1987

Roberto Unger and the Critical Legal Studies Movement: An Examination and Evaluation

Russell Pannier

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

Recommended Citation
Available at: http://open.mitchellhamline.edu/wmlr/vol13/iss4/2
ROBERTO UNGER AND THE CRITICAL LEGAL STUDIES MOVEMENT: AN EXAMINATION AND EVALUATION

RUSSELL PANNIER†*

INTRODUCTION .................................................. 648

I. UNGER’S OVERALL VISION .................................. 650

II. EARLIER THEMES ........................................... 651
   A. The Good is Definable as the Realization of Human Nature ........................................... 652
   B. The Essence of Human Nature Would be Fully Revealed Only in an Ideal Society .............. 652
   C. The Ideal Society Would be a Society of Organic Groups ................................................. 654
   D. Customs Rather Than Legal Rules Would Play the Primary Part in Shaping the Life of the Organic Communities ................................................................. 657
   E. Genuine Communication Between Persons Can Exist Only in an Organic Group ............... 657
   F. Although the Transformation of Society into a True Community is not an Historical Inevitability, We Have Reason to be Optimistic ............................................... 658

III. UNGER’S CONCEPTION OF THE CRITICAL LEGAL STUDIES MOVEMENT ............................ 658
   A. The Formalist and Objectivist Conceptions of Law are Mistaken ....................................... 658
   B. A Critical Legal Studies Lawyer Should Help Develop and Apply Deviationist Doctrine ......... 662
   C. Deviationist Doctrine May Proceed Either by the Method of Internal Development or by the Method of Visionary Insight ................................................................. 662

† Professor of Law, William Mitchell College of Law. Professor Pannier received his A.B. from Olivet University in 1964, his M.A. from Harvard University in 1969, and his J.D. from the University of Minnesota in 1974.

* I wish to thank Professor Douglas Heidenreich for several helpful discussions concerning the topic of this paper.
D. The Critique of Objectivism Results in a Redefinition of the Institutional Forms of Democracy and the Market ........................................ 664
E. This Social Ideal and the Theory of the Relation Between Law and Society Lead to a Program for Cultural Revolution ........................................ 665
F. The Social Ideal of Critical Legal Studies Can Also be Translated into a Program for the Reconstruction of the State and the Other Institutions of Society .......... 666
G. The Social Ideal of Critical Legal Studies Leads to a Critique of the Existing Democratic System and to a New Conception of an “Empowered” Democracy ... 666
H. A Necessary Step Toward Creating an Empowered Democracy is Reorganizing the Government .......... 668
I. A Second Necessary Step Toward Creating an Empowered Democracy is Reorganizing the Economy 669
J. A Third Necessary Step Toward Creating an Empowered Democracy is Defining a New System of Individual Rights ........................................ 670
K. The Program for Creating an Empowered Democracy Can be Accomplished Gradually .................. 672
L. The Critical Legal Studies Vision Leads to a New Conception of Law Practice ............................. 672
M. The Critical Legal Studies Vision Also Leads to a New Conception of Legal Education .................. 673

IV. Evaluation .................................... 674
A. Our Knowledge of Human Nature .................. 674
B. Does Human Nature Change? ...................... 676
C. The Goodness of Human Nature .................. 676
D. Are All Hierarchies Morally Unjustifiable? ........ 677
E. The Rejection of Formalism and Objectivism .... 677
F. Is Unger’s Program Essentially Totalitarian? ....... 678
G. Are Unger’s Economic Proposals Plausible? ........ 680
H. Meaning in the Life of the Lawyer and Law Student 681
I. Can the Ultimate Meaning of Life be Found in Social and Political Relationships? .................. 681

Conclusion ..................................... 682

Introduction

Five philosophies of law dominate the conversation in contemporary Anglo-American jurisprudence. The law and eco-
nomics school uses the concept of economic efficiency to analyze and evaluate the law. Legal rules are deemed justifiable to the extent to which they maximize the total wealth of society. Legal positivism sharply distinguishes between law and morality, offers a nonideological conception of law and holds that judges have discretion in the sense that the law fails to compel unique resolutions of many legal disputes. Ronald Dworkin opposes positivism. He claims that no clear line can be drawn between law and morality and that the law is determinate in the sense that for any legal question there is one correct answer. Natural law theory maintains that law should be evaluated teleologically by asking how well it protects natural rights and promotes the common good. The critical legal studies movement attacks the other schools from the Left. It claims that legal rules can be manipulated to serve conflicting political ends and urges lawyers to use their skills in creating a socialist society.

Of all these approaches the critical legal studies movement is perhaps the least well understood by the community of lawyers. I shall try to remedy at least some of the lack of understanding by providing an exposition of some of the movement's leading themes.

There are at least three ways to write such an exposition. First, one could characterize the movement as a whole without sustained reference to any particular writer or writers. The drawback of this method is that many purport to speak on behalf of the critical legal studies movement and disagree among themselves. A general characterization would risk oversimplification and misstatement. Second, one might describe the theories of all or most of those claiming to represent the movement. One of the difficulties with this approach is that an adequate description of the writers who would have to be discussed would exceed any reasonable length for a paper of this kind. Third, one might select for intensive review one of the leading critical legal studies writers in the hope that his or her ideas are sufficiently representative.

I have chosen the third method. I shall focus upon the theo-

---

ries of Roberto Mangabiera Unger, one of the generally acknowledged leaders of the movement. 5

I shall concentrate primarily upon ideas Unger sets out in *The Critical Legal Studies Movement.* 6 But Unger develops certain underlying philosophical and political principles in earlier writings which should be kept in mind when reading his later work. After setting out what I take to be Unger's overall picture in Part I, I shall sketch some of these underlying conceptions in Part II. In Part III I describe the main elements of Unger's view of the critical legal studies movement. In Part IV I offer some brief evaluative comments.

I have found Unger's writings very obscure, even as measured by the modest standards of political philosophy. His language is excessively abstract. He rarely offers examples. Many of his sentences are cumbersome and too long. He almost never presents arguments. I have often been unsure of his meaning. I mention this only to put the reader on notice that the interpretation I offer is certainly not the only one that could be lifted from Unger's work. Of course, the best evidence of Unger's intentions is his own writing.

It seems best to begin with Unger's political vision, for it is this vision which underpins his entire theory. At risk of oversimplification I shall briefly describe in very general terms his basic conception. In Parts II and III I shall provide some of the details.

I. UNGER'S OVERALL VISION

Unger is a communitarian socialist. He believes that a truly just society would create and maintain the conditions for genuine equality by eliminating hierarchies of economic, social, political and legal power. Such a society would consist of a class of relatively small "organic" communities in which the sentiments of love and solidarity were fully expressed in the members' mutual relationships. In such communities the full humanity of each person would flourish free from artificial

---


constraint. The classic socialist principle would provide the principle of economic distribution: from each according to his ability, to each according to his need.

Unger is ambivalent about the question of collectivist control. On the one hand, he says many things suggesting that his ideal socialist state would not be totalitarian. The state would provide basic economic guidance for the organic communities but would protect political, social and economic freedoms. The principle of decision-making at all levels would be democratic. On the other hand, it seems that this ideal society would bring with it a vastly enlarged governmental apparatus whose potential for coercive control would far exceed anything now existing in our system.

