a key feature of Unger's approach: change does not occur as a product of law-like constraints, and persons do, and should, make a difference in determining the kind of society we have. Indeed, because of naturalistic and necessitarian beliefs and dogma, Unger believes that persons are subject to a false necessity syndrome. Constraints may result from the belief that there is some natural, unstoppable progression of history.¹²⁸

Unger is unconvinced by explanations which rely on law as an explanation for historical change. He examines the Marxist thesis that a certain framework (i.e., the relations of production) produces an elite class that dictates law and institutions as a means of effectuating control.¹²⁹ The Marxist thesis continues: there is no change until a new mode of production (e.g., industrial vs. cottage industry) produces a new group which then alters law and ideology to conform to its interest.¹³⁰ Together with this analysis goes a functionalism that Unger also opposes. The functional argument is that the elite can be successful because the institutions they produce do in fact work well for them, or are inexorable in terms of fulfilling the terms of their domination and are therefore universally applicable to produce such results.¹³¹ To put it colloquially, functionalists oppose change in law and society by saying that there is only one way to run a railroad, no matter where it is. Unger argues

127. See, e.g., Collins, *supra* note 26, at 390.

128. See SOCIAL THEORY, *supra* note 1, at 87–120 (supporting this paragraph).

129. See FALSE NECESSITY, *supra* note 1, at 287–88.

130. See SOCIAL THEORY, *supra* note 1, at 93–96.

131. See FALSE NECESSITY, *supra* note 1, at 332–40; SOCIAL THEORY, *supra* note 1, at 93–96.

that there are plenty of ways to run a railroad: look around you.

Unger thus maintains that there is no one set of institutions and societal arrangements that lead to maximum productivity and military might. First, the legal arena contains contradiction, so there is no clear pattern.¹³² For example, the business community on the one hand needs "equity," such as trust and good faith, and on the other hand needs "law," which provides the arms length rigidity of rules with no deviation. Second, when one's vision is expanded, history reveals several paths that societies have taken to attain different modes of production.¹³³ Here the contrast between the West and Japan could be made. Third, where capitalism is the subject, it becomes impossible to define capitalism and market economy in such ways as are consistent with the thesis of one, and only one, big cause, such as a dominant elite acting to secure power.¹³⁴ The whole notion of cause needs to be relaxed.

As Unger perceives it, Marxists must face the criticism that there are no law-like constraints. Some Marxist apologists have retrenched, e.g., to "relative autonomy."¹³⁵ Relative autonomists argue that the causal relations between the dominant class and particular societal arrangements are loose. There is a degree to which those social arrangements or institutions are autonomous, that is, have a life of their own, and are not affected by pressure from the dominant elites.¹³⁶ Perhaps the minimum wage, or equal pay for women are examples that may not be in the interest of the dominant elite. And the movement goes two ways: institutional arrangements and laws, which on the one hand may operate to promote elite interests, come back to impact the dominant group (and for that matter, many other groups). For instance, many groups may be bound to participate in desegregation or conjoined to obey laws against discrimination on the basis of race or sex.

The problem for Marxist apologists is that, having now taken one step away from the one cause thesis (i.e., the dominant elite necessarily getting its way), they must now rely on several

132. See FALSE NECESSITY, *supra* note 1, at 101.

133. See *id.* at 223-28.

134. See *id.* at 196-98; SOCIAL THEORY, *supra* note 1, at 101-13, 176.

135. See SOCIAL THEORY, *supra* note 1, at 113-17, 176. "Relative Autonomy" is a convenient shorthand term for Unger's concept here.

136. *Id.*

causes. Unger explores the danger that the more the one cause thesis is relaxed, the more it includes too much—too many historical situations which could qualify as capitalist (and not enough).¹³⁷ Qualifications emerge which create so many exceptions that the historian is put in the position of a judge trying to apply a rule riddled with exceptions. The rule-like character of the one cause thesis becomes undermined, and the application of the relative autonomy theme is, to coin a phrase, indeterminate.¹³⁸

b. Functionalism and Deep Structure

A second key concept in Unger's thought is that false necessity also develops from a functionalist approach.¹³⁹ The term functionalism is used to indicate the power of certain acts to produce specified effects.¹⁴⁰ This functionalist approach may derive from Marxism, or from liberal apologetic modes.¹⁴¹ In Marxism, a basic notion is that our idea of social reality is constructed from the interest of a dominant class which controls the means of production.¹⁴² While Unger agrees that explanations of social reality are constructs or, as he puts it, artifacts, he disagrees with the implications of this particular Marxist construct.¹⁴³

For Marxists, the dominant class creates institutions and laws which are designed to achieve, or are functionally related to, certain goals. These goals are the perpetuation or reproduction of society in a form favorable to upper class domination.¹⁴⁴ Hence, any given set of institutions, government, law, and so on, will bear a functional relation to that end. Such institutions and laws will be the ones best designed (or at least well designed) to keep the dominant class on top.¹⁴⁵ Unger questions the idea that there is an inevitable thesis/antithesis build-up of counter forces which would lead to the collapse of

137. *Id.* at 101–109, 113–17.

138. *See* Collins, *supra* note 26, at 391.

139. *See* FALSE NECESSITY, *supra* note 1, at 332–37.

140. *See id.* at 332.

141. *See* SOCIAL THEORY, *supra* note 1, at 99–100, 111, 160.

142. *See id.* (criticizing inference that there is a “one-to-one” relationship between modes of production and levels of production).

143. *Id.* at 99–120.

144. *See* H. COLLINS, MARXISM AND LAW 28–29 (1984) (legal and political institution created by dominant social class to preserve their class position).

