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Article

Unger's Philosophy: A Critical Legal Study

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Of all the scholars associated with the Critical Legal Studies movement, none has garnered greater attention or higher praise than Roberto Unger of Harvard Law School. In this Article, William Ewald argues that Professor Unger's reputation as a brilliant philosopher of law is undeserved. Despite the seeming erudition of his books, Professor Unger's work displays little familiarity with the basic philosophical literature, and the philosophical, legal, and political analysis in those works—in particular, the celebrated critique of liberalism in Knowledge and Politics—is so riddled with logical and historical errors as to be unworthy of serious scholarly attention.

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I. INTRODUCTION

In his first book, Professor Roberto Mangabeira Unger of Harvard Law School announced that he had discovered "the context of ideas and sentiments within which philosophy and politics must now be practiced."¹ Since that time, he has become a prominent thinker in Critical Legal Studies (CLS), a movement that, in his own words, "has undermined the central ideas of modern legal thought and put another conception of law in their place."²

If anyone in CLS can claim to have undermined the central ideas of modern legal thought, that person is Professor Unger. There is widespread agreement that he is the philosophical leader of CLS and that his most influential work is the critique of liberalism in his first book, *Knowledge and Politics*.³

His books on political and legal theory⁴ range over the whole of the Western philosophical tradition. They cite authors from Aristotle to Quine, from Hobbes to Hegel to Emil Lask. They bristle with footnotes to works in German, French, Latin, Italian, Greek, and Dutch. They

1. R. UNGER, *KNOWLEDGE AND POLITICS* v (1975) [hereinafter KP].

2. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 561 (1983) [hereinafter CLSM].

3. This book has been called "the most extensive and influential critique of liberalism in recent memory." Levinson, Book Review, 96 HARV. L. REV. 1466, 1466 n.4 (1983). Opponents and proponents of CLS agree about Unger's importance and about the importance of KP to CLS. See, e.g., Ackerman, *Foreword: Law in an Activist State*, 92 YALE L.J. 1083, 1127 & n.78 (1983) (KP is "[t]he most significant theoretical work" of communitarian form of "deviationist legal doctrine"); Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 10 (1986) (Unger's work is "the true inspiration of the [CLS] movement"); Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. LEGAL STUD. 1, 6 & n.14 (1986) (Unger's value to CLS is in his "general theoretical critique of liberalism," and his "influence within [CLS] is primarily through his earlier text *Knowledge and Politics*"); Hutchinson & Monahan, *Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 231 n.141 (1984) (Unger's CLSM "builds on his earlier work, *Knowledge and Politics* and *Law in Modern Society*"); see also *infra* note 234 and text accompanying note 7; Schwartz, *With Gun and Camera Through Darkest CLS Land*, 36 STAN. L. REV. 413, 416 (1984) ("If Kennedy is the Pope of CLS, Unger is the Christ figure"); Stick, *Can Nihilism be Pragmatic?*, 100 HARV. L. REV. 332, 334 n.9 (1986) ("Roberto Unger's study of liberalism, *Knowledge and Politics*," is one of "[t]he seminal legal texts that gave rise to legal nihilism"). Observe that all of these quotations appeared after the publication of Unger's article on CLS—an article which had been widely disseminated before it appeared in print.

4. In addition to *Knowledge and Politics*, Unger has written *Law in Modern Society* (1976); *Passion: An Essay on Personality* (1984); and *Politics, A Work in Constructive Social Theory* (3 vols. 1987). CLSM, *supra* note 2, also appeared as a book, *The Critical Legal Studies Movement* (1983); my page references will be to the article. In this article I shall discuss the two works that have had the most influence on CLS—i.e., KP and CLSM—and Unger's encyclopedic new project, *Politics. Law in Modern Society* is shorter than KP, heavily dependent on its theses, concerned with sociology rather than with philosophy, and less frequently cited in the CLS literature. *Passion* is largely superseded by *Politics*. Unger's "Note" at the beginning of *Law in Modern Society* remarks: "This study builds upon my *Knowledge and Politics* (Free Press, 1975). To make the present work intelligible to readers unfamiliar with *Knowledge and Politics*, it was necessary in some cases to restate ideas developed in the earlier work." Similarly, in one of the volumes of *Politics* Unger points out: "The argument of the fragment on cultural revolution stands in close relation to the main part of my book, *Passion: An Essay on Personality*." R. UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY. PART I OF POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY 630 (1987) [hereinafter FN]. Accordingly, I shall not discuss these two works.

purport to show that "no coherent theory of adjudication is possible within liberal political thought,"⁵ and they embark on a "search for changes in social life that might serve as the basis, or as the inspiration, of a nonliberal doctrine of mind and society."⁶ These books received a number of favorable reviews. For example:

Law in Modern Society is a truly profound book. It defies coherent summarization in a few hundred words. It contains more fundamental insights into the human condition than any other book I have read by a living author. The sheer breadth of Unger's knowledge and the unrelenting force of his analysis can only be regarded with something approaching awe. One leaves this book with the feeling that a century from now scholars may still be poring over it, much as they now do with the works of Marx, Durkheim and Weber.⁷

Unger has also been compared to Spinoza, Dante, and Virgil.⁸

Unger's own claims have not been modest. He compares his fellow professors of law to "a priesthood that had lost their faith and kept their jobs"—until the gospel of CLS liberated the legal academy.⁹

More recently, Unger has published three volumes, forming the first part of *Politics: A Work in Constructive Social Theory*.¹⁰ In this work, too, Unger makes grand claims: He says he aims to provide a new theoretical vision for the left—a radical alternative to both Marxism and social democracy.¹¹ Having noticed that radical social theory was "an instance of illusion passing into prejudice," he wanted to write a book "to set things straight."¹² Again, his followers have been supportive. One contributor to the *Northwestern University Law Review's* Symposium on *Politics*, while noting that "neither *Politics* nor theory nor the human intellect can work the redemption of humanity," nevertheless holds that "*Politics* is a remarkable achievement. It warrants study, attention, and celebration. It contributes aid to the rescue of humanism from the failures of liberal democracy, Marxism, modernism, and Christendom."¹³

5. KP, *supra* note 1, at 98.

6. *Id.* at 20.

7. Monahan, Book Review, 61 SOC. & SOC. RES. 431, 432 (1977).

8. See Boyle, Book Review, 98 HARV. L. REV. 1066, 1079 (1985) ("the Spinozian latticework of epistemological argument that characterizes Unger's earlier works"); Hutchinson & Monahan, *The "Rights" Stuff: Roberto Unger and Beyond*, 62 TEX. L. REV. 1477, 1491 (1984) (passage comparing Unger's work to Dante and Virgil quoted *infra* note 234).

9. This comment occurs in the conclusion to CLSM, *supra* note 2, at 675; the passage is quoted in full *infra* p. 756.

10. Individually entitled: (1) *Social Theory: Its Situation and Task. A Critical Introduction to Politics, a Work in Constructive Social Theory* (1987) [hereinafter ST]; (2) FN, *supra* note 4; and (3) *Plasticity into Power: Comparative-Historical Studies on the Institutional Conditions of Economic and Military Success. Variations on Themes of Politics, a Work in Constructive Social Theory* (1987) [hereinafter PP]. Unger also plans a Part II of *Politics*. See FN, *supra* note 4, at 630.

11. FN, *supra* note 4, at 1.

12. ST, *supra* note 10, at 79.

13. Ball, *The City of Unger*, 81 NW. U.L. REV. 625, 627 (1987). This Symposium is to be

I propose to examine the accuracy of all these claims—to see whether Unger's philosophy is as impressive as he and his admirers say.

Unger's work falls into three areas: philosophy, law, and politics. I shall accordingly proceed in three stages. I begin by discussing the most philosophical of Unger's works, *Knowledge and Politics*, concentrating on the passages that are most relevant to CLS. In this Section, I shall try to gauge the quality of his scholarship, and to explain what I think is askew with his philosophy. Next I turn to his essay on *The Critical Legal Studies Movement*, and say something about the relationship of his philosophy to law and legal theory. Finally, I turn to the concrete political recommendations of *Politics*—specifically, to Unger's theory of cultural revolution. These recommendations seem to me deeply troubling, for reasons I shall explain in due course. If my analysis is correct, there is a linear progression from the philosophy, through the law, to the politics, and the seeds of Unger's recent political views are already to be found in his early philosophy.

Throughout this discussion, I shall try to be intelligible to a general audience, even if this means explaining points that will be obvious to professional philosophers. And I shall try not to presuppose any previous acquaintance with Unger's writings, even if this means summarizing arguments that will be familiar to his readers. My goal is to obtain a clear view of the "sheer breadth of Unger's knowledge and the unrelenting force of his analysis." Neither, I argue, is as great as his followers believe.

But before we start, a few words about the movement of which Unger is the philosophical leader may be in season. I shall in particular try to explain why his critique of liberalism is important to CLS and what significance my criticisms of Unger have for CLS as a whole.

To begin with, I should emphasize that CLS is a diverse movement. Professor Duncan Kennedy, one of the leaders of CLS, described it as "a ragtag band of leftover '60s people and young people with nostalgia for the great events of 15 years ago."¹⁴ Not all of its members claim to be philosophers, and not all of those who do build directly upon Unger. So a refutation of Unger is not by itself enough to "refute CLS"; the movement is too complex, too multifarious, for such a simple refutation to be possible. Nevertheless, all members of the movement agree, with varying degrees of intensity, on the following theses: first, that traditional legal doctrine is "incoherent"¹⁵ or "impossible"¹⁶ or "contradictory and

published as a book by the Cambridge University Press.

14. Eastland, *Radicals in the Law School*, Wall St. J., Jan. 10, 1986, at 16, col. 4.

15. See, e.g., *Excerpts from Critical Legal Studies Q & A*, 38 HARV. L. BULL. 22 (Summer 1987) [hereinafter *Excerpts*] ("Kennedy identified three basic CLS propositions about traditional legal doctrine: it is neither coherent nor determinate nor objective; it is the basis of corporate capitalism, and as such dictates who gets how much in the society; and its outcome is radically unjust.").

16. KP, *supra* note 1, at 97 ("a coherent theory of adjudication or of legal justice is not possible on the premises of liberal thought"); Kairys, *Introduction*, in *THE POLITICS OF LAW: A PROGRES-*

manipulable";¹⁷ second, that the existing legal order is "radically unjust" and "contributes to the legitimization of an oppressive social order";¹⁸ and, third, that existing social and legal arrangements ought to be transformed so as to create a society that will be free from the "hegemony" and "hierarchies" that prevail at present.¹⁹ In consequence of these views, CLS deprecates traditional legal scholarship and traditional legal education. Instead of behaving like the "toadying jurists" of the past, instead of treating the existing legal materials as "given" and "rigidly defined,"²⁰ CLS attempts "to free us from the illusion of the necessity of existing social arrangements."²¹ Professor Kennedy's opinion is characteristic, and shows how these theses are connected:

To say that law school is ideological is to say that what teachers teach along with basic skills is wrong, is nonsense about what law is and how it works; that the message about the nature of legal competence, and its distribution among students, is wrong, is nonsense; that the ideas about the possibilities of life as a lawyer that students pick up from legal education are wrong, are nonsense. But all this is nonsense with a tilt; it is biased and motivated rather than random error. What it says is that it is natural, efficient, and fair for law firms, the bar as a whole, and the society the bar services to be organized in their actual patterns of hierarchy and domination.²²

These views have drawn heated criticism, and the resulting dispute has attracted the attention of the mass media,²³ but in fact there is much here

SIVE CRITIQUE 3 (D. Kairys ed. 1982) [hereinafter *POLITICS OF LAW*] ("[t]here is no legal reasoning in the sense of legal methodology or process for reaching particular, correct results").