Contrary to classical Marxist theory, this just society can be created by democratic means from the materials of present American society. Each person who becomes convinced of the desirability and possibility of creating socialism will find ways of working toward that ideal from within his or her occupational role. Lawyers have their own part to play in the struggle for the radical transformation of society. The law consists of rules which can be manipulated for various political ends. The law is not a monolithic structure which mechanically determines resolutions of conflicts. Lawyers dedicating themselves to working for true community and equality will discover, through Unger's guidance, the necessary tools of action.

A fully human life is possible only within a truly just society. But in the meantime we can approximate full humanity by working to make that ideal actual. In fact, only by participating in the revolutionary struggle for equality can we find personal integration. Lawyers typically lead fragmented lives dedicated to the arbitrary desires of clients and to the cynical masterminding of sordid power plays. Through becoming fully conscious participants in the cause for true community, lawyers will transcend these disintegrating forces and will find the deep fulfillment of a unified consciousness.

II. EARLIER THEMES

In this section I shall present some of the themes Unger dis-

7. For a clear statement of a Marxist theory of law, see H. COLLINS, MARXISM AND LAW (1982).
cusses in writings published before *The Critical Legal Studies Movement*. These earlier themes illuminate the general argument of that book.

A. The Good is Definable as the Realization of Human Nature

One of Unger's pervasive themes is the claim that good and evil are the ultimate categories of moral evaluation. Thus, a legal system should be evaluated by determining the extent to which it realizes the good. Because the category of the good is basic to Unger's enterprise, it is important to understand his definition of goodness.

Unger defines the good in terms of human nature. The good is the realization of human nature. Thus, a legal system is justifiable to the extent to which it promotes the realization of human nature.

The definition of the good as the realization of human nature presupposes two kinds of harmony, one within the self and one between the self and the world. With respect to the former, Unger assumes that the self is so constituted that genuine realization and happiness are possible. With respect to the latter he assumes that there are no metaphysical factors precluding human fulfillment.

B. The Essence of Human Nature Would be Fully Revealed Only in an Ideal Society

Because the standard for evaluating the justice of a society is human nature, it is important to investigate that essence. To the extent to which we are unclear about human nature we are unclear about the good.

In contrast to philosophers who deny the existence of significant similarities among humans, Unger asserts the existence of an essence shared by all. But he also says that this essence

10. See, e.g., *id.*, ch. 4, at 145-90 (critiquing the "welfare-corporate" state).
11. *Id.* at 237.
12. *See id.* at 239, 245.
13. *See id.* at 237.
15. *See id.*
changes.  

Like any universal, the human essence is transformed by history. There are no fixed essences of the kind postulated by Aristotle.  

One factor which transforms the human essence is knowledge itself. Each thing must be defined by its relations with everything else in the universe. For the human knower there can be no intelligible distinction between the “objective” nature of these interrelationships and their “meaning” to him.  

For, the very distinction between the “objective” nature of a relation and its “subjective” apprehension by a knowing subject presupposes the impossible project of escaping from one’s own perspective. Hence, every act of knowing transforms the object known in the sense that the object now has a new relationship with some thing (viz., the knowing subject) which changes it. Now, the case of the human knower knowing the human essence is only a special case of the general case of the knower apprehending a universal. Hence, the very attempt to understand the human essence transforms it.  

Not only does the attempt to know the human essence change that essence, but the forms of social life themselves transform it. Human nature is “reinvented and transformed by each new form of social life; indeed, by every individual.”  

It might seem that this situation makes it impossible to know the human essence. If every attempt to know it changes it, and if every form of social life changes it, how could the essence ever “stand still” long enough to be understood? One might even question the intelligibility of talking about essences at all under such conditions. 

But matters are not hopeless. Unger believes that we can be sure of one thing: wherever there is “domination” of some persons by others, human nature cannot show itself. In a society with no forms of domination, legal, political, economic or 

17. Id.  
18. See Knowledge and Politics, supra note 9, at 203.  
19. Id. at 203-04.  
20. See id. at 203.  
21. Id.  
22. Id. at 203-04.  
23. Id. at 204.  
24. See id.  
25. Law in Modern Society, supra note 16, at 42.  
26. Knowledge and Politics, supra note 9, at 247.
social, human nature will reveal itself as it is. Thus, there is a sense in which we cannot fully know the human essence until we observe it in a just society.

C. The Ideal Society Would be a Society of Organic Groups

A good society would be a genuine community. A genuine community would be a community in which persons shared purposes in whose moral legitimacy they believed and in which each member treated every other as a "concrete and complete" being. True community would encourage the expression of mutual benevolence. Such benevolence would take the form of a sentiment of solidarity. A person experiences the emotion of solidarity to the extent to which he feels responsible for those whose lives touch his and to the extent to which he is willing to share their fate. Solidarity is concern with another as a person rather than as an occupier of a social role or as an abstract bearer of legal rights.

Unger's term for a genuine community is "organic group." The good can be realized only in an organic group. In such a community, everyone would recognize the "concrete individuality of his fellows. . . ." No one would treat another as a mere occupier of a social or legal role. Everyone would experience everyone else as working toward the same goals. No one would experience another as an "antagonistic" will.

An organic group must satisfy two conditions. First, it must be possible and likely that each member would have many "face-to-face dealings" with all the other members. Second, each member must live with the others in many different social circumstances so that everyone learns to experience everyone else as a "concrete individual."

These two conditions make it necessary that an organic

27. See id.
28. Id. at 184.
29. See LAW IN MODERN SOCIETY, supra note 16, at 206.
30. See id.
31. See id.
32. Id.
33. KNOWLEDGE AND POLITICS, supra note 9, at 259-62.
34. Id. at 260.
35. See id. at 261.
36. Id.
37. Id. at 262.
38. Id.
group be relatively small and characterized by many different purposes. And since each group must be small there will have to be a great many organic groups within the society, each one based upon a "distinct set of common experiences and shared purposes." A society of organic groups would have to sacrifice much efficiency in terms of production of goods and services. Such sacrifice would be required by the drastic decentralization and by the multipurpose activities within each group.

One of the inherent dangers in a society of organic groups would be the temptation to think that any existing community sufficed as a "final expression of the good." This temptation might lead to the oppression of group members and to the suppression of dissent. All members of the society would have to keep well in mind the "transitory and limited character of all forms of group life as manifestations of human nature." Within each organic group, all important decisions would be made democratically. Unger calls such an arrangement a "democracy of ends." Decisions regarding what to produce, how to produce and for what purposes would be political choices and open to debate and collective decision. In participating in such debates and in voting on such issues, each member should keep uppermost in mind the genuine good of the community. No member should act from purely self-interested motives.

The ultimate standard of distribution within each organic group would be the socialist principle of giving to each person what he needs for the development of his personality. However, in the beginning it might be necessary to distribute on the basis of both merit and need. As each organic group matures, it will acquire a better understanding of human needs.