145. *See id.*

the ruling order in each previous stage of development.¹⁴⁶

c. Attack on Functionalist Theory of Liberalism

As mentioned above, persons who do not accept Marxist thought, and who perhaps are conservative in orientation, may share the functionalist theory. Conservatives may believe that the institutions and laws in capitalism are necessary for capitalist society.¹⁴⁷ In other words, such functionalists believe that the basic market structure in, e.g., the United States, is *the* basic capitalist structure, and *the* basic market structure.¹⁴⁸ Deviation from those institutional arrangements would strike at the heart of capitalism and market and kill the goose that lays the golden eggs. Put another way, a third-world country would have to adopt all the same institutions that comprise the present version of capitalism and market in rich Atlantic countries, or not take capitalism at all.¹⁴⁹ Capitalism could not, continues the functionalist, be transplanted with a leaf here and a root there. Take the tree or take nothing. Marxists also may see capitalism as a system whose characteristics would have to be transplanted in toto, and whose constituent parts form a whole that cannot be transplanted piecemeal.¹⁵⁰

Unger asks, what is it that is distinctive about capitalism? What is distinctive about the idea of the market economy? "Capitalism" and "market" are indeterminant concepts with no one inherent meaning.¹⁵¹ If market and capitalism are indeterminant, there can be no one meaning to transplant. Unger argues that other countries which developed capitalism, e.g., Germany, did so later with a greater participation of central government.¹⁵² He defies the social analyst to fit a functionalist explanation for historical occurrences into any meaningful definition of capitalism and market.¹⁵³ Such con-

146. See SOCIAL THEORY, *supra* note 1, at 119.

147. See *id.* at 160; Collins, *supra* note 26, at 397 (Marxists and Posner would agree that concepts such as private property and free market resolve controversy).

148. See, e.g., SOCIAL THEORY, *supra* note 1, at 109-13 (In a criticism of this theory, Unger suggests there are many "capitalist" combinations of work organization which have no Western counterparts).

149. See FALSE NECESSITY, *supra* note 1, at 83.

150. See SOCIAL THEORY, *supra* note 1, at 101 (capitalism seen by Marxists as indivisible social type—to dilute that concept reduces law-like behavior argument).

151. See SOCIAL THEORY, *supra* note 1, at 101-09, 160.

152. See *id.* at 107.

153. See *supra*, note 151.

servative approaches make functional and deep structure arguments which hold that existing institutions relating to market and capitalism are the most suited to society and its productive functions.¹⁵⁴ Unger argues that persons advocating this naturalistic approach are wrong to contend that a set of institutional arrangements which happen to occur in North America in 1989 are necessarily the highest achievement that can be produced, and are of necessity the only ones which are suitable to the society.¹⁵⁵

For example, Unger argues that there could have been an alternative development of “petty commodity production” in the formative stages of capitalism.¹⁵⁶ This was nipped in the bud, explains Unger, because elites found the central feature of differentiation between task defining and task execution congenial to their own position.¹⁵⁷ The process of petty commodity production blurs the distinction between task execution and task definition.¹⁵⁸ An example is the small scale farmer, or artisans in the textile trade in France.¹⁵⁹ Task definition and task execution in this setting are often shared endeavors. Granted, says Unger, small scale cottage industry did lose out.¹⁶⁰ But, he would have us note that the small farmer continued to exist. First, this was because of subsidies and other institutional arrangements designed to encourage that endeavor.¹⁶¹ Such industry still exists today in France and elsewhere.¹⁶² But it could not have existed without institutional/market arrangements suitable to its development.

Mass-scale industry, with the separation between task definition and task execution won out.¹⁶³ But such industry did so by structuring the market in such a way as to promote that arrangement, and suppress the cottage industry development.¹⁶⁴

154. See SOCIAL THEORY, *supra* note 1, at 129, 160.

155. See *id.* at 111, 129 (synthesis of deep structure and functionalism—“only one combination of institutions” can sustain productive capability).

156. See FALSE NECESSITY, *supra* note 1, at 223–28.

157. *Id.* at 227–28.

158. *Id.*

159. See *id.* at 185–87.

160. See, e.g., *id.* at 187–88.

161. See *id.* at 187–91.

162. See *id.* at 185–87.

163. See *id.* at 191, 195 (relative failure of petty commodity production due to hostile institutional structure).

164. See *id.* at 181–82, 227.

It could have been otherwise; it was not inevitable. One could infer that a reason to suppress the cottage industry was because the mass production controllers saw the breakdown of the distinction between task definition and control as endangering their position in the social hierarchy.¹⁶⁵ Put simply, the small scale cottage industry model allows for more equality in determining what is to be done, and who is to do it. If that idea spread, creating a vast partnership between workers and managers, the position of elites across the board might be undermined.

C. Military History Analogies—Historical Development Not Subject to Law-Like Constraints

To further attack the Marxist deep logic and functional approaches, Unger juxtaposes historical examples of military encounters and the development of productive capability.¹⁶⁶ He sees them as opposite sides of the same coin. Unger would like to show that military ventures and responses have been most successful when the troops have been allowed to respond to battlefield situations without being subject to command structures imposed from outside.¹⁶⁷ The ideal model, from his standpoint, is the functioning of elite troops or commando operations. Improvisation is encouraged in each individual. Task execution and task defining are performed by the troops themselves on the spot. Unger observes that this military blurring of task-defining and task-executing could serve as a model for altering other functions of society.¹⁶⁸

Unger wishes to establish the position against a predetermined rigidity—the notion that “these institutions must be like this”—and for plasticity of social institutions as the best road to worldly power and productive capability.¹⁶⁹ Unger concedes that it is uncertain whether plasticity, or placing a premium on openness to change institutions and arrangements, will be the best road to take.¹⁷⁰ We cannot know, for instance, whether a despotism will or will not win out in the process.¹⁷¹

165. *See id.* at 227–28.

166. *See, e.g., id.* at 161–63.

167. *See id.* at 162.

168. *See id.* at 163.

169. *See, e.g., id.* at 32–33; PLASTICITY, *supra* note 1, at 208, 212.

170. *See* PLASTICITY, *supra* note 1, at 212.