17. CLSM, *supra* note 2, at 563 n.1 (CLS emphasizes "the contradictory and manipulable character of doctrinal argument").

18. See *Excerpts*, *supra* note 15; Kennedy, *Cost-Reduction Theory as Legitimation*, 90 *YALE L.J.* 1275, 1276 (1981); see also Note, *Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 *HARV. L. REV.* 1669, 1681 n.80 (1982) (citing further references in similar vein).

19. E.g., CLSM, *supra* note 2, at 587 ("The guiding and unifying aim of the cultural-revolutionary practice I have in mind lies perhaps in the systematic remaking of all direct personal connections—like those between superiors and subordinates or between men and women—through their progressive emancipation from a background plan of social division and hierarchy."); see also Unger's theory of "Organic Groups" (discussed *infra* Section II. E); Professor Tushnet's call for a "community of understanding" in which "we will destroy the need for constitutional theory," Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *HARV. L. REV.* 781 (1983); Klare, *Critical Theory and Labor Relations Law*, in *POLITICS OF LAW*, *supra* note 16, at 65, 84 (withering away of law).

20. "The dominant view treats the existing institutional structure as given. It regards the imaginative scheme of models of possible and desirable human association, including the contrast of contract to community, as rigidly defined." CLSM, *supra* note 2, at 633. For the remark on toadying jurists, see *id.* at 570.

21. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 *INDUS. REL. L.J.* 450, 482 (1981).

22. Kennedy, *Legal Education as Training for Hierarchy*, in *POLITICS OF LAW*, *supra* note 16, at 40. For similar sentiments, see also CLSM, *supra* note 2, at 668–70.

23. See Margolick, *The Split at Harvard Goes Down to its Foundation*, *N.Y. Times*, Oct. 6, 1985, § 4, at 7, col. 1; Lacayo, *Critical Legal Times at Harvard*, *TIME*, Nov. 18, 1985, at 87; Trillin,

that any lawyer might agree with. That the law contains deep conflicts; that the legal system is frequently unjust; that the wealthy are more likely to receive justice than the poor; that legal education is imperfect—these ideas are not new to CLS. Likewise, when CLS attempts to rethink fundamental legal concepts, or searches for specific examples of injustice, or proposes new methods of resolving disputes, it is engaged in a familiar and important enterprise which all lawyers might applaud. The actual proposals put forward by CLS are often less radical than the flamboyant rhetoric would suggest;²⁴ Unger's three-point program for governmental reform in *The Critical Legal Studies Movement* is an example.²⁵

In fact, one may well wonder whether CLS is as novel as it claims—whether lawyers really need to be freed “from the illusion of the necessity of existing social arrangements.” Oliver Wendell Holmes long ago poured cynical acid on the “brooding omnipresence” theory of law, arguing vigorously that our legal system cannot “be worked out like mathematics from some general axioms of conduct.”²⁶ The Legal Realists' elaboration of Holmes's theory has indelibly marked our jurisprudence. The idea that law is malleable, a human creation, an instrument for serving social ends has been a central tenet of American legal thought for generations. It is not news.

This is a point in favor of CLS. For when critical legal scholars devote themselves to the analysis of relatively concrete legal problems, they sometimes, despite the rhetoric, engage in a perfectly traditional form of legal scholarship. To take an example, Unger's analysis of Anglo-American contract law, despite being encased in a welter of five levels of “visions” and “countervisions,” is, in the end, nothing more than a proposal for reforming the law of contract.²⁷ This scholarship can be very able (as in

A Reporter at Large: Harvard Law School, NEW YORKER, Mar. 26, 1984, at 53; see also Kennedy, *Rebels from Principle: Changing the Corporate Law Firm From Within*, HARV. L. BULL., Fall 1981, at 36.

24. A good example is furnished by a student piece in the *Harvard Law Review*. Note, *supra* note 18. The Note begins with a flourish of radical rhetoric: “A radical scholarship of practice would enmesh legal scholars in activity, in endeavors that, beginning with a transformative objective, would explore the capacity of social structure to respond to efforts toward fundamental change.” *Id.* at 1687. But this “radical scholarship of practice” is not, in fact, as extreme as it sounds. On the contrary, it resembles a typical clinical program at almost any American law school:

Scholars might, for example, create situations that would blur the boundary between political and legal discourse by setting up conflict-resolution mechanisms in which community members served as arbitrators of neighborhood disputes. Community organization, *perhaps inviting the participation of law students*, would involve scholars in the implementation of participatory democracy and place them in environments in which property, contract, or tort doctrines could be imaginatively recast. Total environments—prisons, hospitals, or workplaces—could provide unique opportunities for the involvement of relatively homogeneous populations in activities that would explore the possibilities for sustained social and political engagement.

Id. (footnote omitted and emphasis added).

25. See *infra* text accompanying note 267.

26. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897).

27. This point is made by Finnis, *On 'The Critical Legal Studies Movement,'* in 3 OXFORD ESSAYS ON JURISPRUDENCE 154–58 (J. Eckelaar & J. Bell eds. 1987). For further discussion, see *infra* text accompanying notes 257–60. I follow Finnis here, and more generally in his evaluation of

Professor Horwitz's *Transformation of American Law*²⁸), or rather less so. Because my concern is with philosophy, I shall make no attempt to decide how much of the narrowly legal CLS literature falls into the former category and how much into the latter: That is ultimately a matter for the legal community to establish. My point is that *some* CLS scholarship is not as extreme a departure from the tradition as it may seem—that it *may* be doing the same sort of thing as Holmes and the Realists, and doing it very well.

But although some CLS scholarship is in the tradition of Holmes and Legal Realism, the differences are as striking as the similarities. To begin with, CLS is much more extreme in its conclusions. The attitude of Holmes might be paraphrased like this: "Do not suppose that the law is a set of eternal truths, given to you by Logic or by Nature and incapable of change. Law is a human creation and must be made to serve the interests of the community; it must be reformed in the light of the best insights of economics and history and philosophy."²⁹ Holmes did not doubt that law exists, that it can be said to function either well or badly; he did not deny the importance of meticulous legal scholarship or the value of legal education. His attitude was not that "law is nonsense," or that it is *just* the interests of the rich, or that there are *no* right answers in legal disputes, or that "trashing . . . [is] the most valid form of legal scholarship available at the moment."³⁰ He and his Realist successors were practitioners, and they were deeply involved at the bench and bar—in the writing of treatises, in the drafting of legislation, in the litigation and adjudication of cases. Whatever their criticisms of the existing legal system, they took it seriously enough to try to work within it.

CLS, in contrast, has been largely a movement of theoreticians and philosophers. Its members have not been heavily engaged in the practice of law, nor do they recognize an obligation to be the "technical assistants" of judges and legislators.³¹ A good example is furnished by Mark Tushnet, another leading figure in the movement. Like Unger, Professor Tushnet

Unger's theory of contract.

28. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* (1977).

29. E.g., Holmes, *supra* note 26, at 465–78 (importance of history, economics, and jurisprudence in shaping law).

30. Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1229 (1981).

31. Unger is explicit on this matter:

So when asked whether deviationist doctrine can suitably be used by judges, we answer as follows. We are neither servants of the state (not at least in the conventional sense) nor their technical assistants. We have no stake in finding a preestablished harmony between moral compulsions and institutional constraints. We know, moreover, that the received views of institutional propriety count for little except as arguments to use against those who depart too far from professional consensus. Most of what courts actually do—brokering small deals against a background of disputed facts and uncontested though vaguely conceived rights and supervising the police and prosecutors as they decide which violent members of the underclass to imprison—hardly fits those conceptions of institutional competence.

CLSM, *supra* note 2, at 581.

has little use for practicing lawyers. He is a theorist, devoted to the "world of scholarship." He regrets that law professors are led by their ambition into the world of public affairs; he contrasts the "corruption" and "moral obtuseness" of Laurence Tribe with the purity of those scholars who strive for "intellectual substance."³² The claim seems to be that CLS owes its primary allegiance to learning and high theory, not to practical lawyering: What matters is the philosophy. This aspect of CLS—this repudiation of legal practice—is novel: So far as I am aware, there has never been anything like it in English or American law.

Now, I agree with CLS that philosophy has an important role to play in the legal academy, but if you are going to make this kind of argument, if you are going to reject the legal system and describe yourself as a philosopher, then your philosophy had better be up to professional standards. There is little merit in a philosophy of law that makes no contributions to law or to philosophy. In particular, if you want to write about Hobbes or mathematical logic or Aristotle's metaphysics, you would do well to proceed with a certain degree of care: These are not topics for amateurs.

Perhaps for this reason, the leaders of CLS have been eager to claim the mantle of high scholarship. Professor Kennedy says:

I believe in high standards of academic excellence, and I don't think the debate is about that at all. I think the real danger of the movement is that people who have produced work which meets the highest possible academic standards will be denied tenure because of their political agendas, and I think that has already happened at the [Harvard Law] School in one case.³³

32. Professor Tushnet's remarks are contained in his review of Laurence Tribe's *American Constitutional Law*. Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694 (1980). Tushnet says:

I hope that what has gone before raises a serious puzzle: how could so morally obtuse a work be taken so seriously? The answer can be found in Professor Tribe's ambition, which, like that of constitutional scholars generally, lies outside the world of scholarship and in the world of contemporary public affairs. Not that there is anything intrinsically wrong with ambition. Its rewards, enumerated by Ward Just as honor, power, riches, fame, and the love of women, are, with one obvious modification, nothing to be sneered at. Most of us have imagined ourselves as Justices of the Supreme Court, and Professor Tribe, whose chances are better than those of the rest of us,* would surely be a better Justice than many.

The question, though, is to what activities the rewards of ambition accrue. In the world of public affairs, they accrue not necessarily to intellectual substance. One who addresses the real questions of justice is by that fact alone disqualified from serious consideration for public position and influence, because raising those questions raises in turn questions about the world of the positions that now exist, to be occupied or influenced. Under the circumstances, I take some pleasure, not however unmixed with regret, in noting that the Framers would have understood the phenomenon that Professor Tribe's work represents: they called it corruption.

*[Tushnet's footnote:] I do offer Professor Tribe two bits of gratuitous advice. The track record of appointments of academics to the Supreme Court is weak indeed, as some of Professor Tribe's own colleagues could tell him. And I pass on an observation by Judge Henry Friendly, who ought to know about this question: "Don't take one job expecting that it will lead to another."

Id. at 710 & n.50 (footnotes otherwise omitted).

33. *Excerpts, supra* note 15, at 23 (quoting Duncan Kennedy).