39. See id.
40. Id. at 279.
41. Id. at 265.
42. Id.
43. See id. at 266-67.
44. See id.
45. Id. at 267.
46. Id. at 268.
47. Id.
48. Id. at 270.
49. See id. at 272.
50. Id.
and will be able to more closely approximate the ideal of distribution on the basis of need.\textsuperscript{51}

The rigid division of labor characterizing Western democracies should be broken down within the organic groups.\textsuperscript{52} Persons who exercise power over others in one respect should be made subject to those others in other respects.\textsuperscript{53} No one should be allowed to combine within himself a variety of powers over others. Systematic rotation of tasks and occupations should be required.\textsuperscript{54} No one should be forced or allowed to spend much time at any one task. Some tasks would be disliked by everyone but would be necessary for the life of the community. Those tasks should be assumed by all as a "common burden."\textsuperscript{55}

An organic group would be required to carefully protect the freedom of its members.\textsuperscript{56} Freedom can be defined as the "measure of an individual's capacity to achieve the good."\textsuperscript{57} True freedom requires that each organic group member have certain legally protected rights against the group and against other members. First, there would be freedom to join or leave any group.\textsuperscript{58} Second, each member would have a right to speak freely on all issues.\textsuperscript{59} Third, each person would have freedom to choose his work.\textsuperscript{60} Finally, everyone would have a right to belong to several organic groups at a time.\textsuperscript{61}

What would be the role of the state? One of its functions would be standing above all of the organic groups and keeping peace between them.\textsuperscript{62} Another would be the legal protection of the personal freedoms of the members of the organic groups.\textsuperscript{63} The state would also establish the conditions under which each organic group would relate to every other in the same way that members of any particular organic group would

\textsuperscript{51} Id.
\textsuperscript{52} See id. at 275.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} See id. at 278-79.
\textsuperscript{57} Id. at 278.
\textsuperscript{58} Id. at 279.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 280.
\textsuperscript{62} Id. at 282.
\textsuperscript{63} Id.
be required to relate to each other. Thus, the state would see to it that all the organic groups interacted in love, brotherhood and solidarity.

D. Customs Rather Than Legal Rules Would Play the Primary Part in Shaping the Life of the Organic Communities

The organic groups would replace governance by legal rule with guidance by custom. Customs are “tacit standards of right that are actual patterns of conduct.”

The reason for replacing rules with customs is that no set of rules could do justice to the emotion of solidarity which ties together each organic group. The sentiment of solidarity requires each person to take none of his legal rights for granted. A rights holder should always ask himself, prior to exercising any of his rights, whether using his legal power in a particular situation coheres with his ultimate purpose of “sharing the burden” of all those whose lives touch his. Now, to that question, there could never be a general answer formulated in terms of a generally applicable rule. As Unger says:

Everything will depend on issues like the degree to which the other person has acted wrongly in the particular relationship and his ability to bear the loss that would result from the exercise of the power. These are not factors that can be made the basis of rules; instead, they are elements of decision that bear on how one uses the rights allocated by existing rules.

E. Genuine Communication Between Persons Can Exist Only in an Organic Group

Human action must be understood in terms of the purposes pursued through that action. Two conditions must be satisfied in order for two persons to understand each other’s actions and words. First, both must have the “same kind of

64. Id. at 282-83.
66. Id. at 251.
67. Id. at 207.
68. Id.
69. Id.
70. Id.
71. Id. at 207-08.
72. See id. at 246.
being or mind.” 73 Second, this potential similarity of mind must be expressed in “shared experiences, understandings, and values.” 74 Such conditions could only be met within an organic group.

F. Although the Transformation of Society into a True Community is not an Historical Inevitability, We Have Reason to be Optimistic

In spite of all the conflicting purposes dividing people, everyone has the overriding aim of affirming his humanity. 75 Thus, we all share the concern to create the conditions for true fulfillment. 76 In time, this common sentiment may become so strong that we will all be induced to work with each other in the common cause of building a better society. 77

Further, there is reason to believe that divine providence is working with us. 78 Although we cannot know God fully, we do know that He is willing and able to help us in our struggle for justice. As Unger puts it:

When philosophy has gained the truth of which it is capable, it passes into politics and prayer, politics through which the world is changed, prayer through which men ask God to complete the change of the world by carrying them into His presence and giving them what, left to themselves, they would always lack. 79

III. Unger's Conception of the Critical Legal Studies Movement

A. The Formalist and Objectivist Conceptions of Law are Mistaken

Unger says that the critical legal studies movement began by rejecting the formalist and objectivist theories of law. Formalism is the belief that legal analysis does not involve ideological or philosophical elements. 80 Legal argument is not open-ended debate about the fundamental conditions of society. 81

73. Id. at 258.
74. Id.
75. Knowledge and Politics, supra note 9, at 230.
76. See id.
77. Id.
78. See id. at 294.
79. Id.
80. See The Critical Legal Studies Movement, supra note 6, at 1.
81. Id.
Legal analysis bases itself upon "impersonal purposes, policies and principles."  

It is "apolitical" in the sense that the lawyer or judge analyzing or applying the law need not take any position on the justice or desirability of the legal system. There is a basic contrast between lawmaking and law application. While law application may sometimes involve creative effort in the sense that the lawyer has to appeal to principles and policies, such appeal is qualitatively less controversial and more determinate than the appeal to principles and policies in the lawmaking context.

A formalist believes that genuine "legal doctrine" is possible only through the formalist method. Legal doctrine exists when two conditions are satisfied: (1) lawyers are willing to base their professional judgments on the institutionally defined materials of a given collective tradition, i.e., cases, statutes, regulations, etc.; and (2) lawyers purport to speak authoritatively from within such tradition for the purpose of influencing the application of governmental power.

Objectivism is the belief that the entire class of statutes, cases, and legal concepts making up our legal system expresses a single underlying scheme of human association which is morally and philosophically justifiable. Thus, objectivism requires more than the claim that our system of law is justifiable in the sense that it is based upon an underlying theory of society which is morally and philosophically justifiable. An objectivist also believes that there is a unique correlation between the underlying theory of society and the system of law. That is to say, he claims that the underlying theory could be expressed only in the way in which it is currently expressed by our law.

This underlying scheme of human association which the objectivist thinks is uniquely expressed by our system of legal rules has two elements: "democracy" and "the market." Thus, the objectivist believes that the underlying scheme of democratic government and free markets is morally defensible and expressible only in the way in which it is currently ex-
pressed by our law. 89

The critical legal studies movement rejects objectivism. 90 Repeated attempts to find the "universal legal language" of democracy and free markets shows that there is no such language. 91 Democracy and the market system can be embodied in radically different legal systems. 92 Consider the relationship between the free market system and the law of contracts. That law contains two principles which contradict each other. 93 On the one hand, there is the principle of freedom to choose one's contracting partner and freedom to choose the terms of the bargain. 94 On the other hand, there is the "counterprinciple" that freedom of contract is not permitted to destroy the "communal aspects of social life" and that grossly unfair agreements are unenforceable. 95 There are two incompatible ways of understanding the relationship between the principle and counterprinciple. On the one hand, one might understand the counterprinciple as a relatively narrow, ad hoc qualification of the basic principle of freedom of contract. 96 On the other hand, one might see the counterprinciple as basic and the principle as governing a narrow set of extreme limiting cases. 97 Which conception expresses the true nature of a market system? Unger says that neither does. 98 Commitment to a market system does not force us to accept either one. We are free to combine a commitment to free markets with either understanding of the law of contracts. 99

Thus, for the critical legal studies lawyer, the law is essentially indeterminate. 100 There is no necessary connection between an underlying adherence to democracy and markets and the present state of the law. We are always free to change our rules in different ways without forsaking belief in either demo-

89. See id. at 5-6.
90. See id. at 6.
91. Id.
92. See id. at 7.
93. Id.
94. Id.
95. Id.
96. See id.
97. See id.
98. See id. at 7.
99. See id.
100. See id.
The critical legal studies movement also rejects formalism. Every branch of legal doctrine must rely upon an underlying vision of human society. Without such a guiding conception legal reasoning is nothing more than a "game of easy analogies." Unger says that a common experience of lawyers and law students is having:

the disquieting sense of being able to argue too well or too easily for too many conflicting solutions. Because everything can be defended, nothing can; the analogy-mongering must be brought to a halt. It must be possible to reject some of the received understandings and decisions as mistaken and to do so by appealing to a background normative theory of the branch of law in question or of the realm of social practice governed by that part of the law.