171. *Id.*

As he has already observed, the results of change are indeterminate. Unger then raises the question of what remains of his theory after this important qualification. Since results are indeterminate,¹⁷² Unger relies on his moral notions of what is appropriate in society to lessen the power that an elite hold over others.¹⁷³

1. Attacks on “Positivist Social Science”

Unger also takes Positivist social science as a major target.¹⁷⁴ From Unger’s perspective, the position of Positivist social scientists contains several major flaws. For one, they take the framework of society for granted as an unalterable component.¹⁷⁵ Framework is the often implicit structure under which societal members operate.¹⁷⁶ An example of “framework” is as follows. A person wants to be a creative writer. But she cannot do so because of the fact she is not one of the very few who can make a living at it. There may be other employments which are available to her. The “market” demands up-to-date information about how to value stocks, or advice on the legal arena in which transactions take place. Thus, she may choose to become a financial news reporter or a lawyer. Critical social theory would attempt to imagine changed arrangements that would allow such persons to fulfill their true ambitions for self-fulfillment by creating a limited number of subsidies for writers.¹⁷⁷

“Routine” is activity that follows from the structure of framework. A routine is the day-to-day things that people do in work or social contexts, e.g., who gets the coffee, who closes the door, who waits till someone else terminates the meeting. So a framework is often an unarticulated supposition about who tells whom to do what, and who does the what that is implicitly or explicitly required.¹⁷⁸ Our framework often involves a pecking order. Perhaps who goes to whose office if they want

172. *Id.* at 208–12.

173. *See id.* at 212.

174. *See, e.g.,* FALSE NECESSITY, *supra* note 1, at 276–77; SOCIAL THEORY, *supra* note 1, at 1–2.

175. *See* SOCIAL THEORY, *supra* note 1, at 2.

176. *Id.* at 2–3.

177. *See* Collins, *supra* note 26, at 388–89.

178. *See* SOCIAL THEORY, *supra* note 1, at 3–5; 88–91 (the examples are mine).

something is an example. I do not ordinarily summon the Dean to my office if I want a leave of absence.

Positivist social scientists may assume that existing institutions and social arrangements are the ones best fitted for the particular society.¹⁷⁹ For example, such social scientists may fail to question whether the institutional structure which determines the mode of court or other dispute resolution, is appropriate. Secondly, they believe that the progression of society obeys law-like constraints.¹⁸⁰ Unger refers, for example, to conventional economists. If pressed, they will agree that the "laws" they see operating in the area of unemployment or price are, at best, particular to the framework of capitalism currently practiced in, say, the United States in 1989.¹⁸¹ But this is only giving lip service to the potential effects of the transformation of framework. Their basic approach reflects a lack of interest in changing basic societal institutions. So, for them it is back to business—if we raise the interest rate . . . , or reduce the capital gains tax

In summary, Unger attaches to Positivist social science the following premises: 1) that the framework determines routine through the constraint of a preordained natural way;¹⁸² and 2) that social life is best explained as problem solving relating to conflicts of interest groups or the pursuit of self-interest.¹⁸³ With respect to the first of these two premises, one particular set of constraints relating to functionalism may arise.¹⁸⁴ One would be a Positivist social scientist if one believes that current institutional settings and market structures are necessary for maximum productivity and military might, and that capitalism and market structure cannot be transplanted except as a whole.¹⁸⁵ In such a view, institutions form a seamless web such that to alter one will imperil the whole.¹⁸⁶ In short, the positive social scientist assumes that what we have is the best and it cannot be changed. Ultimately, however, such assumptions

179. *Id.* at 9–10, 130, 131–32.

180. *Id.* at 146–47.

181. *Id.* at 133–35.

182. *See* FALSE NECESSITY, *supra* note 1, at 277.

183. *See id.* Collins, *supra* note 26, at 389.

184. *See* discussion of functionalism, *supra* text section II (B)(2).

185. *See, e.g.*, FALSE NECESSITY, *supra* note 1, at 212–13.

186. *Id.*

may only be legitimating positions which rationalize elite control.

2. Unger's Affirmative Program

As a prelude to his affirmative program, Unger sets up the current dominant theory, namely, large scale mass production necessitates rigid separation of task definition and task execution.¹⁸⁷ The contrasting vanguard style, where the troops are little generals, occurs as an occasional anecdote in military operations and the economy.¹⁸⁸ Unger attacks this dominant version which contends that there must be large scale mass production and accompanying separation between task definition and execution.¹⁸⁹

Unger admits that certain structures in a society constrain the development of possible frameworks. Historically, ruling groups such as agrarian bureaucracies have explored a series of limited political options,¹⁹⁰ suggesting restraints flowing from framework. Unger pursues a modern parallel which he calls reform cycles.¹⁹¹ Reform cycles seem to be governmental tinkering back and forth with marginal redistributive adjustments: perhaps changes in who gets what deductions in the income tax code would be one good example. Major political parties enact these marginal changes in one way or another when they get into power. Unger argues that the reform cycles become part of the routine.¹⁹² Unger thus affirms that some frameworks or contexts, such as those producing the limitations of the reform cycle problem, are quite inflexible.¹⁹³

Moreover, Unger argues that certain other relationships which permeate social organization constrain the development of possible frameworks. For example, the patron-client relation is not conducive to relaxation of hierarchy.¹⁹⁴ In the patron-client relationship, presumably exemplified by feudalism, the client gives services for protection. For the client, this is an incomplete relationship. The donee-client becomes depen-

187. *See id.* at 176-77.

188. *See id.* 161-63.

189. *See id.* at 227-28.

190. *See PLASTICITY, supra* note 1, at 21-22.

191. *See FALSE NECESSITY, supra* note 1, at 44-79, 172-73.

192. *See id.* at 17, 52, 54-55, 172-73.

193. *See id.* at 60.

194. *See id.* at 164.

dent and vulnerable by receiving patronage, but the patron does not. Unger believes ingratiating relationships such as this have been altered only when the social order is reimagined.¹⁹⁵

a. Historical Content: Property, Contract and Classical Liberalism

The property-contract regime is more conducive to relaxation of the distinction between task defining and task execution.¹⁹⁶ Presumably the purpose of Unger's development of the origin of the property-contract regime is to debunk a functionalist explanation that there necessarily inheres in property and contract a particular content such as curtailment of state power. Thus, for Unger, there is nothing necessary or unchangeable in the doctrines which would indicate they must be preserved as they exist at any particular time.¹⁹⁷

Unger explains that originally in early modern Europe, the development of the current property-contract regime developed from a deal between elites.¹⁹⁸ The ruling elite was not different from the economic elite, except that the ruling elite exercised governmental power.¹⁹⁹ The ruling elite obtained greater control over finance and armies, in exchange for the dispersal of economic rights associated with contract and property. Absolute ownership gave the economic elite the power to determine the conditions under which non-owners would survive. The trade off was statist power to the ruling elite. Thus, argues Unger, the origin of absolutist property and contract was the expansion of statist power: the delegation to a political central group of more ruling powers, rather than the curtailment of governmental power.²⁰⁰

The compromised political structure which emerges is based on two ideas. First, the fear of power and dependence produces a theory that we are governed by impersonal rules. We have impersonal rules because we need to fear others, and the discretion allowed by personalized rules would undermine the

195. See *id.* at 135–44, especially 143–44.

196. See *id.* at 164.

197. See FALSE NECESSITY, *supra* note 1, at 198–200; Hunt, *The Critique of Law: What is "Critical" About Critical Legal Theory?*, 14 J. L. & Soc'y 5, 14 (1987) (search for social origins of theory is part of critique).