I propose to take the leaders of CLS at their word. My discussion will be resolutely non-political, and will focus on the central issue of academic quality. This procedure is in any case the only way to evaluate the decision of the leading philosophers of the movement to remain aloof from the practice of law. That decision rests on the claim that (as Professor Kennedy says) law is "nonsense," that legal doctrine is "contradictory and manipulable" and will remain so until liberal society has been radically reformed. If this exciting thesis is correct, then Tushnet's remarks about Tribe are fully justified. There is no point in tinkering with minor aspects of the legal system—in using bandages on an illness that needs the knife.

Of course, CLS scholars cannot merely *assert* that law is "nonsense"; they need an argument. But here, too, they have a straightforward answer, namely, that they have applied "philosophy, social theory, history, psychology and anthropology" to legal thought³⁴ and their investigation has established the "nonsense" theory of law.

It is at precisely this point that Unger's *Knowledge and Politics* becomes crucially important to CLS. Unger is the most renowned thinker in the movement. *Knowledge and Politics* is (as we shall see) his most scholarly work. His critique of liberalism ("the most extensive and influential critique of liberalism in recent memory"³⁵) is the most sophisticated argument CLS has produced for the thesis that "no coherent theory of adjudication is possible within liberal political thought."³⁶ Moreover, he is the only CLS theorist who has attempted to describe his "vision" of a new society—of "organic groups" and of "the practical and spiritual, individual and collective empowerment made possible by the disentanglement of formative structures."³⁷ I shall therefore concentrate on these aspects of his work.

II. KNOWLEDGE AND POLITICS

I begin by discussing *Knowledge and Politics*. I shall examine this work in detail because it gives Unger's fullest argument against the possibility of a liberal legal theory. His later writings build on this argument, so it will be worthwhile to examine it closely.³⁸

A. Unger's Argument

Let us start by taking a brief survey of the book as a whole. It divides into three parts. Part One describes a philosophical theory, shows the

34. See Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209, 210 (1979).

35. Levinson, *supra* note 3, at 1466 n.4.

36. KP, *supra* note 1, at 98.

37. CLSM, *supra* note 2, at 650.

38. In claiming that Unger's later writings build upon *Knowledge and Politics* I am following the authors quoted *supra* note 3.

baleful consequences of its acceptance, and argues that it is self-contradictory. Parts Two and Three attempt to replace it with something better.

Unger calls the theory he deplores "liberalism," and it is important to observe at the outset that his use of the term "liberal" is not the familiar one whereby politicians are classified as "liberal" or "conservative." As defined by Unger, liberalism is not just a political attitude, but a *Weltanschauung*—an all-pervasive vision embracing our attitudes towards ethics, society, human personality, the social and natural sciences, politics, metaphysics, jurisprudence, epistemology, and psychology. Despite this seeming multiplicity of subject-matter, liberalism is "a single mode of thought. . . . The premises of this vision of the world are few; they are tied together; and they are as powerful in their hold on the mind as they are unacknowledged and forgotten."³⁹ Although unacknowledged and forgotten, the premises of liberalism are nevertheless "the dominant and central element in modern thought."⁴⁰

The heart of Unger's argument is the connection he draws between liberal epistemology and the social organization of the liberal state: that is, between the "knowledge and politics" of his title. In his view, the modern state is both the reflection and the protector of liberal thought. This fact is of great importance for three reasons. First, the disintegration and resignation experienced by those who live in modern societies can be explained as the consequence of the deficiencies of the liberal theory. Second, the fact that these theoretical deficiencies have remained undetected for so long can be explained by pointing out that the liberal ideas are deeply entrenched within the organization of society (they are, Unger says, "a way men have in fact come to experience their moral life"⁴¹)—a fact which also explains why a radical critique ("total criticism") is now necessary. Third, by bringing the inner contradictions of liberal thought to light, Unger will be able to expose the flaws in liberal social organization; thus, the link between knowledge and politics proves to be the entire system's undoing. I shall elaborate these points in turn.

1. *The Sins of Liberalism*

First, consider the practical failings of liberalism. These may be treated under two headings: the moral predicament of the individual, and the political predicament of modern society.

The predicament of the individual is that he is subject to two "seemingly opposite" moral sentiments, each of which "is, in a sense, the truth of the other and brings to the fore what is hidden as a secret in its coun-

39. KP, *supra* note 1, at 3.

40. *Id.* at 7.

41. *Id.* at 17.

terpart."⁴² The first sentiment is that of *disintegration*.⁴³ The second is that of *resignation*: "Resignation is a despairing submission to a social order whose claims are inwardly despised. It is the governing idea and emotion of the peculiar Stoicism in which the bureaucratic and professional classes of the welfare-corporate state so deeply participate."⁴⁴ These two sentiments "share a common view of the relation of thought to life" in which the public realm of factual and technical discourse is severed from "an intimate world of feeling. Within the cage of private emotion all religion, art, and personal love is arrested, and from it all rational thought is banished."⁴⁵ In consequence, "[t]he self is split in two, each half finding the other first incomprehensible, then mad. Thus, the subversion of the standards of sanity and madness is a consequence of the progress of these sentiments."⁴⁶

Unger's principal aim in *Knowledge and Politics* is to extricate us from this predicament: "There is a moving hand behind the critique of liberal thought. It is the desire to escape from the condition of the moral sentiments I have described into that state of simultaneous union and division of self and world in which all resignation becomes immanence and all disintegration transcendence."⁴⁷ His ambition is not hopeless, because, "for all its power, the liberal doctrine is not powerful enough to subjugate the full range of our feelings and ideas."⁴⁸ There remain a number of ideals which liberalism has been unable to eradicate.⁴⁹ As for the political and social predicament, it too is caused by the dominant consciousness in the liberal state, and Unger describes it eloquently.⁵⁰

42. *Id.* at 26.

43.

Its characteristics are the falling apart of different elements of the self, and revulsion against the external world, especially against the social world. Disintegration is the defining experience of the culture of modernism. It is the fate of the dejected, the defeated, and the damned, who have never shared the consciousness of which the liberal doctrine is a philosophical expression.

Id.

44. *Id.*

45. *Id.* at 27.

46. *Id.*

47. *Id.* at 28.

48. *Id.*

49. For example, there remains:

an ideal, which liberalism never succeeded in stamping out and whose force was acknowledged even by many of the liberal philosophers. It is the view that the conscious self should be, and in a sense always is, related to nature, to others, and to its own concrete life and station, yet, in another sense, remains independent from them. The ideal of the relation between self and nature I call natural harmony, that of the relation between self and others sympathy, and that of the relation between the abstract and the concrete self concrete universality.

Id. at 21-22.

50.

The dominant consciousness in the liberal state includes a characteristic view of the relation between man as an agent or a thinker and the external world, between man and his fellows, and between man and his work or social place. With respect to the first, it emphasizes the subjection of nature to human will as the ideal of action and the choice of efficient means to given ends as the exemplary procedure of reason. With regard to the second, it underlines the

Not only does liberalism warp people's relationships to themselves and to others: It distorts their intellectual life as well. Unger's own experience bears this out. He says that, having turned his mind to some problems of legal theory, he found that "the house of reason in which I was working proved to be a prison-house of paradox whose rooms did not connect and whose passageways led nowhere"; it was this discovery, he says, that caused him to write his book.⁵¹

2. *Partial Criticism*

Unger does not suppose that these problems have hitherto gone wholly unremarked. He says that there have been attempts to solve the dilemmas of liberalism in a piecemeal fashion, but these attempts have not met with success: "Our approaches to social study are nothing but partial assaults on a mode of thought they have neither repudiated nor understood in its entirety."⁵² So long as we proceed in this way, we shall get nowhere: "The sciences are simply partial critiques of the classical theory. It is the partiality of their criticism, rather than the criticism itself, that both separates the sciences from each other and enslaves them to the theory from which they already imagine themselves free."⁵³

Why should partial criticism be doomed to failure? Because of the interconnections of knowledge and politics: specifically, because of the reciprocal dependence of liberal theory and the liberal social order.⁵⁴ The failure of the partial assaults "shows the unbroken tyranny that the classical theory, in this case the liberal doctrine, exercises over the minds of those

separateness of person [sic], the artificial character of society, and the ties of reciprocal need and hostility among individuals. As to the third, it focuses on the ambivalent value of work as both a manifestation and a surrender of personality.

These three aspects of consciousness express a more general view of the world, the religion of transcendence, which asserts the radical separation of God and man, heaven and earth, soul and body. But transcendence takes a secularized form in the liberal mentality. The consequences of secularization are so far-reaching that they ultimately imply a radical transformation of the dominant consciousness itself.

Id. at 19.

51. *Id.* at 3.

52. *Id.* at 5.

53. *Id.* at 2.

54. Consider, for instance, what Unger says about the difficulty of criticizing liberal theory's "Principle of Analysis":

The axiom of analysis stands opposed to any attempt to pass, in the discussion of liberal thought, from partial to total criticism. It always points toward the study of individual problems by denying that there is any whole in the tradition of liberalism except a collection of particular ideas entertained at different times. The emperor of Japan, separated by a screen from his groveling subjects, could not have hoped for a better hiding place than the one this view of knowledge gives to the liberal doctrine.

The principle of analysis may owe much of its appeal to a particular form of social order, to whose perpetuation it in turn contributes: the situation in which each man's social existence is divided into a diversity of roles. . . . A fractured social existence can only produce a fractured knowledge of the social order.

Id. at 48.

who believe they have extricated themselves from its clutches."⁵⁵ And the partial criticism of liberalism has suffered "the fate of all partial criticism: to remain enslaved by that from which it claims to be free."⁵⁶

Even such great thinkers as Marx, Durkheim, and Weber did not "succeed in establishing a psychology that escaped the implications of the liberal distinction of reason and desire, and this failure in psychology runs as a poison through their political ideas."⁵⁷

3. *Total Criticism*

How is one to overcome the limitations of partial criticism? By resorting instead to what Unger calls *total criticism*. It is not enough to attack the liberal doctrine in a fragmentary fashion. "Liberalism must be seen all of a piece, not just as a set of doctrines about the disposition of power and wealth, but as a metaphysical conception of the mind and society. Only then can its true nature be understood, and its secret empire overthrown."⁵⁸

Total criticism requires the critic to work with concepts of great abstraction. The first step in Unger's argument is therefore to uncover what he calls the "deep structure" of liberal thought. The deep structure is defined by six interconnected principles, three of which come from psychology, and three from political theory. The deep structure is *not* something that all liberal thinkers have believed; indeed, "there is no one thinker who accepts the liberal theory, in the form in which I present it, as a whole, or whose doctrines are completely defined by its tenets."⁵⁹ In other words, his "deep structure" is to be an idealization of historical liberalism.⁶⁰ Without an understanding of this "deep structure," Unger says, his task would be hopeless.⁶¹

The deep structure of liberalism having been described, the next step in Unger's program of total criticism is to show that the six principles defining the socio-politico-metaphysical deep structure of liberalism are self-contradictory: "that they produce antinomies that cannot be resolved within the system itself."⁶² As for the implications of this investigation for

55. *Id.* at 5.

56. *Id.* at 10.

57. *Id.*

58. *Id.* at 6.

59. *Id.* at 8.

60. See *infra* Section II. C.2 ("Unger's Logic").

61.

The critique of the metaphysical framework of our ideas about knowledge and politics would be reduced to an endless game of hide-and-go-seek. In the game the one who hides will change position each time the one who seeks draws near, and the chaser will be trapped in a hall of echoes in which the mocking voice of his quarry will seem to come from everywhere and nowhere.