There is no way to correlate any single background vision of society with the class of legal materials. Those materials always express conflicting values and visions. But formalist theory requires a unique correlation between the underlying vision of society and the law. Otherwise, those applying the law could not avoid open-ended ideological debate.

In an earlier work, Unger puts the case against formalism in a somewhat different way. There could be no adjudicative method which did not rely on the personal values of the judge. Words lack "self-evident reference." Hence, the meaning of the words in a rule must be determined by reference to the context and purpose of the rule. But the intention of prior lawmakers is never completely clear. And there is no set of shared values and understandings to which a judge can refer. Our society is not an organic group. Hence, every lawsuit forces the judge "to decide, at least implicitly, which of

---

101. See id. at 7-8.
102. Id. at 8.
103. Id.
104. Id.
105. Id.
106. See id. at 9.
107. See id.
109. Id.
110. Id.
111. Id.
112. Id.
113. See id.
the competing sets of belief in a given society should be given priority."\textsuperscript{114}

\textbf{B. A Critical Legal Studies Lawyer Should Help Develop and Apply Deviationist Doctrine}

A Marxist lawyer regards legal doctrine as a mask for the underlying capitalistic order and therefore unworthy of serious attention. In contrast, a critical legal studies lawyer takes legal doctrine seriously. That is, he commits himself to working with the concrete materials of the legal system, (statutes, cases, regulations), claiming that the results of that work are morally justifiable and worthy of influencing governmental power.\textsuperscript{115}

Unger's term for the kind of legal doctrine critical legal studies lawyers ought to develop is \textit{deviationist} doctrine.\textsuperscript{116} Deviationist doctrine openly uses moral, philosophical, and ideological conceptions and ideals.\textsuperscript{117} It makes no pretense of applying or developing the law in a nonideological way.\textsuperscript{118} Deviationist doctrine makes every legal question a springboard for raising the issue of the kind of society we ought to have.\textsuperscript{119} That is, the critical legal studies lawyer will transform every discussion of legal doctrine into a conversation about the good society.\textsuperscript{120}

\textbf{C. Deviationist Doctrine May Proceed Either by the Method of Internal Development or by the Method of Visionary Insight}

Deviationist doctrine may proceed in either one of two ways.\textsuperscript{121} One method is that of \textit{internal development}.\textsuperscript{122} This method starts with the materials of the present legal order and focuses upon conflicts of two kinds. First, it points to conflicts between principles and counterprinciples.\textsuperscript{123} That is, it calls attention to tensions between rules which arise from conflicting social ideals.\textsuperscript{124} Second, it points to conflicts between an

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{114} \textit{Id.}
\item\textsuperscript{115} See \textit{The Critical Legal Studies Movement}, \textit{supra} note 6, at 15.
\item\textsuperscript{116} \textit{Id.}
\item\textsuperscript{117} See \textit{id.} at 16.
\item\textsuperscript{118} See \textit{id.}
\item\textsuperscript{119} \textit{Id.} at 17.
\item\textsuperscript{120} See \textit{id.}
\item\textsuperscript{121} See \textit{id.} at 18-19.
\item\textsuperscript{122} \textit{Id.} at 18.
\item\textsuperscript{123} See \textit{id.}
\item\textsuperscript{124} See \textit{id.}
\end{enumerate}
\end{footnotesize}
underlying social ideal and its legal realization.\textsuperscript{125} That is, it looks for discrepancies between an ideal and its approximation by the law.\textsuperscript{126}

Having described such conflicts within the law, the method of internal development endorses one of the social ideals underlying the law and imagines the system transformed so as to more closely approximate that ideal.\textsuperscript{127} If possible, the method will transform the law in fact as well as in imagination.\textsuperscript{128} It may then revise its ideal conception of society in light of its new practical embodiment.\textsuperscript{129} Then it will imagine and instantiate yet another exemplification of the ideal, and so on indefinitely.\textsuperscript{130}

The assumption of the method of internal development is that the legal system already exemplifies all the available social ideals in varying degrees and that it is politically possible to peacefully work toward one of those ideals.\textsuperscript{131} The method begins with the legal system as it is, seeking to transform it from within into an actualization of the potential good lying dormant in statutes and cases.\textsuperscript{132}

The second method of deviationist doctrine is beginning with a "visionary insight" into a reordered society and comparing that ideal with the present legal system.\textsuperscript{133} It then tries to transform the system into a realization of the ideal.\textsuperscript{134}

Unger says that there is no clearcut distinction between the two methods.\textsuperscript{135} On the surface it may appear that the internal critic begins with the present system and works for its internal transformation, whereas the visionary critic starts with an ideal and tries to lift the society to that ideal. But, in reality, even the visionary critic can persuade people only because the ideals he invokes are already at work in the society.\textsuperscript{136} Further, both methods focus upon "deviations" in current law and

\begin{itemize}
  \item \textsuperscript{125} See id.
  \item \textsuperscript{126} See id.
  \item \textsuperscript{127} Id.
  \item \textsuperscript{128} Id.
  \item \textsuperscript{129} Id.
  \item \textsuperscript{130} Id.
  \item \textsuperscript{131} See id.
  \item \textsuperscript{132} See id.
  \item \textsuperscript{133} Id. at 19.
  \item \textsuperscript{134} Id.
  \item \textsuperscript{135} See id.
  \item \textsuperscript{136} Id.
\end{itemize}
imagines them transformed into "organizing conceptions and practices."\textsuperscript{137}

**D. The Critique of Objectivism Results in a Redefinition of the Institutional Forms of Democracy and the Market**

As we have seen, the legal system is based upon the social ideals of democracy and the free market.\textsuperscript{138} Now, the negative critique of objectivism leads to a search for new ways of institutionally expressing those ideals.\textsuperscript{139} The tool for this search is deviationist doctrine itself.\textsuperscript{140}

This search requires three things. First, we need a theory of social transformation.\textsuperscript{141} Such a theory will provide standards for identifying political and social programs which are "realistic."\textsuperscript{142} Second, we need a conception of the social ideal to guide us in reconstructing democracy and the market.\textsuperscript{143} Third, we need to understand the proper relationship between law and society.\textsuperscript{144} The new institutional forms will have to be expressed in legal categories.\textsuperscript{145}

The social ideal is ascertained by generalizing aims shared by liberalism, socialism and communism.\textsuperscript{146} At the basis of these three great secular movements is the idea that the "weakening of social divisions and hierarchies would reveal deeper individual and collective identities and liberate productive and creative powers."\textsuperscript{147} The generalization of this idea proposed by the critical legal studies movement can be stated in three equivalent ways.\textsuperscript{148} First, the fixed order of society should be loosened. This means that the society's plan of social hierarchy and modes of human association should be made vulnerable to "collective conflict and deliberation."\textsuperscript{149} No part of the social order should be immune from "destabilizing strug-
A second form of the social ideal postulates that the life chances and experiences of all persons should be freed from the "tyranny of abstract social categories." A person should not be confined by his position in the division of classes, sexes and nations. The opportunities, experiences and values which the present society conventionally links to those classes should be "deliberately jumbled." Third, the contrast between the routine and the revolutionary should be broken down. Every aspect of everyday existence should offer the possibility of recreating the conditions of social existence. Social life should be made much less confining in order to enable us to "overcome and revise" all the social and "mental" structures in which we now live.