198. See FALSE NECESSITY, *supra* note 1, at 198–200.

199. *Id.*

200. *Id.*

supposed protection.²⁰¹ Concomitant is a governmental structure which results in stalemate coupled with protections of citizens from governmental power.²⁰²

Developments in the United States led to separation of power in government based on a fear of power in the government, and a concentration of power in private hands. Unger explores the political paradox that universal suffrage in the United States has not led to a dismantling of systematic privilege, encouraged by the property right as constituted.²⁰³ Why? The “official” story is that the political process produces a series of compromises in which concentration of power is undermined because of the competition between various interest groups.²⁰⁴ Another reason why there has been no real attack on the bastion of privilege in the “official” story is that persons think they can break out of the class structure, and want the benefits of class privilege there waiting.²⁰⁵

Unger is clearer on the fact of the privileging that results from the property-contract regime than the reasons the privilege persists. Surprisingly, Unger rejects the false consciousness explanation. He accepts it in the general context of persons thinking what is here is natural and necessary, but rejects it in the context of an explanation as to why the mass vote has not led to substantial reduction of privilege.²⁰⁶ That result has been stymied by acceptance of the consolidated property right, and accompanying contract law which allow a small group of private persons to control investment decisions, and continue the pattern of differentiation between task execution and task definition.²⁰⁷ Unger considers the right consolidated because all the rights of property are aggregated in one entity, for example, the right to property exists indefinitely, is subject to transfer, and may be inherited.²⁰⁸ Instead of an appropriate level of equality, we have the working force subjected to a routine which denies their equality.²⁰⁹

201. See SOCIAL THEORY *supra* note 1, at 27 (appeal of liberalism’s defenders to impersonal principles); REISMAN & SCHREIBER, *supra* note 9, at 351.

202. See FALSE NECESSITY, *supra* note 1, at 454–56, 526.

203. See *id.* at 213–16.

204. See *id.* at 217–21.

205. See *id.* at 214–15.

206. See *id.* at 216.

207. See *id.* at 21, 69–70, 196, 370, 481.

208. *Id.* at 500.

209. See, e.g., *id.* at 69.

b. *Revised Capital Allocation*

Unger's central program conceives that a breakup of the consolidated property right will achieve the goals assumed by classical liberalism. Unger claims also to assimilate the goals of conservatives (including classical liberalism), socialists, and communists, who favor decentralization, liberty, equality and fraternity.²¹⁰ Some want more community, others more equality, and liberty. Unger thus attempts to make good on his claim that he is the true liberal. Others make the mistake of associating particular institutions extant today with necessary components of capitalism and market.²¹¹ Unger also favors capitalism and market, as he defines them, or rather, as he places content in them.

Unger thus rejects the socialist alternative of state ownership of the means of production. State ownership simply transfers the "consolidated property right" from a few private hands to a few "public" hands.²¹² In Unger's revision of the current system, democratic controls would be extended to the group of government officials who would make capital available on a temporary basis to teams of entrepreneurs and workers.²¹³ There would be a two-tier control of capital. The first tier is composed of government officials drawn from the central executive and representative bodies.²¹⁴ The second tier administers capital under guidelines from the first tier of officials.²¹⁵ Broad outlines of policy are set which help blur the distinction between social roles, hierarchies and divisions, and task executing and defining functions.²¹⁶ In doing so, the standards set help eliminate the problem of an entrenched skilled and semi-skilled unionized labor force that has no concern for a floating pool of laborers who are "unskilled."²¹⁷

The businesses operating in this arrangement are allowed incentive in that they get increased income for their efforts.²¹⁸

210. See *id.* at 10, 348; see generally Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

211. See FALSE NECESSITY, *supra* note 1, at 196-97.

212. See *id.* at 481-82.

213. See *id.* at 491-93.

214. See *id.* at 493.

215. See *id.*

216. See *id.* at 498-99, 508.

217. See *id.* at 499-500.

218. See *id.* at 492 (enterprises profit from their activity).

However, overall limits are set by the first tier representative body.²¹⁹ Within the sphere of capital takers, there is a group where there are no holds barred, or as Unger puts it, they are like gamblers.²²⁰ The qualifications and exceptions to the arms length, survival of the fittest ethic in contracts and property (e.g., fiduciary duty or unconscionability doctrine) are eliminated with a vengeance.²²¹ Within that sphere the consolidated property right reappears, except that profit is limited and capital may be withdrawn.²²²

The second tier of this rotating capital fund is a group partly appointed and partly elected.²²³ These second tier administrators have as a model a bank or philanthropic "Ford Foundation."²²⁴ This group allocates capital to a team of entrepreneurs, technicians and workers.²²⁵ The capital may go to large or small groups with a high priority on innovation.²²⁶ It bears repeating that capital could be concentrated, but the claims to it are not absolute in time, and may be withdrawn.²²⁷ Inheritance is eliminated because security is provided through a system of entitlements, discussed hereafter as immunity rights.²²⁸ Elimination of inheritance prevents the control of the industrial and commercial arena from being kept in the same families generation after generation.²²⁹ The state would be financed by a charge on capital made in the first instance to the controllers of capital, and passed on to the teams of persons who would engage in industry, commerce and farming.²³⁰

c. Normative Priorities

In Unger's program, it would be state policy to reduce inequalities.²³¹ Though Unger does not suggest it, I would offer the idea that the elimination of inheritance could be a useful

219. *See id.* at 493 ("wage and authority disparities" and "rights to distribute gains as current income").

220. *Id.* at 522.