KP, *supra* note 1, at 9.

62. *Id.* at 13 (Unger defines an antimony as "a contradiction among conclusions derived from the same or from equally plausible premises"); see also *id.* at 18 ("the contradictions of liberal thought").

legal theory, "[a]n especially important conclusion is that no coherent theory of adjudication is possible within liberal political thought."⁶³

Unger is not under the illusion that "a philosopher's trick"⁶⁴ will suffice to overthrow the empire of liberalism. For "liberalism is a ruling consciousness as well as a metaphysical theory,"⁶⁵ and "[e]ach of the theoretical problems will be seen to correspond to a problem in life that only the transformation of experience through politics can truly resolve."⁶⁶ This interconnection of theory and experience causes Unger to consider a plan for "the transformation of the conditions of social life, particularly the circumstances of domination, that produce the experience of the contingency and arbitrariness of values."⁶⁷

Part Two of Unger's book is his theory of the emerging "Welfare-Corporate State" and of "its distinctive features of consciousness and organization."⁶⁸ Unger says that "[i]nsofar as they foreshadow a possible union of transcendence and immanence in consciousness and of autonomy and community in social organization, the welfare-corporate and the socialist state change the experience of which the liberal doctrine is both a part and a metaphysical representation."⁶⁹ But the "Theory of the Welfare-Corporate State" does not "define adequately what the new theory might be";⁷⁰ Unger undertakes this project in Part Three. There he outlines a "theory of the self" whose aim is "to define what a union of transcendence and immanence, autonomy and community, would mean."⁷¹ He then tries to show "how the ideal of the self can be accomplished in society through a transformation of the welfare-corporate and the socialist state."⁷² He describes a community whose institutional features are derived from the theory of the self, and he calls this community the *organic group* or the *community of life*.⁷³ He says that organic groups will help the world to achieve "natural harmony, sympathy, and concrete universality."⁷⁴ But he does not believe that organic groups can be easily attained: "An actualization of the ideal that broke through the logic of the everyday and the extraordinary would require, if it could be accomplished at all, the reformation of society."⁷⁵

Unger's book ends with a section on religion, and the famous conclud-

63. *Id.* at 98.

64. *Id.* at 17.

65. *Id.* at 24-25.

66. *Id.* at 17.

67. *Id.* at 103.

68. *Id.* at 20.

69. *Id.* at 21.

70. *Id.*

71. *Id.*

72. *Id.* at 237.

73. *Id.* at 260-61.

74. *Id.* at 23.

75. *Id.*

ing paragraph: "But our days pass, and still we do not know you fully. Why then do you remain silent? Speak, God."⁷⁶

Throughout the book, the link between epistemology and social organization—the "knowledge and politics" of his title—plays the central role. This link is what allows Unger to make the transition from his critique of liberal metaphysics to his conclusions about liberal politics; as he emphasizes, this connection will "serve as the key that will allow us to escape from the prison-house, just as it was the chain with which the gates were long ago locked by the builders."⁷⁷

B. *Remarks on Strategy*

The boldness of Unger's program is refreshingly unequivocal. He says that he will (1) launch a total assault on a doctrine that (although its premises are "forgotten," and although no single thinker held all its tenets) forms the "deep structure" both of modern thought and of modern society. Specifically, he will (2) show that these principles are self-contradictory. All this will take three chapters—a little over a hundred pages. In the remainder of the book he will (3) point the way to a new kind of thought and a new kind of social life, intimated by the theory of organic groups. These are the three most striking and important elements of his book; particularly the first two, which amount to a claim to have refuted the central core of modern thought. I shall discuss these three elements—the *methodology*, the *antinomies*, and the theory of *organic groups*—later; but first, let me say a few words about Unger's project in general.

Although I shall have many criticisms of the details, I am entirely sympathetic to the *kind* of enterprise Unger is engaged in. His work tackles an impressive range of problems and attempts to solve them by exploiting a deep connection between epistemology and political organization. The connection, like the Loch Ness monster, has often been glimpsed. Although nobody has ever brought back irrefutable evidence, I suspect that it exists and that it is as important as Unger says: If his spectacular claims are correct, they have implications far beyond the narrow world of legal theory. I too share Unger's admiration for the tradition of Continental philosophy; on this issue he is ahead of many Anglo-American philosophers. I also feel some sympathy for the enthusiasm his enterprise has evoked among his followers. Most academic moral philosophy is dry, difficult, and—superficially, at least—uninspiring. Unger, in contrast, displays a refreshing willingness to make breathtaking claims that most professional philosophers are too unimaginative or too timid or too prudent to

76. *Id.* at 295.

77. *Id.* at 4.

make; few works of academic philosophy begin by announcing the refutation of modern thought or end by saying, "Speak, God."

Of course, the ability to make breathtaking claims is not enough: You also have to support them. And here the details matter. It is the details, after all, that make the difference between the thrills of the astrologer and the more austere excitement of the astronomer, or between the claims of *The National Enquirer* and those of *The Washington Post*. In particular, Unger has an obligation to satisfy the basic standards of historical exposition and of philosophical argumentation.⁷⁸ Everything in his refutation of liberalism depends upon these two requirements. For if the history is wrong, he will have achieved nothing more substantial than victory over a straw-person; and if the argumentation is careless, his adversary, even if it be of straw, will survive the battle unscathed.

My strategy will therefore be straightforward. I shall proceed through the stages of Unger's argument, and at each stage I shall ask: How accurate is his history? And how sound are his arguments? I shall then consider his theory of organic groups. In particular, I shall ask:

(1) *Methodology*. What is "liberalism"? Does it have a "deep structure"? And is the methodology of "total criticism" logically coherent?

(2) *The Antinomies*. Do Unger's six principles embody a distinct, historically important philosophical theory? (That is: Do the classical liberal thinkers generally accept Unger's six principles, and do the non-liberals reject them?) And do Unger's arguments show that the principles lead to contradictions?

(3) *Organic Groups*. Does this theory offer a plausible replacement for modern social life and for modern political theory?

To the first of these questions I now turn.

C. Unger's Methodology

1. What Is Liberalism?

Unger says that liberalism took its classical form in the seventeenth century in the works of Thomas Hobbes, who rejected the Aristotelian metaphysics and moral psychology.⁷⁹ A close examination of Unger's book yields the following list of liberals: Hobbes, Locke, Hume, Spinoza, Rousseau, Kant, Bentham, Mill, von Humboldt, T.H. Green, Strawson, Rawls, Dworkin.⁸⁰ The list of post-Hobbesian non-liberals is rather shorter: Although Dewey, James, Marx, Durkheim, Weber, Scheler, and

78. Unger might argue that these standards are themselves a product of liberalism, hence part of the object of his attack, and thus not applicable to his work. I discuss this argument *infra* notes 94-113 and accompanying text.

79. KP, *supra* note 1, at 5.

80. *Id.* at 9, 88, 298, 303, 306-08.

Hartmann are mentioned as providing "partial critiques" of liberal thought,⁸¹ nobody is listed as a clear opponent of the liberal doctrine.

If by "liberal" Unger meant simply "modern" (so that "non-liberal" would mean "pre-modern"), then the two lists would not be so puzzling; but he explicitly rules out this interpretation.⁸² He thereby leaves us with the problem of trying to understand why the list of non-liberals is empty, and what his "liberals" have in common apart from having lived and written after the Peace of Westphalia. The problem is compounded by the fact that the term "liberal" already exists in ordinary usage and is ambiguous enough that Unger's readers may be tempted to read their own interpretation of liberalism into his argument. Even at the level of concrete political discourse, the term is notoriously vague. Historically, the word dates from the years following the French Revolution; it designated a loose cluster of political principles—on the one hand, opposition to authoritarian forms of political organization (such as monarchy) and to the excessive power of the state; on the other hand, a concern for political liberties (freedom of speech and of religion), for democratic political institutions, for the separation of church and state, and for electoral reform. Even at this concrete level, these principles can come into conflict with one another, and liberalism soon split into branches, such as laissez-faire economic liberalism, movements for national self-determination, libertarianism, and New Deal liberalism—to mention only a few.⁸³ It is a familiar observation that a politician can be "liberal" on one issue and not on another, and that the positions identified as "liberal" change over time. In addition, there is the sense of "liberal" that can be used to classify members of the Soviet Politburo or the South African Parliament as "liberal" or "conservative."

Once one moves to the more abstract level of political theory and searches for the philosophical underpinnings of liberalism, matters become still more confusing. Hobbes, for instance, Unger's prime liberal, was an advocate, not of individual rights, but of monarchy and the absolute power of the state. On the other hand, his theory of sovereignty, his account of the social contract, his secularism, his individualism, his empiricism, and his positivism exerted a profound influence on subsequent political theory, including that of British liberals like Mill, Bentham, and Sidgwick. (His influence on continental liberals like Kant and von Humboldt was minimal.) So Hobbes' claim to be called "liberal" is not entirely unproblematic. Even if we restrict our attention to philosophers who can be

81. *Id.* at 10, 15, 301.

82. "First, what I shall call liberalism is not tantamount to modernity. Much in modern thought is irreconcilable with liberal principles; the polemic against them dates back to the time of their original formulation." *Id.* at 8.

83. For a helpful account of the history of the word "liberal," see J. RITTER & K. GRÜNDER, *HISTORISCHES WÖRTERBUCH DER PHILOSOPHIE* (1980).

fairly uncontroversially classified as "liberals"—such as Kant, Bentham, Mill, von Humboldt, Green, Dewey,⁸⁴ and Rawls—the amount of metaphysical, epistemological, psychological, and even political diversity is striking.⁸⁵ So Unger's use of the vague and ambiguous term "liberal" to designate a single politico-metaphysical-socio-cultural-psycho-epistemological theory adhered to by all these thinkers needs considerable historical justification.

In the interest of clarity, Unger should have supplied an historical exposition of "liberalism" and disentangled it from his critique; he ought at the least to have given a clear list of modern liberals and non-liberals, and he ought perhaps to have used a more precise term (like C.B. MacPherson's "possessive individualism") to describe the doctrine he opposes. To these objections Unger might reply, first, that he is not so much concerned to enumerate a set of liberals as to refute a set of ideas that have been influential in modern thought; and, second, that his presentation of the "deep structure" gives a precise account of the philosophy of "liberalism." But a brief glance at one of Unger's six "principles of liberalism"—the "principle of individualism"—illustrates the difficulties with this reply.⁸⁶ This principle is vague to the point of emptiness. Moreover, as stated, it contains an obvious fallacy, and to the extent that this principle has any identifiable meaning it is explicitly rejected by Rawls (who says he is following von Humboldt on this point).⁸⁷ I can see no justification for attributing it to any influential thinker who actually existed.

Of course, Unger is entitled to call his six principles by whatever name he chooses. But it is important to remember that these six principles must be shown to determine an historically important philosophical theory. A mere redefinition is not enough. A simple example of an argument that

84. *Pace* Unger; see J. DEWEY, *LIBERALISM AND SOCIAL ACTION* (1935).