Associated with this social ideal is a theory of the proper relationship between law and society. Law must be seen as "the denial rather than the reaffirmation of the plan of social division and hierarchy." The law should define a system of rights which will counteract and destroy the maintenance or recreation of any system of social roles and ranks that might become immune to challenge by democratic processes. Legal rights should give persons the tools for keeping society in a permanent condition of "self-revision."

E. This Social Ideal and the Theory of the Relation Between Law and Society Lead to a Program for Cultural Revolution

The social ideal and the theory of the relationship between law and society just described give the critical legal studies lawyer a basis for a vision of "transformed personal relations." That is, the social ideal can be translated into a program for cultural revolution.

150. Id.
151. Id.
152. Id.
153. Id.
154. Id.
155. See id.
156. Id.
157. Id. at 24.
158. Id.
159. See id.
160. See id. at 24-25.
161. Id. at 25.
162. See id.
The vision of cultural revolution includes the idea that the self is "infinite" in that it can always transcend the limits of any imaginative and social worlds it fashions.163 The aim of cultural revolution is remaking personal relationships by emancipating persons from all constricting structures of division and hierarchy.164 Persons should be freed from preassigned roles in a fixed system of social or gender contrasts.165 Each of us should be free to have the opportunities and experiences available to all categories of people.166 We should be free to combine and recombine any styles of life.167 No way of living should be closed to a person simply because he is in the wrong cultural, legal or gender category.168

F. The Social Ideal of Critical Legal Studies Can Also be Translated into a Program for the Reconstruction of the State and the Other Institutions of Society

The social ideal of critical legal studies gives rise not only to a revolutionary program for cultural change, but also to a program for institutional reform.169 This program begins by redefining the ideal of democracy.170 This redefinition, in turn, leads to proposals for the organization of the government, the economy, and the system of legal rights.171 I shall discuss these proposals in the next four sections.

G. The Social Ideal of Critical Legal Studies Leads to a Critique of the Existing Democratic System and to a New Conception of an "Empowered" Democracy

The critical legal studies movement takes seriously the ideal of democracy and expands it into a program for the democratic transformation of all levels of society.172 What is the conception of democracy with which our system presently works? The minimal core of the democratic ideal is the principle that

163. See id. at 26.
164. Id.
165. See id.
166. Id.
167. See id.
168. See id.
169. Id. at 25.
170. See id.
171. See id.
172. See id.
government must not fall permanently hostage to any faction.\textsuperscript{173} Now, this minimal core of the democratic ideal makes no sense if the government is embedded in a system of rigid social divisions and hierarchies which limit the life chances of individuals.\textsuperscript{174} So, the minimal core must be expanded to include a demand for breaking apart all such structures.\textsuperscript{175}

Our system fails to satisfy this expanded ideal of democracy in several respects.\textsuperscript{176} First, our forms of economic and political organization enable small groups to control the general level of economic prosperity by making the important investment decisions.\textsuperscript{177} Second, major areas of social life such as factories, offices, hospitals and schools, are not subject to effective democratic control. Persons in such institutions are burdened by arbitrary power.\textsuperscript{178} These areas of life are "cathedrals of private power" immune from the risks of "party-political conflict."\textsuperscript{179} Third, our politics are conventionally limited to a very narrow range of policy alternatives.\textsuperscript{180} Whenever a leftist movement gains political control on a program of wealth redistribution, the normal political realities close in.\textsuperscript{181} Such reformist schemes fail before being seriously tested.\textsuperscript{182} Constitutional guarantees for limiting governmental power encourage postponement of and resistance to radical reforms.\textsuperscript{183} The fear of wealth redistribution causes capital flight.\textsuperscript{184} Electoral support for the radical program evaporates.\textsuperscript{185} The reformers gradually turn to short-term goals which are meaningless in the larger scheme of things.\textsuperscript{186} Before having a chance to make any significant impact on society, they lose the next election.\textsuperscript{187} This cycle recurs again and again. No party is permitted drastic change. Thus, policy options are limited no

\textsuperscript{173.} Id. at 27.
\textsuperscript{174.} Id.
\textsuperscript{175.} See id. at 27-28.
\textsuperscript{176.} See id. at 28.
\textsuperscript{177.} Id.
\textsuperscript{178.} Id.
\textsuperscript{179.} Id.
\textsuperscript{180.} Id.
\textsuperscript{181.} See id. at 28-29.
\textsuperscript{182.} Id. at 29.
\textsuperscript{183.} Id.
\textsuperscript{184.} Id.
\textsuperscript{185.} See id.
\textsuperscript{186.} Id.
\textsuperscript{187.} See id.
matter what party has power.188 These impeding factors make it impossible for society to realize the expanded ideal of democracy.189 In order to establish society that was truly democratic we might have to change “every aspect” of our social and political structure.190 Ideally, a democracy should be a “self-revising” institution which would provide “constant occasions to disrupt any fixed structure of power and coordination in social life.”191

H. A Necessary Step Toward Creating an Empowered Democracy is Reorganizing the Government

The structure of our present government interferes with building an empowered democracy.192 The very devices designed to restrain governmental power also tend to “deadlock” it.193 Our system is built on a foundation of checks and balances and separation of powers which makes it impossible to radically reform the American class structure.194

There are several changes we should make. First, we should multiply the branches of government.195 To every “crucial feature of the social order” should be assigned a branch of government which would provide a forum for destabilizing conflict over that realm of social life.196 There should be no significant aspect of social life free from democratic challenge and change. The way to ensure this is to assign a branch of government to oversee every such aspect for the benefit of the people.197

Now, if we multiply the branches of government, we will increase the chances of conflict between these various branches.198 So, the second required change is building into the government some method for resolving such conflicts “cleanly and quickly.”199 This method of resolving intragov-

188. See id.
189. See id.
190. Id. at 30.
191. Id. at 30-31.
192. See id.
193. Id. at 31.
194. See id.
195. Id.
196. Id.
197. Id. at 31-32.
198. See id.
199. Id. at 32.
ernmental conflict should replace the system of checks and balances.200

The third change is making sure that the party in office gets a genuine chance to try its programs.201 We should eliminate the stultification of checks and balances, separation of powers, factionalism, and so on.202

I. A Second Necessary Step Toward Creating an Empowered Democracy is Reorganizing the Economy

The present economic system frustrates the development of an empowered democracy in several ways. First, it permits some people, through the accumulation of wealth, to reduce others to conditions of dependence.203 For example, employees, even when unionized, are forced to depend upon employers.204 Second, the system permits small groups of people to control overall prosperity by making the significant investment decisions.205 Third, the system limits economic progress by preventing decentralization.206 Pressures toward oligopoly and economies of scale make the notion of free competition look like a romantic dream.207 Fourth, the economy discourages economic experimentation.208 For example, the economy imposes a rigid distinction between "task-defining" and "task-executing" activities.209 The people who define the tasks are not the same people assigned to do the tasks.210 Fifth, the system makes it difficult to formulate and apply significant macroeconomic policies.211 Any radical proposal for national macroeconomic reform is stultified by the ability of both business and labor to exert economic and political pressures in opposition to change.212