221. *Id.* at 523.

222. *Id.* at 522-23.

223. *See id.* at 494-95.

224. *Id.* at 495.

225. *See id.* at 491.

226. *Id.* at 498-99; Unger, *supra* note 210, at 596.

227. *See FALSE NECESSITY, supra* note 1, at 496.

228. *Id.* at 500-01.

229. *See id.*

230. *Id.* at 491-92.

231. *See id.* at 493, 500.

transition step in bringing about the revised order. Thus, control over capital could be assumed by the state gradually without confiscation and direct redistribution that could prove troublesome in implementation. Presumably also, inheritance could be eliminated without legal problems under the current constitutional dispensation. Confiscation might be viewed as a "taking."

The underlying assumptions of Unger's institutional reordering are: 1) that no institutional arrangements are sacred;²³² 2) that there is a tendency to freeze power relationships into those who control and those who are controlled;²³³ 3) that this diminishes some people and unnecessarily privileges others;²³⁴ 4) that the government must be able to break the limitations of the reform cycle, and engage in real reform which is inhibited by outdated ideas of government stalemate through checks and balances;²³⁵ and 5) that governmental policy, including economic policy, should be periodically put to public approval or disapproval.²³⁶

What Unger wishes to accomplish, through what he calls the spirit of the new constitution, has an ephemeral quality. Persons may experience a kind of redemption, presumably a secular one.²³⁷ It is not that everyone will be put in a situation of redistributive equality in one fell swoop. Rather, institutional arrangements which impede this tendency will be under attack. There will be role jumbling, and role confusion.²³⁸ Roles, a function of frozen reality and hierarchy, will be under attack, and reduced.²³⁹

d. Rights

There are three basic sets of rights in Unger's affirmative program: 1) immunity rights, 2) destabilizing rights, and 3) solidarity rights (discussion of this last right appears in the footnote).²⁴⁰

232. *Id.* at 397-401.

233. *See id.* at 505 (the politics of privilege tend to reappear).

234. *Id.* at 397-401.

235. *See id.* at 454-57.

236. *Id.* at 457.

237. *See generally id.* at 570-96.

238. *Id.* at 593-94.

239. *See id.* at 499, 593-94.

240. *See* FALSE NECESSITY, *supra* note 1, at 524-30, 530-35, 535-39. Solidarity rights are group rights based on community oriented subdominant rights in existing

Immunity rights include protections from violence, coercion and poverty.²⁴¹ Immunity rights put the citizen in a position that he/she is not cowed by authority or threatened by the revisable nature of the political life, and that he/she can participate in civic life.²⁴² Perhaps this might be viewed as expanding the theory of academic tenure to the society at large. Another purpose of this economic aspect of the immunity right is to prevent a worker from developing too much of a vested interest in a particular job so as to provide a flexible work force.²⁴³

Destabilizing rights are the rights in groups, perhaps a specialized governmental body, whose work it is to prevent deals, accommodations and arrangements which cement in or freeze particular hierarchies.²⁴⁴ Unger indicates that his system will generate cliques, and deals between the government authorities who control capital and the capital takers.²⁴⁵ The remedy here comes from the theory that no institutional arrangement is sacred. From the bottom, there will be neighborhood organizations of restless inquiring citizens.²⁴⁶ They are freed from fear of governmental retaliation by immunity rights (note here again the possible parallel to tenured faculty members), and have time for this activity.²⁴⁷ Nothing is sacred, except that nothing is sacred. There are far reaching constitutional

property and contract law. These rights stress confidence and trust, and not taking unfair advantage. They relate to persons who have ongoing relationships in business for whom arms-length business arrangements are deemed inappropriate. These rights are not enforceable through legal procedures, but they remain as important ideals. These rights are neither legal rights nor natural law rights, according to Unger. Presumably they serve to bridge the gap between the two sets of standards—a stronger, arms-length willed transaction set of standards for contract, and the protected, trusting private sphere, where one takes refuge from the brutal world of business and work.

Unger rejects the notion that there is a problem with rights as such. Those who see rights as necessarily alienating, make an error. The mistake here is to associate rights with a vested interest in a particular kind of capitalist structure, one with, for example, a consolidated property right. That right puts all the powers connected with property in one person or entity. Rights may be alienating as administered, but they need not be if hierarchy is reduced and the terms of availability of humans to each other is altered in the working sphere. *See id.* at 508–10.

241. *Id.* at 524–30.

242. *Id.* at 524–25.

243. *See id.* at 499–500, 528–29 (the degree of support is such that one may withdraw from work life).

244. *Id.* at 530–35.

245. *Id.* at 533–34 (bias may develop in capital allocation).

246. *Id.* at 579–80.

247. *See id.* at 524–30.

changes.²⁴⁸ Changes occur which allow for the effective use of state power. Basically, there is an executive decisional core with power to effect reform, and serious disputes may be handled by referring the matter to the electorate.²⁴⁹ Unger here seems to have in mind the British "Westminster System," with a strong emphasis on referendum.

III. UNGER'S AFFIRMATIVE PROGRAM: EVALUATION

A. *Summary of Evaluation*

I am a sympathetic critic with three evaluative observations which I consider relatively minor. My concerns relate to: 1) knowledge problems, 2) problems of piecemeal participation, including the problem of piecemeal rebellion against framework by positive social scientists or others, and 3) related to the knowledge problem, the normative aspect of the controversy over the preferred model of human association.

B. *Knowledge Problems*

Unger exploited the knowledge problem in his attack on existing liberalism.²⁵⁰ Unger has unleashed the same "dragon" as the Legal Realists unleashed. The dragon here is that if there is no closure, and no objective truth, how can any set of normative commitments inside or outside the judicial process be defended?²⁵¹ As put by one commentator, "a central focus of Unger's attack upon the rule of law—and liberal society—is his presumption that legal doctrine (or, indeed, any knowledge) is incapable of being wholly neutral or objective."²⁵² What is Unger's knowledge base? Are we not at impasse?²⁵³

Unger's first reply could be that the problem with liberalism is that it rests on a naturalistic, necessitarian edifice. It is classical liberals, and orthodox Marxists who purport to have found a closure or finality in terms of historical processes or theories

248. *Id.* at 454–55 (under the present constitutional system of checks and balances, stalemates of power occur whenever real reform is likely).