85. If Hegel is added to the list, as many scholars have argued he should be, then my claim becomes even stronger. See R. DREIER, *Bemerkungen zur Rechtsphilosophie Hegels*, in *RECHT-MORAL-IDEOLOGIE* (1981); J. RITTER, *HEGEL UND DIE FRANZÖSISCHE REVOLUTION* (1957); S. AVINERI, *HEGEL'S THEORY OF THE MODERN STATE* (1972); Pelczynski, *The Hegelian Conception of the State*, in *HEGEL'S POLITICAL PHILOSOPHY I* (Z. Pelczynski ed. 1971).

86.

[A] group is simply a collection of individuals; in other words, the attributes of a group are the sum of the attributes of its individual members. [This is] the principle of individualism, or simply individualism.

If we take the group as the whole and the members as parts, the principle of individualism affirms that the whole is just the sum of its parts. In this sense, it is formally analogous to the principle of analysis, which states that all complex knowledge (the whole) can be analyzed back into the elementary ideas or sensations (the parts) with which it was built. This formal analogy will later turn out to be the outward sign of a profound connection.

KP, *supra* note 1, at 81. Note in passing that the first sentence in the above quotation contains a fallacious inference. To say that "a group is simply a collection of individuals" is quite different from saying that "the attributes of a group are the sum of the attributes of its individual members." A table is simply a collection of atoms. A table has the attribute of being a table, but atoms do not have this attribute. For the point about Rawls, see J. RAWLS, *A THEORY OF JUSTICE* 520-29 (1971) and *infra* text accompanying notes 226-32.

87. J. RAWLS, *supra* note 86, at 523 n.4.

commits the "redefinitional fallacy" will clarify this point. "I wish to prove that tuna fish do not exist. I begin by defining tuna fish to be mermaids; that is, they are mythological creatures, half human and half piscine. But it is physiologically impossible for a single organism to be both warm-blooded and cold-blooded. This is an antinomy, from which it follows that tuna fish do not exist."

Professor Unger's usage of the word "liberal" commits precisely this fallacy. I shall show later that his "six principles of liberalism" do not, in fact, constitute an historically important theory. His "refutation" of what he calls "liberalism" refutes, at best, only what *he calls* "liberalism"; it refutes historical liberalism only by redefinitional equivocation. For this reason Unger's usage must be carefully distinguished from the ordinary political and philosophical usages. In what follows, I shall write it as LIBERALISM in order to keep the senses distinct. My subsequent discussion will show that much of the plausibility of Unger's argument depends on confusion—specifically, on confusing LIBERALISM with liberalism.

A further objection addresses the logical form of Unger's argument. The problem is that his LIBERALISM is meant to serve, not merely as a rational reconstruction of historical liberalism, but as a target for refutation. There is an important logical difference between the two enterprises. If you wish to support a political thesis or to uphold a philosophical tradition, you need only produce a single theory that supports that thesis or that falls within the tradition and then argue for its truth. If other theories in the tradition fall short of the truth, so much the worse for them: Your theory still stands. But if you wish to *refute* a philosophical tradition, it is not enough to refute a single theory. For one of the other theories in the tradition might be true, and then so much the worse for your refutation.

2. *Unger's Logic*

Obviously, it would be tedious to examine and refute each separate theory in the LIBERAL tradition. If that laborious work is eschewed, as Unger has eschewed it, there remain three strategies for refuting this collection of theories. It is important to distinguish the strategies, because one of them is fallacious, and the other two impose different constraints on the form of the refutation.

The first strategy—call it the *ideal strategy*—is to (1) single out some one theory T (which may be an idealization or rational reconstruction), (2) show that it is the best of all the theories, and (3) show that it nevertheless fails. One can then argue that T's weaker cousins would also fail. This strategy is rather like establishing your prowess at fisticuffs by beating up the neighborhood bully; you hope it won't be necessary to fight everyone else on the block as well. Of course, logically speaking, this sort

of argument does not *prove* that you would not be thrashed by the bully's little sister; and, logically speaking, it may be that one of the other theories would not succumb quite so easily as T. But it is not very likely, provided that T is clearly stronger and more plausible than all the other candidates, and provided that the other candidates are apt to fail for the same sort of reason that T failed. The crucial point is that T must not be made of straw; otherwise the argument shows nothing.

The second strategy—the *core strategy*—is to show that all theories in the tradition share a common set of assumptions, and that these assumptions lead to unacceptable conclusions or to a contradiction. This strategy, unlike the ideal strategy, does, as a matter of logic, imply that *all* the theories fail.⁸⁸ And it imposes a different responsibility on the argument: to show that *all* theories in the tradition have these principles in common. It is obviously not enough to grab a few theses from here and a few from there and then show that they lead to a contradiction. The argument must be directed against the *intersection* of the theories, not against their *union*; for, as a logical matter, the latter strategy shows nothing.

The third strategy—the *agglomeration strategy*—makes precisely this mistake. It confuses the sum of a few theses gathered from here and there with the central core of the theory. It is as though you were to argue: "Jack and Jill share a common theory of the authorship of *Hamlet*. Jack thinks it was written by Shakespeare; Jill thinks it was written by Bacon. This is an antinomy; *ergo*, their theory is untenable." If this argument shows anything, it is that the supposed "common theory" does not exist.

There are thus three possible strategies, attacking respectively the ideal, the common core, or the agglomeration of the theories. Which one does Unger choose? Not the ideal strategy, for his six principles are not presented in anything like the detail that would be required to make them the best possible version of LIBERALISM.⁸⁹ (Indeed, as will appear, his six

88. In practice, there will often be some overlap between the ideal and the core strategies, for the following reason. An ideal-strategy argument shows that all theories "sufficiently similar" to the ideal will fail; and the notion of "sufficiently similar" will often be detailed enough to mark out a common core. For example, when Francis Bacon argued against Aristotle's account of science, he was at the same time attacking assumptions that had been made by all of Aristotle's medieval followers; so he was simultaneously making a valid core argument and a valid ideal argument. There is clearly nothing wrong with making an argument that is valid on *both* counts, but the two strategies are logically distinct, and if you confuse them you risk making an argument that is valid on neither count.

89. To be more precise, the historical facts I discussed earlier suggest that no unitary socio-political-metaphysical ideal-strategy argument could be made to work against liberalism. The diversity of ways in which philosophers have argued for liberal political views makes it unlikely that one could construct a *single* theory which everybody would agree to be the best version of liberalism—there are several strong contenders, and they have different philosophical underpinnings. Just as a victory over the best boxer in town does not show that one could beat the local black-belt, so a victory over even the best utilitarian-based liberal political theory does not in itself refute the best Kantian-based theory. So if one wishes to pursue the ideal strategy, one has to pursue it against each of the principal *types* of liberal political theory—that is, one has to select the best representative for each of the three or four principal types of liberalism and defeat each of these theories separately. Unger argues against a single, weak theory rather than against several strong ones, from which I infer that he is not following the ideal strategy.

principles are little more than a straw-person: They are too vague to be plausible, and they do not define an historically important theory.) Nor does he follow the core strategy, for he tells us, not only that his six principles are not held in common by *all* LIBERAL thinkers, but that *no* LIBERAL holds all six.⁹⁰ In fact (as a detailed examination of his argument will show), he appears to be employing the fallacious agglomeration strategy, in which case his argument can show nothing more interesting than that LIBERALISM is not a political theory—a conclusion that I have already given grounds for believing.⁹¹

Unger gives a curious justification for his procedure. He does not discuss the genuine—indeed fatal—logical difficulties that beset the agglomeration strategy; instead, he worries (in the section entitled “The Problem of Language”) about a logical matter which he treats as a problem, although in fact he should have welcomed it. He says that he intends to show, first, “that the principles informing liberalism are related to one another and, second, that they produce antinomies that cannot be resolved within the system itself.”⁹² But a worry then strikes him:

Should the antinomies of liberal thought prove to be indeed insoluble, would we not have to abandon the claim that liberal principles are interdependent? If we did, however, it would then no longer be clear in what sense the principles constituted a system, even though, as a contingent matter, they might coexist in certain minds.⁹³

This sounds as though Unger has noticed the central difficulty with the agglomeration strategy—that Jill's principles *plus* Jack's principles do not constitute a system. But in fact what seems to be bothering him here is not a doubt about the agglomeration strategy, but something quite different: “It cannot in fact be demonstrated that the different premises of the liberal doctrine follow from one another by a strict logical necessity, nor would such a demonstration be consistent with the discovery that these premises lead to contradictory conclusions.”⁹⁴

90. “[T]here is no one thinker who accepts the liberal theory, in the form in which I present it, as a whole, or whose doctrines are completely defined by its tenets.” KP, *supra* note 1, at 8.

91. It should be observed that the “redefinitional fallacy” and the agglomeration strategy are related. They are both examples of equivocation, but they equivocate in different ways. Unger commits the agglomeration fallacy when he takes incompatible theses from distinct theories, agglomerates them into an artificial theory, shows that the artificial theory is inconsistent, and concludes that he has refuted the original theories. He commits the fallacy of redefinition when he dubs the artificial theory “LIBERALISM,” and concludes that, in refuting it, he has refuted historical liberalism. These fallacies have to be exposed in different ways. The argument against the agglomeration fallacy is *logical*, and consists in pointing out the gap in Unger's reasoning. The argument against the redefinitional fallacy is *historical*, and consists in pointing out that, because the “six principles of LIBERALISM” do not constitute a theory that any philosopher has ever held, there is no warrant for calling them “liberalism.”

92. KP, *supra* note 1, at 13.

93. *Id.*

94. *Id.* at 15.

On the contrary: If Unger were making a valid core argument (as he sometimes seems to take himself to be doing), then such a demonstration is precisely what he ought to hope for. For it has the consequence that *all* the premises of LIBERALISM must be abandoned; otherwise the antinomies could be resolved by dropping one or another subset of the principles and keeping the others.⁹⁵ The logical form of an argument of the sort Unger proposes is in fact well known and has nothing paradoxical about it. Here, for instance, is Bertrand Russell arguing against "naive realism": "Naive realism leads to physics, and physics, if true, shows that naive realism is false. Therefore, naive realism, if true, is false; therefore it is false."⁹⁶ Arguments of this sort are perfectly familiar. They come in many different forms, and although they are usually more complicated than Russell's argument they are just as reconcilable with the laws of logic. So the "quandary" Unger discusses is merely a pseudo-problem: He need not have worried.

But his proposed solution lands him in the logical soup. I shall linger over it, because in a very brief compass it shows the quality of Unger's scholarship as well as of his reasoning.

Unger begins the defense of his methodology by raising the following problem: "The methods of proof and argument are part of the theory to be criticized. In what form then is total criticism to bring its suit, and by what law are its claims to be judged?"⁹⁷ He next argues that LIBERALISM's methods of proof and argument—its "familiar modes of explanation"—are engendered by LIBERALISM's separation of the "order of ideas" from the "order of events":

Much of the history of modern philosophy can be understood as a series of attempts to elucidate the relationship between the order of ideas and the order of events. First, the order of events was reduced to that of ideas so that logic provided the key to all explanation (rationalism). Then the order of ideas was reduced to that of events so that causality served as the basis of a unified science of the world (empiricism).⁹⁸

One wonders what to make of the assertion that empiricism reduced "the order of ideas . . . to the order of events." It would have been more accurate to say that the empiricists (in particular, Berkeley and Hume) tried to show precisely the reverse, namely, that *physical* events and objects

95. This is a straightforward application of what logicians call the "completeness theorem for propositional logic." The basic idea is this. Consider the simplest case, where there are only two premises, *X* and *Y*. Suppose that premises *X* and *Y* taken together lead to a contradiction. Now, if *X* implies *Y*, then both *X* and *Y* must be abandoned. But if *X* does not imply *Y*, then you can abandon *Y*, retain *X*, and avoid the contradiction.