The empowered democracy would solve some of these
problems by setting up a "rotating capital fund."213 Investment funds would be made available to "teams of workers or technicians" under conditions specified by government.214 Such conditions might include limits on disparities of income or power within the group, limits on the power to accumulate capital, and limits on the power to distribute profit as income.215 The interest charged on the capital would constitute the primary source of government revenue.216 The differentials between the various interest rates would provide the means by which government would encourage "risk-oriented" and "socially responsive investment."217 The central capital fund would be administered so as to encourage a continuous flow of new entrants into markets.218 The government would not permit enterprises to monopolize market power or to immunize themselves against competitive forces.219

A legal accompaniment to the rotating capital fund would be the redefinition of property rights.220 The bundle of rights making up what we now think of as absolute ownership would be broken apart.221 Some of the strands would be given to the government. Others would be allowed to remain in the hands of private associations using the capital funds.222

J. A Third Necessary Step Toward Creating an Empowered Democracy is Defining a New System of Individual Rights

The present system of rights frustrates the development of an empowered democracy in two ways.223 First, it assigns property rights to individuals and lets them use economic power to dominate others.224 Second, it encourages us to conceive of a legal right as something which can be exercised without regard to the effects upon our communal life.225 Within

213. Id. at 35.
214. Id.
215. Id.
216. Id.
217. Id.
218. Id.
219. See id.
220. Id. at 36.
221. Id.
222. Id.
223. Id.
224. Id.
225. See id. at 36-37.
the domain of the legally protected right, the right-holder is encouraged to think of his activity as unconstrained. 226 This frustrates the development of genuine community. In a true community, each person is always prepared to give way to the needs of the whole. 227 The concept of an inviolable right is inconsistent with this need to be ever-ready to accommodate one’s own desires to the needs of the group. 228

A system of empowered democracy would establish four categories of rights. 229 The first category consists of immunity rights. 230 These rights would establish “nearly absolute” claims to security against the government, other groups, and other persons. 231 Examples of immunity rights are freedom to participate in the political process, freedom to associate, freedom to speak, rights to welfare, and rights to withdraw from established groups and even from the territory itself. 232 Now, although such rights are “nearly absolute,” they would not be allowed to “defend power orders against democratic politics.” 233 Presumably, this means that an individual would not be allowed to use his rights to exercise power over others. 234

The second category consists of destabilization rights. 235 These rights would give the holder power to “disrupt established institutions” and to destroy entrenched social hierarchies and divisions. 236 The government would stand ready to enforce such rights by rooting out class structures theretofore immune from democratic attack. 237

Market rights would constitute the third category. 238 These would give the holders “conditional and provisional” claims to portions of the social capital. 239 These rights would not be absolute or nearly absolute entitlements such as the property rights in our present system. They would be subject to the

226. Id.
227. See id.
228. See id.
229. Id. at 38.
230. Id. at 39.
231. Id.
232. Id.
233. Id.
234. See id.
235. Id.
236. Id.
237. See id. at 38-39.
238. Id. at 39.
239. Id.
powers retained by the central government for organizing production and investment.\textsuperscript{240}

The fourth category consists of solidarity rights.\textsuperscript{241} These would set the standards for the relationships between the members of the genuine communities.\textsuperscript{242}

\textbf{K. The Program for Creating an Empowered Democracy Can be Accomplished Gradually}

It is a mistake to think that this transformation of society must be accomplished in its entirety or not at all.\textsuperscript{243} The program can be accomplished in relatively modest steps\textsuperscript{244} and these steps would not require violent revolution.\textsuperscript{245}

\textbf{L. The Critical Legal Studies Vision Leads to a New Conception of Law Practice}

The critical legal studies lawyer will practice law in a distinctive way.\textsuperscript{246} She or he will provide a legal defense for individual and group interests in such a way as to (i) make public the underlying institutional hierarchies which give rise to the problem, (ii) subject that underlying structure to a "series of petty disturbances capable of escalating at any moment," and (iii) suggest alternative ways of organizing society so as to more closely approximate the ideal of true community.\textsuperscript{247} In short, the lawyer will consciously strive to cause "social destabilization" through the concepts and methods of deviantionist doctrine.\textsuperscript{248}

As society more closely approximates the critical legal studies ideal, the nature of law practice would change.\textsuperscript{249} There would no longer be any sharp distinction between lawyers and nonlawyers.\textsuperscript{250} Several factors would be responsible for this. First, legal doctrine would have come to be recognized as

\textsuperscript{240. See id.}
\textsuperscript{241. Id.}
\textsuperscript{242. See id. at 39-40.}
\textsuperscript{243. Id. at 40.}
\textsuperscript{244. Id.}
\textsuperscript{245. See id.}
\textsuperscript{246. See id. at 40-42, 110-11.}
\textsuperscript{247. See id. at 111.}
\textsuperscript{248. See id.}
\textsuperscript{249. Id.}
\textsuperscript{250. Id.}
nothing but moral, philosophical, and ideological argument. It requires no special professional expertise to talk about these things.\(^{251}\) Second, the present three-part system of government, (judiciary, legislature, executive), would have been eliminated in favor of a government with a great many arms, many of which would engage in what are now regarded as uniquely judicial functions.\(^{252}\) Third, our present belief in the desirability of ‘inherent institutional roles’ would have been abandoned.\(^{253}\) Legal expertise would survive in the ideal society only as a ‘loose collection of different types of insight and responsibility.’\(^{254}\) There would be no professional bar with its unjustifiable claims to monopolize political power in the name of expert knowledge and skills.\(^{255}\)

**M. The Critical Legal Studies Vision Also Leads to a New Conception of Legal Education.**

Many come to law school with the ‘adolescent fantasy’ of acquiring the skills for bringing about desirable social change.\(^{256}\) But law school destroys their idealism.\(^{257}\) They are taught to think ‘realistically,’ to settle for high incomes and subservience to client interests. Students are told that they will be taught a powerful method of analysis.\(^{258}\) But they quickly learn that there is no special method. Legal analysis is cynical manipulation of language in the service of whatever cause happens to be paying the bill.\(^{259}\) They are taught that the existing social and political order is arbitrary and probably unjustifiable, but unchangeable by any skills they are learning.\(^{260}\) Thus, their prescribed adult role is serving the interests of persons with arbitrary economic power by methods devoid of rational or moral content.\(^{261}\)

The critical legal studies law teacher should instill in the law

---

251. See id.
252. See id. at 31-32.
253. See id. at 111.
254. Id.
255. Id.
256. See id. at 112.
257. Id.
258. Id.
259. Id. at 112-13.
260. See id.
261. See id.
student a sense of “living in history.” That is, the student should be encouraged to experience herself as an “active and conscious participant in the conflict over the terms of collective life.” The student should also be instructed in the concepts and methods of deviationist doctrine so that she can see the possibilities for radical social transformation in the most technical legal problems. Above all, she should be taught how to live in society without “capitulating to it.” She will come to see how to be part of society while working to radically change it. In short, the law student will be given an understanding and ideal which will unify her consciousness and enable her to find genuine fulfillment in the cause of social justice and personal liberation.