249. *Id.* at 456–61. (The president is to be popularly elected.).

250. See, e.g., R. UNGER, *KNOWLEDGE AND POLITICS* (1975).

251. See Hunt, *supra* note 197, at 7–8 (identifying the dispute within CLS as to whether affirmative theory is possible in view of the death of the Enlightenment faith in objective truth).

252. See Alford, *supra* note 6, at 965 (arguing that Unger shows himself to be culture bound in his conceptions).

253. See Van Doren, *Impasse: Is There a Beyond?*, 13 W. ST. U.L. REV. 493 (1986).

of the judicial process, or more generally in current political and economic institutions. The strength of my theory, Unger might say, is that it rests on a denial of a fixed context or framework of knowledge and action.²⁵⁴

Unger wants us to make use of this context smashing knowledge to remake institutions so that they prevent a hardening of the arteries into some scheme in which necessitarian claims foreclose change. Unger can properly claim that he is not making any objective closure-type presumptions. His whole approach is that institutions must be continually subject to revision, because there can be no final solution.²⁵⁵

However, another problem remains. What is the epistemological and normative basis of Unger's commitment to liberty, equality and fraternity? What of the preference for context smashing, for breakdown of the power that a few have over many in the economic arena? What of the attempts to break up social stratification and roles, and what of attempts to jumble roles and render persons more accessible to each other?²⁵⁶ Where is the normative basis for making changes which would allow us (or more of us) to be able to engage in self-assertion in a community without excessive dependence, loss of self and dignity?²⁵⁷

Unger states that there should neither be total rebellion against all that is, which he calls modernism,²⁵⁸ or total acceptance of what there is. The middle course, one which imagines the imagination, will produce results which are tentative and controversial.²⁵⁹ Unger inevitably faces the knowledge question, which involves the normative question, or, as he puts it, antinomy between fact and value:²⁶⁰ which is, how do we know? So the problem of knowledge comes back to haunt Unger. His answer is as it must be, since God has not spoken yet, that he has no answer to the knowledge skeptic.²⁶¹ He speaks,

254. See FALSE NECESSITY, *supra* note 1, at 12 (no context is a permanent home).

255. *Id.*

256. *Id.* at 354–55 (anticipating this argument).

257. See Smolin, *Roberto Unger's Theory of Personality, Law, and Society: Critique and Proposal for a Revised Methodology*, 55 U. CIN. L. REV. 423, 433–39 (1986) (suggesting that Unger is substituting his preferences concerning plasticity or rigidity for those of others).

258. See SOCIAL THEORY, *supra* note 1, at 168–69.

259. *Id.* at 207.

260. See FALSE NECESSITY, *supra* note 1, at 353–54.

261. *Id.* at 354–55.

as he must speak, in the final analysis, of his values, his normative commitments, and then heads for the stratosphere.²⁶²

Unger's central tenet is that history is not governed by law-like constraints, that instead there is an open quality to history.²⁶³ That itself is a statement that may be false, or proved false. Unger supports it by historical examples from "hard" and "soft" sciences, and stresses that our continued capacity to imagine and reason precludes the finality of any truth,²⁶⁴ presumably including the one he comes up with. Unger indicates he cannot necessarily convince the knowledge skeptic.²⁶⁵ He is correct; he cannot.

The "knowledge problem" was an enormously effective device to "deconstruct" liberal legalism. The basic CLS attack targets the premises of liberal legalism, concluding that the goals of liberalism cannot be achieved. More specifically, the contradiction between the need for and the appropriate fear of subjection to others cannot be reconciled on an objective basis. But that is because there is no objective basis that we can know.²⁶⁶ So, any system which purported to be based on some closure, some objective basis for the reconciliation of conflicting interests grand or small, would be doomed to failure. The appeal of necessitarian argument is that in the legal realm it justifies or legitimates a given system.

The knowledge problem is not confined to liberalism. For example, Western legalism and Christianity both must be based primarily on faith, because the props of 1) assumed ability to mediate contradiction through reason, 2) Natural Law, and 3) hermeneutics or the theories of interpretation, are in such disarray that the tower of Babel is a reality. The problems of hermeneutics spill over to undermine literalism, the mode of interpretation that accompanies positivism, both in Christian interpretation and Western law.²⁶⁷ Literalism, or plain meaning interpretations, and the related presupposition that rules govern cases, remain the prop that particularly Positivist oriented legalists cling to like drowning sailors.

262. *Id.*

263. *See supra* Section II (B)(2)(a).

264. *See supra* Section II (B)(1).

265. *See FALSE NECESSITY, supra* note 1, at 354-55.

266. *See Van Doren, supra* note 253.

267. *See Van Doren, Contradiction and Legitimacy in Christianity and United States Constitutionalism*, 10 WHITTIER L. REV. 637, 656-61 (1989).

Unger's approach is like that of the Christian theologian, Professor Pelikan, who said that method is the only invariable, the constant in our revisable search for truth. Professor Kelsey, another theologian, concedes the hermeneutic confusion and frankly faces the knowledge problem. He argues that as long as one defends one's views, and is purporting to do Christianity in good faith with reference to the Christian texts, that is sufficient. Interpreters will produce determinant propositions. There is no problem that these diverge or contradict each other.²⁶⁸

Unger would agree with Pelikan's assertion that the only constant is method which incorporates the notion of constant revisability. There can be no final truth in natural or other science.²⁶⁹ Unger would not feel himself constrained, however, by the particularities of documents such as the text of liberalism (the Constitution), because he seeks to modify them substantially.²⁷⁰ Unger skillfully seeks legitimation from Western tradition by extracting the goals of freedom, equality, and friendliness (love?) which are, he might argue, insufficiently realized by the current Constitution. Unger could take the document, the Constitution, as his model, and purport to derive the working propositions of liberty, equality and fraternity from it. But he does not do so. Instead, he claims to derive these from liberal, socialist and communist traditions. Unger then is like a "Catholic theologian" who consults tradition to find the real "liberal Gospel."²⁷¹ He has followed a legitimating model of consulting tradition, and in Pelikan's terms, has taken a broad jump from where we are to where we should be going.