96. B. RUSSELL, AN INQUIRY INTO MEANING AND TRUTH 13 (1962).

97. KP, *supra* note 1, at 12.

98. *Id.* at 13-14.

could be explained in terms of *mental* events and objects: what Hume called "impressions and ideas," and what later empiricists called "sense-data." And as for causality, Hume argued, in one of the most famous texts in the history of philosophy, that there is no such thing as causality "in the object," but that the basis of causality is rather to be found in "the association of ideas": that the "power and necessity" involved in causation are "qualities of perceptions, not of objects."⁹⁹ Ever since Hume, causality has been a problematic concept for empiricists. Bertrand Russell's opinion is typical: "The law of causality, I believe, like much that passes muster among philosophers, is a relic of a bygone age, surviving, like the monarchy, only because it is erroneously supposed to do no harm."¹⁰⁰

Unger's remarks on the rationalists are equally untenable. In the first place, the rationalists were not interested in the *reduction* of "events" to "ideas" so much as in trying to *elucidate the connections* between the mental and the physical. This remark is especially true of Descartes, who was (notoriously) a dualist,¹⁰¹ but it also holds for Spinoza and Leibniz. Second, the rationalists did not take *logic* to be the key to all explanation. Spinoza scarcely mentions the word "logic"; Descartes does so only once, and says that he found the subject useless for his purposes.¹⁰² And although Leibniz wrote about logic, his ideas were not published until the present century. Logic, in fact, had its heyday under Aristotle and the Schoolmen,¹⁰³ not under the rationalists. Until the mathematical developments of the nineteenth century, the standard view was that of Kant: that Aristotle had said the last word on logic, a subject that was all very well in its place, but of little use for the discovery of new truths.¹⁰⁴

So Unger's description of the *content* of the views of the rationalists and

99. D. HUME, *A TREATISE OF HUMAN NATURE* bk. 1, pt. 3, §§ 12, 14 (1740) (L. Selby-Bigge ed. 1958). For a detailed discussion and a lengthy bibliography, see J. MACKIE, *THE CEMENT OF THE UNIVERSE* (1974).

100. B. RUSSELL, *Mysticism and Logic*, in *MYSTICISM AND LOGIC AND OTHER ESSAYS* 180 (1918).

101. Descartes was the originator of "Cartesian dualism," the doctrine that mind and body are two radically distinct substances.

102.

I observed in respect to Logic that the syllogism and the greater part of the other teaching served better in explaining to others those things that one knows (or like the art of Lully, in enabling one to speak without judgment of those things of which one is ignorant) than in learning what is new. And although in reality Logic contains many precepts which are very true and very good, there are at the same time mingled with them so many others which are hurtful or superfluous, that it is almost as difficult to separate the two as to draw a Diana or a Minerva out of a block of marble which is not yet roughly hewn.

R. DESCARTES, *DISCOURSE ON THE METHOD OF RIGHTLY CONDUCTING THE REASON* pt. II (E. Haldane & G. Ross trans. 1911).

103. I.e., the scholastic philosophers of the middle ages, who were reviled by later generations for their allegedly excessive use of logic. The effects of this revilement can be seen in the etymology of two familiar English words. Students in medieval Oxford were expected to study logic, grammar, and rhetoric, three subjects that were collectively known as the *trivium*; from this root grew our word *trivial*. And one of the greatest logicians of the middle ages, Duns Scotus, had his name corrupted by Renaissance anti-logicians into *dunce*.

104. See I. KANT, *CRITIQUE OF PURE REASON*, B viii-ix (1794).

the empiricists is inaccurate. It is also irrelevant. For he is trying to justify the *methodology* of his argument, and so he ought to have considered the methodology that rationalists and empiricists used to make their arguments. Not that their methodology would help him. The rationalists do not argue purely from logic, nor do the empiricists argue purely from causality.¹⁰⁵

And, in fact, the rationalists have no unique claim to logicity. Rationalists and empiricists, Aristotle and the Schoolmen, logical positivists and their Quinean successors—all (not very surprisingly) accept the basic laws of logic; and they would reject as invalid any argument that relied on the agglomeration strategy—the problem that Unger should have discussed, but didn't.

Unger invokes this history to support the following argument. Recall that he is facing "the fundamental problem of method engendered by the disjunction of the order of ideas and the order of events."¹⁰⁶ He says that he intends to solve this methodological problem by developing a different mode of explanation: "The objective is to work toward a situation in which the critique of liberalism will itself forge a method of interpretation more adequate than logical analysis, a result only to be achieved fully through the construction of a nonliberal system of thought."¹⁰⁷ But Unger's excursion into the history of philosophy is not likely to persuade anybody to "embrace that third and yet undefined mode of explanation that stands beyond the boundaries of formal logic and causality."¹⁰⁸ Such a drastic step ought to be supported by arguments, and the arguments

105. For example, Descartes's *Meditations* begin with Descartes in his room reflecting on his dreams and on the malleability of a piece of wax; he is led, via universal doubt, to the *cogito* argument (which assures him of his own existence); then to a *causal* proof of the existence of God (which assures him of the existence of an external world, of the truth of mathematics). This argument depends heavily upon extra-logical premises, and, in particular, upon premises about causality; it is not an exercise in pure logic. Similarly, Berkeley's idealism rests on a logical analysis of the concept of matter, on an argument that the notion of material substance is logically self-contradictory; it is not an exercise in causal explanation.

106. KP, *supra* note 1, at 14.

107. *Id.* at 15. Unger adds: "This procedure will require the introduction of certain plausible but contingent empirical assumptions at various points of the exposition and the abandonment of strict demonstration in favor of suggestive argument." *Id.* But this does not help him, and would not do so even if he were subsequently clear about which "empirical assumptions" he introduces. You can add as many empirical premises to a logically flawed argument as you like, and the flaw remains: " $1+1=3$, *ergo* $2+2=5$ " is not improved if you change it to, " $1+1=3$ and snow is white, *ergo* $2+2=5$." In any case, the agglomeration strategy is in no sense a "suggestive argument"; it is simply muddled.

108. *Id.* Compare Unger's argument to the following: "The natural sciences are subject to a disjunction between the mathematical sciences and the physical sciences. I wish to construct a new science which will transcend both. In the argument for my science, I shall have to resort to equations that state that $2+2=7$. This may look odd, but you should remember that the mathematicians do everything in terms of numbers, and the physicists do everything in terms of physical objects. Because I am attempting to find a method of interpretation more adequate than mathematical analysis, I cannot be held to the methodology of the mathematicians." Obviously, the chief fallacy in this argument is the assumption that *only* the mathematicians have an interest in the laws of elementary arithmetic; Unger's historical remarks about the rationalists and the empiricists seem to me to make precisely the same mistake, but for logic rather than mathematics.

ought to be solid as bricks. But Unger's solitary argument is that, *because* his book is not going to adhere to the standards of logic, *because* he is going to employ the agglomeration strategy, we need "a method of interpretation more adequate than logical analysis": "The need to deviate from logical analysis compels us to prefigure that other and more complete sort of explanation to which we have aspired, and which must constitute the cornerstone of another theory."¹⁰⁹ Not only are we to "deviate from logical analysis," we are to do so in the interests of a "mode of explanation" that will not emerge until LIBERALISM has been overcome: "If both the problem [of methodology] and the disjunction that produces it are themselves bound up with the fate of the liberal system, it will not be possible to go from the name of the solution to the solution until we have found an alternative to liberalism."¹¹⁰ But because the overthrow of LIBERALISM will, as Unger stresses, require "the reformation of society,"¹¹¹ he spares himself the necessity of answering any embarrassing questions about how the new "mode of explanation" will work, or about what life will be like in a society that has rejected the laws of logic.

Unger is in fact mistaken in his premise that logic is ideologically tainted. Political attacks on logic and the natural sciences (as being "bourgeois" or "non-Aryan" or "male supremacist") have been tried before, and they have never had much success. Generally speaking, they are advanced by people whose arguments cannot stand close scrutiny, and whose abilities at logical argument are not particularly strong. In fact, modern formal logic is the creation of socialists (Russell), anti-Semites (Frege), liberals (Hilbert), Jews (Tarski), women (Rasiowa), and the non-political (Gödel). The logicians Jean van Heijenoort (who was Trotsky's private secretary) and Michael Dummett (a passionate campaigner against British racism) both agree that Frege was the greatest logician since Aristotle.¹¹²

Unger's argument in this passage has little to recommend it.¹¹³ He ap-

109. *Id.* at 16.

110. *Id.* at 14-15.

111. *Id.* at 23.

112. See M. DUMMETT, FREGE: PHILOSOPHY OF LANGUAGE xii (1973); J. VAN HEIJENOORT, FROM FREGE TO GÖDEL 1-5 (1967).

113. The argument, "Logic is a product of LIBERAL society; I am trying to reform LIBERAL society; *ergo*, I am entitled to deviate from the laws of logic," is quite a muddle, and it certainly does not remove the flaw in the agglomeration strategy. Nor is it particularly new. The literature of pseudoscience is filled with exchanges of the following general form: "Look at these equations! I've proved that mathematics is inconsistent!"—"No you haven't. Look here: You've divided by zero."—"So what? I *told* you mathematics was rotten to the core." Madame Blavatsky, a nineteenth-century spiritualist, wrote about *uril*, a mysterious cosmic energy mastered by the inhabitants of Atlantis which, she said, had provided the power for John Keely's perpetual motion machine. In the 1920's, a Chicago businessman, Robert T. Nelson, Jr., began to sell brass cylinders containing a substance called *urilium*. The cylinders were supposed to emit radiation for 20 feet, thereby repelling bacteria and killing germs within the body. In 1950, the United States government revealed that the cylinders contained nothing but a cheap rat poison; furthermore, this rat poison was found to have no effect on geiger-counters. "I believe," replied Nelson, "that we have an *unrecognized* form of radioactivity."

pears to have sensed the logical difficulties with his methodology, but to have realized neither exactly what they were nor exactly how they were to be avoided; instead of eradicating the problem, he tries to patch it with a deeply confused discussion of the history of logic. Fortunately for Unger, his practice is better than his theory, and most of his critique of LIBERALISM can be read as a coherent argument. But, unfortunately, he is marching into battle against a theory nobody ever held, a straw-person, and he is marching without the benefit of any knowledge of elementary logic. It remains to be seen who will win.