IV. Evaluation

Because my main purpose in writing this paper is to simply present some of Unger’s basic themes, I shall not undertake the kind of extensive analysis and evaluation which those themes deserve. But I shall offer a few considerations with which any adequate evaluation would have to deal.

A. Our Knowledge of Human Nature

Unger’s identification of goodness and the realization of human nature seems a useful way to begin a philosophical analysis of law and society. This way of defining the good is typical of the natural law tradition. Versions of the definition can be found in Plato’s Republic and in Aristotle’s Nicomachean Ethics. A writer could be in worse company.

But there are some difficulties in Unger’s account. First, his account of the relationship between the mind and the world is difficult to reconcile with his claim that there is a unitary human essence to be known. As we have seen, Unger says that the very attempt of a mind to understand a thing (such as the human essence) changes that thing. He relies here upon the Liebnizian idea that the nature of a thing is a function of all the

262. Id. at 113.
263. Id.
264. See id. at 112-13.
265. Id.
266. See id.
267. See id.
relationships in which that thing stands to other things. As those relationships change so does the nature of the thing. Now, if the human essence is changed by the very attempt of the mind to grasp it, it is difficult to see how there can be any nature "there" to grasp. As soon as a mind forms a belief about human nature, that nature changes accordingly. Thus, human nature is whatever it is believed to be. There is no unitary human nature. Not only would the human essence change as the beliefs of any one person about it changed, but there would also be a different human nature for every mind trying to understand human nature. There would be as many human essences as there are minds. Thus, it seems that the very project of understanding human nature destroys itself by dissolving its own subject matter.

Similarly, his account of the relationship between human nature and history seems inconsistent with his claim that human nature exists. Unger denies the existence of "fixed essences." The Aristotelian conception of natures remaining constant through time is a myth. Natural essences (such as human nature) change with the evolutionary processes of history. Now, if human nature is constantly changed by the social processes in which it is embedded, in what sense is there a unitary human nature at all? How is anyone justified in asserting that any particular cultural or political change is a "better" way of developing human nature than others? Given his own premises, how can Unger legitimately claim that a fascist takeover would be any less true to human nature than socialistic change? Wouldn't he be compelled to say, if he were consistent, that in a fascist society the natures of the members would become fascist natures? If human nature is a chameleon which takes on the colorings of its cultural environment, in what meaningful sense is there a unitary human nature at all?

Unger claims that the human essence will reveal itself only in a classless society which has destroyed all hierarchies of power. But how can he possibly know this on his premises? It seems that he is assuming some kind of nonhistorical insight into the core of the human essence, an insight his own epistemological premises deny him.

Thus, while Unger's theory requires knowledge of human nature, it provides no coherent account of how such knowledge could be attained.
B. Does Human Nature Change?

Unger rejects the Aristotelian theory of fixed essences. All essences, including the human, change with the historical process. But he offers no empirical argument. On its face the claim seems implausible. What empirical grounds are there for supposing that the capacities and powers defining us as humans have ever been different or nonexistent? Was there a time when the human essence did not include, say, the power of intellectual activity, the power of love, the power of reproduction or the power of aesthetic experience? If so, Unger gives us no reasons for believing it.

C. The Goodness of Human Nature

As a socialist Unger takes the Rosseauist line about the inherent goodness of human nature. We are potentially good despite the fact that we constantly mistreat each other, cooperate in unjust social systems and generally behave in all sorts of evil ways. Human evil is caused by bad social systems. If we lived in good societies then we would be good. In a classless society lacking hierarchies of status, wealth, or power, the human essence would show itself as it really is. True community would flourish in a spirit of love and benevolence. We would fulfill ourselves in public-spirited activities for the common good. There would be no envy, hatred or strife because the social conditions which cause such emotions would have been destroyed.

There is probably no way of decisively refuting this theory of human nature. Calling attention to evil acts committed in apparently desirable social situations does not conclusively settle the matter. The socialist will say that the very existence of evil conduct shows that its social context is not truly classless.

Nevertheless, it seems to me that the facts of human history, everyday experience and introspection make such a strong case for the conservative view of human nature that at the very least we can put the burden of persuasion on the socialist. The facts seem to show that evil social conditions are primarily caused by conflicts and fault in the human heart. One need not labor to imagine tension, conflict, hatred, envy, detachment, self-centeredness, depression, despair and cruelty quickly arising in Unger’s organic groups. The members of the groups would effortlessly find ways to arrange themselves in status
heirarchies no matter what legal restraints were imposed. If, for example, inequalities of wealth were prohibited, people would find other ways of feeling superior to each other. Even so simple a thing as facility with Unger’s writings would suffice. Indeed, one can argue in the spirit of Tocqueville that as the opportunities for political and economic differentiation decreased, the obsession with status and hierarchy would increase proportionately.268

This is not to say that I accept the Calvinist view of human nature. Any plausible account of human nature has to make room for our potential for good as well as for evil. The important challenge for political philosophy is identifying social structures and patterns which take into account both our propensity for the good and for evil. A political program whose success depends upon the eradication of human evil is certain to fail.

D. Are All Heirarchies Morally Unjustifiable?

Unger assumes that all relatively stable hierarchies are illegitimate. But surely he overstates the case. Some stable hierarchies are justifiable and, indeed, necessary if society is to make even modest progress. Consider, for example, the hierarchy of scientific and mathematical scholars. There seems good reason to believe that a person who has dedicated 40 or 50 years of her or his life to the pursuit of physics is qualified to advise the nonscientific community on such matters. Would one of Unger’s “destabilization” right-holders be able to destroy such hierarchies? If so, society would be the loser.

E. The Rejection of Formalism and Objectivism

I sympathize with Unger’s rejection of objectivism and formalism. Surely it is mistaken to think that any set of social or political ideals could be expressed in only one way. And surely it is wrong to think that a person can be a competent judge without having any unifying moral and philosophical principles. The very nature of a complex legal system such as ours renders unworkable the program of mechanical jurisprudence.

But acknowledging that adjudication requires moral and philosophical concepts does not force us to conclude, as Unger

does, that there is no difference at all between legal and ideological argument. Surely it is possible for a judge to argue by analogy from case precedent or rely upon the legislative purpose behind a statute without committing herself to the philosophical framework grounding the precedent or statute. Not only is it possible but it is often obligatory. Of course, there are cases in which legislative purpose is unclear and cases for which there are no compelling analogies. But there are also cases in which legislative purpose is clear and cases in which compelling analogies are at hand. In the latter situation our legal system requires the judge to invoke the purposes and analogies even if she or he disagrees with them on philosophical grounds.

A related point concerns Unger's tendency to find "conflicts" lurking throughout the law. It is difficult to disagree with his claim that a given set of legal materials (cases, statutes, regulations) can always be developed in contrasting ways. No set of legal materials could completely determine its future development in a deductive way. But does this truism entail the proposition that every qualification or exception to a legal principle arises from some basic conflict of social ideals? Why, for example, do we have to understand the relationship between the doctrine of consideration and that of promissory estoppel as arising from a clash between laissez-faire and communitarian conceptions of society? Couldn't we say that both doctrines promote the purpose of encouraging and enforcing promises that are made with deliberation?