As some theologians and politico-legal philosophers are recognizing, ultimate reconciliations must be based on faith in politics, law and religion.²⁷² Western legalists as a whole, however, do not feel they can acknowledge that. Western jurispru-

268. *See id.* at 666.

269. *Id.*

270. *See, e.g.,* FALSE NECESSITY, *supra* note 1, at 457-62.

271. A commentator pursues this parallel more concretely by suggesting that there are significant similarities between Unger's program for greater equality of distribution and that of Catholic bishops. *See generally* Powers, *Critical Legal Bishops: Roberto Unger, the Catholic Bishops and Distributive Justice*, 2 NOTRE DAME J. L., ETHICS, & PUB. POL'Y 201 (1985) (also pointing out differences).

272. *See* Smolin, *supra* note 257, at 448 (Unger fails to make value judgments that will withstand the rigors of skepticism: we consult religious tradition, history and empirical data, the voice of our heart and make a leap of faith).

dence is a testimony to the denial of this central tenet, and is accordingly obsolete. Unger argues that his system would be better than the existing one to bridge the gap between self-assertion and the need for, and fear of, dependence on others. There is a normative commitment here, as there must be. Unger acknowledges that classical liberalism represents an advance over the patron-client social arrangement.²⁷³ He helpfully focuses on the industrial and commercial economy with respect to his "property as power" arguments. It is curious that he reserves a survival of the fittest sector where even the mitigating effects of equity are ruled out of bounds.²⁷⁴ Ironically, he claims that the contract and property rules would be clear and capable of positivistic interpretation.²⁷⁵ Despite this aberration, Unger's focus on the need to break up power of property in the market-sector conditions of life, nicely separates the need for property rights as an immunity to citizens who wish to use it as a buffer between government and private power over persons. But the question of whether Unger's system can ultimately better reconcile contradictions of our existence in community, is ultimately a matter of faith.

C. To Participate or Not to Participate: Piecemeal Activity as Legitimizing

Unger encourages deviations within the system such as small-scale acts of rebellion. He also promotes deviationist lawyering, which is pursuing a deviant strain of the inherited legal tradition, i.e., unconscionability, to advance toward his alternate view of society.²⁷⁶ On the other hand, he clearly seeks major framework changes. He argues that each of those small-scale rebellions could snowball into major framework change.²⁷⁷

This approach disregards the problem that participation within a system may legitimate it, and discourage major change.²⁷⁸ Should one work within the existing framework to

273. See FALSE NECESSITY, *supra* note 1, at 164.

274. *Id.* at 522-23.

275. *Id.*

276. See SOCIAL THEORY, *supra* note 1, at 147; FALSE NECESSITY, *supra* note 1 at 273-74.

277. See *id.* at 6.

278. See D. KAIRYS, THE POLITICS OF LAW 310-12 (1982) (where there is a tension reflected between advocacy of changes within the system and non-participation).

bring about change, or should one hold out for framework change? The lawyer who attempts to develop unconscionability doctrine may create the expectation that the framework does not need change. If one follows Unger and pursues the development of unconscionability, this seems to take the framework for granted.

A second problem in Unger is this. What really is the difference between pursuing a law case of unconscionability, and being a "Positivist social scientist" studying why women do not become partners in law firms? Do not social science studies which show that women often do not make partner in law firms reflect back on the framework? Then what is the matter with Positivist social scientists' efforts in, for example, *Law and Society*? For example, feminists in *Law and Society* work for changes within the system. *Law and Society* adherents, in pursuing the analysis of the gap between liberal ideals and practice, or looking for unexpected facts, e.g., that divorced women do worse under no fault divorce,²⁷⁹ may or may not take the framework for granted. But why is that objectionable within the Unger world? Do they really neatly fall in the category of framework preserving and framework challenging?

Missing in Unger is sufficient recognition of the tension between affirming a structure by working in it, and refusing to participate because participation may retard change. Unger might say that framework is changed by water dripping on the rock, by that series of small rebellions that could crystalize.²⁸⁰ However, while endorsing the efforts to achieve some changes, he denigrates some small changes, such as those he refers to as resulting from reform cycles.²⁸¹ Are small changes, or rebellions complementary to major change by the snowball effect, or do they inappropriately reinforce the current framework, as, e.g., the movement within the reform cycles do?

Unger thus slides over the problem that working within a system tends to support the system and legitimate it. In short, activists in South Africa take the view that there should be no participation in the political bromides that are being offered a

279. See, e.g., R. EISLER, *DISSOLUTION NO FAULT DIVORCE, MARRIAGE AND THE FUTURE OF WOMEN* 40 (1977) (women are in many ways victims of no fault divorce).

280. See *FALSE NECESSITY*, *supra* note 1, at 59, 268, 273 (low level disagreements may escalate).

281. See *id.* at 12 ("Only proposals that are hardly worth fighting for—reformist tinkering—seem practicable.").

basically disenfranchised black majority. If South African Blacks were to adopt Unger's deviationist theory that the doctrines representing a countervision should be pursued in the legal system,²⁸² they, counterproductively, would be legitimating the system.

Unger also seems on a collision course with certain propositions which have emerged from the Frankfurt school of learning. It has been pointed out, for instance, that the makers of popular culture reinforce the patterns of subjection; and by offering the example of persons who make it within the system, ruling groups seek to coopt or seduce away potentially radical activity.²⁸³ This is the best explanation of the situation left open by Unger: why there is no rebellion against privilege in the United States. Unger states that we should exploit the Horatio Alger images to achieve what equality we can. This seems to be contradictory to the approach of the Frankfurt school which seeks to bring out the conservative implications of popular culture which in Unger's terms reinforce the framework.²⁸⁴

A fundamental question remains: should one hold out for a quantum leap and not legitimate the existing order, or should one seek the "quantum leap" piecemeal? If any deviation or defiance of framework could escalate, that is an argument for defying the system or pursuing a counter-dominant ideal. But in some circumstances, participation will further buttress an inappropriate framework, and give the illusion of change without the substance.²⁸⁵

D. *Models of Human Association*

Unger argues that the mass of legal material in liberalism does not reflect a defensible scheme of human association. First, the liberal conception is contradictory.²⁸⁶ Second, it is not revisable; it represents itself falsely as natural, closed and final.²⁸⁷ Finally, and perhaps most importantly, the liberal con-

282. *Id.* at 555.