3. *Recapitulation*

This will be a convenient place to take stock. I began by observing that Unger's argument needs to be up to the mark both in its historical assertions and in its reasoning. I then noted that the details of his six principles of LIBERALISM are given in the discussion of the antinomies rather than being separately presented; I accordingly postponed the examination of their historical accuracy until later. I then reviewed the uses of the word "liberal," and expressed doubt that any interesting "ideal version" could be constructed for a set of political theories that covers so much ground and that contains so many sharp internal differences—especially when the "deep structure" is to be given by principles as broad as the "principle of analysis." This conclusion was important because it ruled out the possibility that Unger could make successful use of the ideal strategy. He himself rules out the core strategy, and appears to adopt the fallacious agglomeration strategy. Since the agglomeration strategy cannot, as a matter of logic, demonstrate what he wants to prove, I cast a critical eye on his discussion of logic.

It seems to me that Unger's refutation of LIBERALISM collapses before he exits from his Introduction. If I merely wished to show that his argument fails, I would end my discussion here. But one might object that even if Unger's argument is defective in its broad outlines, it is nevertheless valuable and original in the details: He may have gotten "the big picture" wrong, but the individual arguments contain profound insights. And perhaps I have been too quick in ruling out the possibility that he is following the ideal strategy. Perhaps the six principles *are* the best version of LIBERALISM; or perhaps Unger, in his separate arguments against the individual principles, manages to refute at least *some* historically important political theories.

In order to meet these objections, I must examine Unger's arguments against the six principles. I shall show that they are as implausible as the observations on logic that I have just discussed. I must also examine Un-

ger's historical assertions. This examination is important for three reasons. First, I promised to investigate whether "the sheer breadth of Unger's knowledge . . . can only be regarded with something approaching awe."¹¹⁴ Second, and more importantly, I wish to show that his argument commits the redefinitional fallacy—that is, that the "six principles of LIBERALISM" do not correspond to an historically important theory. Third, recall that the heart of Unger's book is the profound link he claims to have discovered between knowledge and politics. LIBERAL metaphysics and LIBERAL society are supposed to be mutually reinforcing, and it is this link that allows Unger to make the transition from his metaphysical argument to his social and political conclusions. More specifically, the six principles of liberalism are supposed to characterize the "deep structure" of LIBERALISM and to distinguish the LIBERAL from the pre-LIBERAL era. This historical claim is not mere window-dressing; it is, as Unger says, "the key that will allow us to escape from the prison-house, just as it was the chain with which the gates were long ago locked by the builders."¹¹⁵ If the six principles do not in fact characterize any theory or set of theories and distinguish this theory or set from other, non-LIBERAL theories, then Unger's central thesis cannot stand.

Let us examine more precisely what qualities Unger's argument demands of his six principles. If *P* is any one of the six characterizing principles of LIBERALISM, then *P* must satisfy three conditions. First, *P* must not be so vague that it states no recognizable principle at all. Second, LIBERALS (or at least some LIBERALS) must accept *P*, otherwise the "deep structure" will not pick out an historically important theory. Third, *P* must distinguish LIBERALS from pre-LIBERALS (of whom Plato and Aristotle are Unger's paradigm examples). For if both LIBERALS and pre-LIBERALS agree that *P* is true (or false)—that is, if *P* holds both in the Greek city-state and in the modern, industrial nation-state—then *P* is not doing the classificatory work it is supposed to do. If Unger's principles do not satisfy these three conditions, then both his claim to have uncovered the "deep structure" of LIBERALISM and his claim to have established a deep connection between metaphysical theories and socio-political structures will collapse.

I shall show that each of Unger's six principles violates one or more of these conditions. The principles are not definitive of any movement that could plausibly bear the name "liberal"; indeed, they are so vague that, as Unger has stated them, it is dubious that they were ever held by anybody at all.

114. Monahan, *supra* note 7, at 432.

115. KP, *supra* note 1, at 4.

D. *The Antinomies of Liberalism*

Unger's refutation of LIBERALISM is presented in the first three chapters. Chapter One—"Liberal Psychology"—discusses LIBERALISM's theory of personality (which, remember, is responsible for the sentiments of resignation and disintegration). Note that by "psychology" Unger does not mean everyday empirical psychology. He uses the term to embrace ethics, epistemology, and metaphysics; why he uses the term "psychology" I do not know. He first discusses something called "the antinomy of theory and fact"; this discussion turns out to be the heart of his argument. He then discusses the three principles of LIBERAL psychology: "the principle of reason and desire," "the principle of arbitrary desire," and "the principle of analysis"; he argues that these principles lead to antinomies. In Chapter Two—"Liberal Political Theory"—he describes the three principles of LIBERAL social and political thought: "the principle of rules and values," "the principle of subjective value," and "the principle of individualism." Again, he urges that these three principles are self-contradictory. Chapter Three—"The Unity of Liberal Thought"—attempts to show that the three psychological components of LIBERALISM correspond to the three political components, and that there is only one way to escape the antinomies, namely, to construct a new vision of metaphysics and society.

So the "deep structure" of LIBERALISM looks like this:

The three psychological principles correspond to the three political principles; the "antinomy of theory and fact" is the taproot of the contradictions. Unger himself says that the "antinomy of theory and fact" and principles (1) and (4) are the "fundamental problems of liberal doctrine."¹¹⁶ Because the "antinomy of theory and fact" is the philosophical core of the book, and because it introduces the metaphysical considerations on which the remainder of his argument rests, I shall pay close attention to the five-and-a-half pages he devotes to this subject; then, more briefly, I shall discuss the other principles, particularly (1) and (4).

116. *Id.* at 133.

1. *The Antinomy of Theory and Fact*

a. *Experience*

Unger's discussion of "the antinomy of theory and fact"—the central theoretical passage of his book—commences with a puzzling paragraph that seems entirely irrelevant to anything else in his book. I discuss its shortcomings in a footnote.¹¹⁷

b. *Intelligible Essences*

Unger next introduces a notion that will figure prominently in everything that follows: the doctrine of *intelligible essences*. The denial of this doctrine not only lies at the root of the "antinomy of fact and value," but "is the ultimate basis of the principle of subjective value"¹¹⁸—and is thus responsible for the impossibility of a LIBERAL theory of adjudication, for the LIBERAL distortion of the self, and so on.¹¹⁹

117. The paragraph begins as follows:

Imagine the world as a field of space and a continuum of time that are the scene of facts or objects-events. . . . Objects-events exist independently of our perception of what they are or of what they should be. Either we assume that everything that happens in nature happens necessarily, or we say that we do not know why things happen. The latter conception, however, implies unintelligible chance, which is also a kind of necessity. So, in either case, the field of objects-events is given to us as a necessity. We call this necessity experience.

Id. at 31. The paragraph is peculiar because it is not clear whose theory Unger is describing—his own, or the LIBERALS'. If it is the latter, and he means to ascribe this argument to some flesh-and-blood thinker, then he should have provided at least a footnote. For there is quite a lot wrong with this definition of experience. In the first place, the sentence beginning "either we assume" contains a glaring logical fallacy. It appears to be an attempt to apply the logical "law of the excluded middle." (This law says that, for any property *X*, either everything has property *X* or something does not have property *X*.) But Unger, or whoever he is quoting, seems to have confused this law with something quite different: "Either everything has property *X*, or nothing does." This latter proposition is clearly invalid; it would imply, for instance, that either everything is blue, or nothing is. But if we rewrite Unger's sentence so that it is logically valid, then we get: "Either everything that happens in nature happens necessarily, or something that happens in nature does not happen necessarily." But then "the latter conception" does not imply that "the field of objects-events" is subject to "unintelligible chance" or that "we do not know why things happen." (You can insert Unger's words "we assume" or "we know" or "we say that we know" symmetrically on both sides of the "or" and still get a plausible reinterpretation of Unger's sentence, but not one that is logically valid. For it is not the case that, for any proposition *p*, either we know that *p* or we know that not-*p*. (Consider, for example, the proposition, "This coin will come up tails.") Unger's sentence is multiply ambiguous; I have tried to interpret it in the most charitable way.) Furthermore, one would like to know what philosopher ever held the view that "unintelligible chance is also a kind of necessity"—which sounds rather like saying that "black is a kind of white." Finally, if this definition of experience is supposed to be a characterization of the standard LIBERAL view, then it suffers from the drawback that it is not couched in terms that would be accepted by any philosopher of historical importance. Traditionally, experience is defined, not in terms of the necessity of "the field of objects-events" (whatever those are), but in terms of the sensations and ideas of a perceiving subject. It is unclear what this odd definition of experience is supposed to accomplish; it does not seem to play a role in anything that follows. Perhaps Unger is stating his own view, but if so it is hard to see why he chooses to do so here.

118. *Id.* at 79.

119. Unger defines "intelligible essences" as follows:

Something has an intelligible essence if it has a feature, capable of being apprehended, by virtue of which it belongs to one category of things rather than to another category. According to such a view, a stone is different from a plant because it has a quality of stoneness, if you like, which we can grasp immediately. . . .

Later I shall discuss the claim about "subjective value." For the moment I shall only make an observation about the historical pedigree of "intelligible essences." This term is, after LIBERALISM, the most important theoretical concept in *Knowledge and Politics*. It plays a crucial role in everything that follows. It is not a standard term in the philosophical vocabulary; it needs to be explained. In a long and impressive-looking footnote (with learned references in Greek, Latin, and German), Unger presents the historical scholarship for "intelligible essences," as found in Aristotle, Spinoza, and Kant. The five sentences he devotes to Aristotle contain eight major blunders; as for the doctrines he ascribes to Spinoza and Kant, they are the precise negation of the views those thinkers in fact held. The errors here are serious—so serious that one almost suspects a joke; one is left wondering, not only what "intelligible essences" are, but whether Unger has a firm enough grasp on the history of philosophy to be able to say.¹²⁰

. . . Now this doctrine is truly a master principle, for its friends have drawn from it conclusions about language, morals, and politics. They have reasoned that because everything has an essence, everything can be classified under the word which names its category. And the supporters of the doctrine of intelligible essences have gone on to hold that the standards of right and wrong must also have essences which thought can comprehend. Plato's ethics and Aquinas' theory of natural law exemplify this line of argument.

Id. at 31–32 (endnote omitted).

120. Unger's endnote begins as follows:

For the authoritative statement of the doctrine of intelligible essences, a doctrine that may be understood as a revision of Plato's theory of ideas, see Aristotle, *Metaphysics*, bk. 7. . . . The essence is the form that by becoming embodied in matter lends each being its distinctive identity. For the development of the Aristotelian view, see Christian Wolff, *Philosophia Prima sive Ontologia* In this tradition, essence is defined by contrast to accident, on the one hand, and to existence, on the other hand. It is both *το τι εἶναι* and *οὐσία* The classical doctrine of intelligible essences has been revived in the phenomenology of Brentano and Husserl.

Id. at 297 (endnote 1).

The errors in Unger's account of Aristotle are as follows. First, Aristotle's *Book Zeta*, to which Unger refers, is perhaps the single most problematic text in the history of philosophy; only Kant's *Transcendental Deduction of the Categories* has received comparable scholarly attention. Although it is only a few pages long, there exist (not counting the numerous medieval commentaries) many lengthy exegeses; the latest and most detailed (that of Patzig and Frede, at press) runs to nearly 500 pages. The difficulties of interpretation are formidable; so when Unger cites *Zeta* as the "authoritative statement" of the "doctrine of intelligible essences" he leaves us in some perplexity about just what the doctrine is.