F. Is Unger's Program Essentially Totalitarian?

On the surface it might seem that Unger's social ideal is anarchistic. The reader is continually treated to the image of angry and envious citizens smashing to pieces with their destabilization rights social patterns or processes they dislike. Unger repeatedly recommends continuous social and political revolution.

But on a deeper level it seems that Unger's ideal requires a much greater degree of governmental control than we now have. There are several things to notice in this regard.

First, these destabilization rights would carry with them government oversight and enforcement. Unger recommends that government agencies be established to police all areas of social
life susceptible to the formation of categories and hierarchies. Government would be omnipresent. If it is necessary to continually break down hierarchies government will have to be eternally vigilant and prepared to act swiftly.

Second, although Unger defines a category of "immunity" rights purporting to protect the individual against society, he is careful to hedge the right with serious qualifications. Indeed, as we have seen, he rejects the Lockean conception of inalienable rights. The right-holder must always be ready to give way to the community's demands. In the organic society the rule of law would be replaced by the rule of custom which, in turn, would be defined by the social organism for its own collective ends. It seems that the primary holder of rights would be the community rather than the individual.

Third, Unger rejects Locke's "negative" conception of liberty as freedom from external coercive contraints and accepts Rousseau's "positive" conception of liberty as freedom to realize one's true nature. From Rousseau's conception it is a small step to the notion that a person should be compelled to be free. What about all those in Unger's society of organic groups who dislike socialistic reforms? Presumably they would be forced to freely realize their human essences at the hands of plaintiffs wielding destabilization rights.

Fourth, recall Unger's impatience with the political processes of democracy. He would do away with checks and balances and separation of powers. He wants a system in which the party in power puts through its platform unimpeded by political opposition. He wants basic investment decisions taken away from private citizens and placed in a central government agency. He wants to multiply the branches of government so that no area of social life is free from the community's protective eye. He advocates a method for resolving conflicts between government agencies "cleanly and quickly." Property rights traditionally left in the hands of private citizens would be transferred to government. All of these recommendations lay the foundation for a degree of collectivization much greater than anything Americans have experienced.

This general tendency toward collectivization and government control in the name of the community will not surprise those who are aware of the inevitable conflict between liberty
and equality. It is a truism that the degree of liberty in a society is inversely related to the degree of equality.

Unger responds to this classical conservative point by invoking the classical socialist redefinition of liberty. But the issue cannot be resolved with a definition. The question is whether a society with Unger's recommended level of governmental control would be desirable. And that question surely deserves careful consideration.

G. Are Unger's Economic Proposals Plausible?

Unger's economic theories raise at least three questions. First, there is the matter of incentives in the organic group. Unger says that distribution would be based on need. One would not earn income in proportion to merit, level of productive effort, or degree of market demand. The level of a person's income would be determined by his need. And the level of need would be determined collectively by the group. As with any socialistic proposal the question here is whether cutting the link between productivity and income would destroy incentives. What would prevent a tendency for members of organic groups to become "free riders," relying on the efforts of others? Unger offers the traditional socialistic response. Members of organic groups would undergo personality transformations in virtue of living in a classless society and would no longer need crude economic incentives. They would spontaneously work selflessly for the common good. The problem with this response is that there seems to be very little historical evidence that cutting the link between productivity and economic incentive works, at least outside the narrow limits of closely bonded family units or very small communities of persons tied together with strong religious or political bonds.

Second, Unger's recommendation that basic investment decisions be made by the central government raises the question of the relative economic merits of an economic system driven primarily by free markets and one controlled from above by centralized government planning. Of course, this is a large question and I shall not go into it here. But Unger offers little argument for the proposition that a tightly centralized economy of this kind could satisfy even minimal efficiency requirements.

In addition, Unger does not specify the relationships be-
tween the production decisions made by the organic groups and the central planning authority. On the one hand, he says that each organic group would decide for itself what to produce, how to produce it, and how to distribute the income. On the other hand, he says that the central government would make the important investment decisions for the economy as a whole. It seems that there is some tension between these two proposals.

Third, I do not think that Unger adequately deals with the conservative claim that a substantial degree of economic liberty is essential for the preservation of freedom. The point is that keeping the basic investment decisions out of the hands of central government makes it more difficult for the government to exercise totalitarian control.269

H. Meaning in the Life of the Lawyer and Law Student

I think that Unger has some valuable things to say about the moral cynicism and fragmentation which pervade the lives of many American lawyers. I also think that his criticism of legal education is useful. It does seem that law schools often succeed only in conveying the ideas that legal reasoning is a sophisticated form of salesmanship and special pleading with no intrinsic rationality and that there are not objective moral values.

But I doubt that the only solution to these problems is dedication to the cause of socialism. Surely there are alternative ways of living as a lawyer which make possible an honest and integrated life.

I. Can the Ultimate Meaning of Life be Found in Social and Political Relationships?

Unger follows the socialist tradition in assuming that the ultimate meaning of life is fellowship with others. If we could live together in mutual love and cooperation our deepest spiritual problems would be resolved. And until utopian community spirit is created, the next best alternative for finding meaning in life is working politically to create a true community.

This conception of meaning contrasts with the idea that the

269. See, e.g., M. Friedman, Capitalism and Freedom ch. 1, at 1-6 (2d ed. 1962).
deepest questions of life must be faced in the privacy of the heart.\textsuperscript{270} How will getting on good terms with Joe or Mary enable me to deal with death, fate, freedom, guilt, time, eternity and the soul? Such questions must be responded to in some way by every person and they cannot be resolved by tinkering with social relationships. I do not mean to say that personal relationships are philosophically or morally irrelevant. But I do mean to deny that they could alone provide unifying meaning. Suppose that we awake some morning to find ourselves members of an organic group bound together by feelings of genuine love. Wouldn’t each of us still have to face the question of death? It is a truism that each of us dies alone. But then each of us must live alone as well, at least on the deepest metaphysical level.

The contrast between ways of dealing with the question of life’s meaning gives rise to contrasting evaluations of politics. For the socialist (as for all activists who see politics as “redemptive”), political activity is the meaning of life. The greater the proportion of “public” to “private” activity in my life, the more fulfilled I am as a human. The other vision sees life’s private dimension as potentially more important than the public dimension because only in the former can the question of one’s relationship to Being be resolved. Political activity is important but only instrumentally so. It is valuable insofar as it helps establish necessary or useful conditions for each person to deal with the matter of living and dying. But politics cannot provide the spiritual unification that some hope to find in it.

**Conclusion**

Unger’s work merits attention as a serious effort to state a systematic and comprehensive view of law and society from the perspective of a non-Marxist socialist. It deserves the attention of both socialists and nonsocialists. Socialists should study it because it is an interesting recent attempt to justify the program of democratic socialism. Nonsocialists who value liberty should respond to it as a radical challenge to the foundations of the classical liberal tradition. Nonsocialists would do well to emulate Unger’s sustained seriousness by articulating compre-

\textsuperscript{270} See, e.g., S. Kierkegaard, *Concluding Unscientific Postscript* (1941).
hensive views of their own. Significant beginnings have been made by such writers as Friedrich Hayek, John Rawls and Robert Nozick. But more needs to be done to place the values and principles of classical liberalism in a comprehensive metaphysical perspective.