283. See Van Doren, *Critical Legal Studies and South Africa*, *supra* note 23.

284. See *id.*

285. See, e.g., Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923, 933 (1988) (race law gives illusion of progress and legitimates oppressive society).

286. See SOCIAL THEORY, *supra* note 1, at 148.

287. See *supra* Section I (D).

ception is morally wrong, as constituted.²⁸⁸ Unger's attack is directed against "objectivism," which is the idea that the current arrangements concerning "market" and "democracy" and the underlying components of the legal system (cases, statutes and legal concepts) are the unique way of expressing the desired form of human association.²⁸⁹ Thus, Unger and CLS maintain that there is no possible objective resolution of adjudicative conflict.

There is indeterminacy at the levels of doctrine, policy and the basic liberal conception of state, family and market. To resolve doctrinal inconsistency, resort must be made to the policy level. Since the policy level is also indeterminate, there is a third level of thought to resolve matters, the liberal form of human association.²⁹⁰ The reason that no model of human association solves the conflicts on the doctrinal and policy level is due to the fact that the three spheres, market, private (family and friendships), and public (state) lack boundaries that hold. Consequently, principles that are present in one area are applied in the other areas. Thus, freedom of speech from the political area could be applied to the business area for whistle blowers.²⁹¹

Unger may be saying that each sphere, market, public, and private, unduly isolates persons from others and from the best in themselves.²⁹² He might add that there is in liberalism so much contradiction, i.e., conflicting models of human association, and so much overlap, actual and potential, that there is no center to hold. On the other hand, there is a dominant ideology based on individualism. Thus, in Unger's scheme, is the problem that the existing liberal model is flawed, or is it that there is no recognizable model at all due to contradiction?

The real attack is normative: the current liberal model is the wrong model. Unger finds the liberal social arrangements are based on happenstance, such as legislative power plays and adjudicative compromise that just reflect where the fighting

288. See *supra* Section II (C).

289. See Pannier, *Roberto Unger and the Critical Legal Studies Movement: An Examination and Evaluation*, 13 WM. MITCHELL L. REV. 647, 659-60 (1987).

290. See Collins, *supra* note 26, at 396-98; SOCIAL THEORY, *supra* note 1, at 147.

291. See Collins, *supra* note 26, at 396-407; FALSE NECESSITY, *supra* note 1, at 273-74 (both supporting this paragraph).

292. See FALSE NECESSITY, *supra* note 1, at 273-74.

stops.²⁹³ The argument over what is a defensible form of human association constitutes the crux of the current dispute between Dworkin, Unger and CLS.²⁹⁴ Dworkin's model judge has a theory of the form of human association to resolve disputes.

But if liberal defenders argue that there is a dominant model, they must answer Unger's claims in *Knowledge and Politics* that it is riddled with contradiction. The liberal model does not resolve the fundamental contradictions, it "balances" them, that is, makes some decision ad hoc between two poles, responsive to no objective determinant. Unger could continue with the argument that there is no necessary resolution, no uniquely correct liberal model of association.

A defender of the liberal order has answered that there is not a *necessary* resolution, say in contracts, but a defensible one nonetheless.²⁹⁵ Finnis indicates that Unger is unclear on whether the indeterminacy of, e.g., "market," is a problem because it is empty and vacuous, or because the indeterminate concept does not give rise to any rules, such as those which exist in United States contract law.²⁹⁶ "Fair" market relations might be defended even though the United State's version might not be the unique way to structure them.²⁹⁷ Moreover, there can be some resolutions which are true to parts of the concept, and yet not be the unique ones.²⁹⁸ Thus, a liberal defender could answer Unger by saying that contradiction does not prevent a dominant model from surfacing. While this is a major anti-necessitarian concession, it is an answer to Unger's contention that the liberal order cannot resolve the contradictions in its own terms. But the question boils down to this: Are the "fair" market relations more fair to some than others? This takes us back to the knowledge problem and normative commitments. How could one ever "resolve" it?

Thus, there seems to be an unresolved contradiction in Unger's thought between casting the dominant liberal ideology as

293. See *id.* at 265, 555 (tension between legislation of interest group politics and the impersonal ideal).

294. See R. DWORIN, *LAW'S EMPIRE* 271-75 (1986). See also *supra* note 74.

295. See Finnis, *On "The Critical Legal Studies Movement"*, 30 *AM. J. JURIS.* 21, 23 (1985).

296. *Id.*

297. *Id.*

298. *Id.* at 37-38.

one which is able to be perceived but wrong, and the idea that contradiction prevents one from emerging at all. What is left is the normative Ungerian claim that the liberal dominant ideology does not square with its theoretical model, i.e., we are supposed to be free, equal, and friendly, but structural arrangements do not allow that. The debate then is between models, which goes back to fact/value, normative problems. Unger, in the final analysis, gives us a method. When he says that all is politics, and proposes the use of deviationist doctrine, what guarantee is there that there will be anything but contingent happenstance when revisability, which is after all, only a technique, is followed? Unger could and does reply that he never promised you a rose garden. He invites you to share his faith: if you remove unnecessary constraints, persons will be freer and good will triumph. Which, by the way, is all anyone else can offer you, their faith.

If we extract two reasons for explanation of why the liberal model fails, we have: 1) interpersonal relations operate at a level where trust results in betrayal; and 2) the operation of the market results in subjection. Unger's model addresses the second, but does not satisfactorily address the first. Unger's presumption that love will flourish if institutional barriers preventing accessibility of persons to one another are removed is a major leap.

CONCLUSION

Professor Unger has done us a great service by continuing to take us into the controversial dimensions of theory of knowledge, political theory, and economics to name a few. Where many of us have faltered for lack of vision or courage, he has advanced. Just to elevate the discussion from the statute of limitations to forms of human association is a tremendous advance. His alternative vision puts us to the test.

Unger has raised our vision from our myopia in the narrow world of adjudication into the taboo (for law professors) arena of broad politics and ethics, largely ceded by lawyers to the political scientists and philosophers. By asking how we are constrained, how we constrain ourselves, who we are, and what we really might be, Unger, in a superlative effort, greatly stimulates our vision of the possible.