Second, the phrase *το τι εἶναι* is one of the most obscure in the annals of philosophy. Professor Anscombe's exasperated comment is typical: "I wish Greek grammarians could determine something about the expressions '*to ti en einai*, *to ti en einai A*, *to einai A*, *to A einai*' (*A* being a *dative*) with which the *Metaphysics* is strewn. . . . To translate '*to ti en einai*': 'the essence' produces gibberish . . ." Anscombe, *The Principle of Individuation*, in 3 ARTICLES ON ARISTOTLE 88, 92 (J. Barnes, M. Schofield & R. Sorabji eds. 1979) (emphasis in original).

Third, the words "intelligible essence" do not occur in *Zeta*, nor elsewhere in Aristotle's *Metaphysics*. (I am grateful to Günther Patzig for this point.) This increases the perplexity, for it is not clear which Aristotelian doctrine Unger is referring to. The issue here is not a mere terminological quibble. As I shall show, Unger sometimes treats "intelligible essences" as though they were non-linguistic universals; sometimes as though they were *abstract particulars*; and sometimes as though they were *essential properties*. But these notions must be kept distinct. *Triangularity* is a non-linguistic universal; *triangles* are abstract particulars; *being triangular* is an essential property of three-sided figures; the predicate "*x* is a triangle" is a linguistic universal. Some philosophers contend that the only universals are linguistic universals; some deny the existence of necessary truths and essential proper-

c. Quine and the Antimony

Unger next contrasts the ancient "theory of intelligible essences" with "the modern conception of nature." He describes the modern view in

ties; some do both; some do neither. In other words, the concepts are independent. Unger is in confusion on these matters, and as soon as the distinctions are properly drawn, many of his arguments will be seen to be fallacious. See *infra* text accompanying notes 172–79.

Fourth, Aristotle does not draw a distinction between "essence" and "existence." This distinction is a product of the late middle ages; it postdates Aristotle by about 1800 years. The development of the essence/existence distinction is chronicled in the article *Existenz, existencia*, in 2 HISTORISCHES WÖRTERBUCH DER PHILOSOPHIE (J. Ritter ed. 1972). Owens says of "essence":

The word conveys to modern ears a sort of opposition to "existence." . . . In the *Metaphysics* there is no trace of any such opposition in the terminology of Being. The Greek has only the one verb for the English "to be" and "to exist" and their derivative forms. There is nothing to express an opposition of "essence" to "existence."

J. OWENS, THE DOCTRINE OF BEING IN THE ARISTOTELIAN *METAPHYSICS* 70 (1951).

Fifth, the reference to Wolff and the undocumented references to Brentano and Husserl add a further layer of confusion. If the "classical doctrine of intelligible essences" is a theory that is supposed to have been "stated" in *Zeta*, "exemplified" in Plato and Aquinas, "developed" in Wolff, and "revived" in Brentano and Husserl, then I am at a loss to know what theory Unger has in mind. It is rather like being told that Adam Smith, Marx, Keynes, and Milton Friedman share a "classical doctrine of capital"—except that these economists actually use the word "capital," while Unger's philosophers do not use the words "intelligible essences."

Sixth, to describe Aristotle's metaphysics as a "revision" of Plato's theory of the Ideas is like describing *The Origin of Species* as a "revision" of *Genesis*. Aristotle attacked the Platonic metaphysics so thoroughly that the Platonic doctrines never revived.

Seventh, Unger says that for Aristotle "the essence is the form that by becoming embodied in matter lends each being its distinctive identity." But this is precisely the Platonic picture that Aristotle was opposing ("here the form; over here the matter"). Unger should have followed standard usage and said "being embodied," not "becoming embodied."

Eighth, as we have seen, Unger says of the doctrine of intelligible essences that "this doctrine is truly a master principle, for its friends have drawn from it conclusions about language, morals, and politics." He gives Plato, Aristotle, and Aquinas as examples. He is right about Plato (or, at any rate, about Plato in the period when he wrote the *Republic*); but he is wrong about Aquinas and Aristotle—particularly about Aristotle, who, in his ethical writings, explicitly (and famously) rejected the Platonic strategy of basing ethics on metaphysics. This matter is discussed in greater detail *infra* notes 174–79 and accompanying text.

I now proceed to the next paragraph of the endnote. Unger says:

Modern metaphysics takes one of two approaches toward the problem of essences. The first is to reject the classical doctrine outright . . . The second is to attempt to accommodate some version of intelligible essences. There are in turn two main variants of this latter tendency. For some, the essence means whatever is needed to make something possible and intelligible; it describes nothing in the empirical world. See Kant, *Metaphysische Anfangsgründe der Naturwissenschaft*, preface, *Kants Werke*, ed. Prussian Academy (Berlin, Gruyter, 1968), vol. IV, p. 467. For the rationalists, however, the essence that makes understanding possible also makes existence necessary because the orders of ideas and of events are the same. See Spinoza, *Ethica*, pt. 2, def. 2, *Spinoza Opera*, ed. C. Gebhardt (Heidelberg, Winter, 1972), vol. II, p. 84.

KP, *supra* note 1, at 279 (endnote 1).

The notion of "essence" (*Wesen*) plays little role in Kant; the word appears only twice in the published writings (once in the footnote to which Unger refers), and the Kantian usage, which Unger has misunderstood, is radically different from Aristotle's. For a lengthy discussion of the Kantian usage, see H. GRAUBNER, FORM UND WESEN 1–92 (1972). Kant's innovation was to distinguish sharply between the *logical* essence and the *real* essence. The former belongs to logic and to the realm of analytic judgments, the latter to metaphysics and the realm of synthetic judgments; the former applies to concepts, the latter to objects. In the Letter to Reinhold (May 12, 1789), *reprinted* in I. KANT, BRIEFWECHSEL 377–85 (Schöndörffer ed. 1986), Kant says that we can have no knowledge of the latter. *Intelligibility* pertains to the logical essence only, and thus only to concepts; it does not pertain to the real essence. See also I. KANT, LOGIK § 116 & Intro. (1800). Unger has misquoted the passage to which he refers, which is discussing the real essence, and which reads: "Essence is the first, inner principle of all that belongs to the possibility of a thing." ("Wesen ist das erste innere Prinzip

terms which he attributes to his Harvard colleague, W.V. Quine.¹²¹ But Quine does not hold the doctrines Unger ascribes to him, and Unger's brief account contains many errors.¹²²

alles dessen, was zur Möglichkeit eines Dinges gehört.") Kant, *Metaphysische Anfangsgründe der Naturwissenschaft*, in 4 KANTS WERKE 467 (Prussian Academy ed. 1968). Unger has added the words "and intelligible; it describes nothing in the empirical world." He has thus run together the distinction between the two kinds of essence, missing precisely what is original in Kant's use of the word.

As for the rationalists, they did not hold that "the essence that makes understanding possible also makes existence necessary." The problem of *necessary existence* is bound up with the "ontological proof of the existence of God," which was first put forward by St. Anselm in the eleventh century. This proof (which, until Kant, was one of the central problems of philosophy) tried to show that God's essential properties—His omnipotence, His perfection, and the like—entail His necessary existence. (Roughly speaking, the proof runs as follows: We can conceive of an absolutely perfect being; but an absolutely perfect being cannot lack the attribute of existence (or else He would not be perfect); therefore, an absolutely perfect being necessarily exists.) Spinoza produces a version of the proof, see SPINOZA, *ETHICS* pt. 1, props. 7, 11 (White-Stirling trans. 1894), but this proof applies only to God's essence, not to essences in general. (Indeed, for Spinoza, as for the medievals, God is the *only* being whose essence involves existence, i.e., He is the only being who necessarily exists. This is why Unger's assertion is so startling. The very first sentence in the *Ethics*, in the Book entitled "On God," is: "By cause of itself, I understand that, whose essence involves existence; or that, whose nature cannot be conceived unless existing." In Spinoza's system, God is the only being which is self-caused. See *id.* pt. 1, prop. 24 ("The essence of things produced by God does not involve existence."); see also *id.* pt. 1, props. 5, 7, 20. If one looks to the passage of Spinoza cited by Unger, one finds, nearly enough, the standard definition of essence in terms of necessary *properties*, but Spinoza's definition says nothing about necessary *existence*:

I say that to the essence of anything pertains that, which being given, the thing itself is necessarily posited, and being taken away, the thing is necessarily taken; or, in other words, that, without which the thing can neither be nor be conceived, and which in its turn cannot be nor be conceived without the thing.

Id. pt. 2, def. 2. In fact, only a few lines further on Spinoza says: "The essence of man does not involve necessary existence; that is to say, the existence as well as the non-existence of this or that man may or may not follow from the order of nature." *Id.* pt. 2, axiom 1.

121.

We cannot decide in the abstract whether a given classification is justified. The only standard is whether the classification serves the particular purpose we had in mind when we made it. Every language describes the world completely, though in its own way. On the modern view of nature, there is no basis for saying that one language portrays reality more accurately than another, for the only measure of the 'truth' of language is its power to advance the ends of the communities of men who speak it. The theories of science are partial languages because they classify things in the world. Their claims to acceptance must therefore rest on their ability to contribute to particular ends, like the prediction or control of events, rather than on their fidelity to a true world of essences.

KP, *supra* note 1, at 32. Unger's endnote 3 at 298 reads: "See W.V. Quine, *Two Dogmas of Empiricism*, in *From a Logical Point of View* (New York, Harper, 1963), p. 44."

122. For example, Quine nowhere endorses the (in any case patently false) view that "every language describes the world completely." (Think of the language of elementary arithmetic.) Nor does Quine ever talk of a "true world," or about "the 'truth' of language." (For Quine, the things that are true or false are sentences—or, more precisely, sentence-tokens.) Nor does he anywhere talk about "partial languages" (whatever those are). Nor does he ever advance an "argument" like that found in Unger's last two sentences: "The theories of science are partial languages because they classify things in the world. Their claims to acceptance must therefore rest on their ability to contribute to particular ends, like the prediction or control of events, rather than on their fidelity to a true world of essences." I find the reasoning here unintelligible, despite the presence of the words "because" and "therefore."

These errors show that he has read Quine carelessly, and the carelessness leads him to a more serious error, contained in the middle of the paragraph: "On the modern view of nature, there is no basis for saying that one language portrays reality more accurately than another, for the only measure of the 'truth' of language is its power to advance the ends of the communities of men who speak it." Had Unger read the passage he cites more carefully, he would have seen that Quine's position is not skeptical:

Unger, having discussed experience, the pre-LIBERAL metaphysic of intelligible essences, and the modern view of science, next turns his attention to the antinomy of theory and fact—"the riddle posed by the modern idea of science and nature."¹²³ The modern idea, according to Unger, is that (1) facts are determined by *theory*, not by the world; and (2) some theories depict the world more accurately than others.¹²⁴ In his opinion, this is a contradiction:

In its simplest form, the antinomy of theory and fact is the conflict of the two preceding ideas: the mediation of all facts through theory and the possibility of an independent comparison of theory with fact. Each of the principles seems plausible in its formulation and absurd in its consequences. They contradict one another, but to qualify either of them would seem to require a drastic revision of the view of nature and thought from which both are drawn. Here is a conundrum that appears to imply the incoherence of our idea of science, indeed of knowledge in general.¹²⁵

Something like Unger's "antinomy" is of course an important and well-known puzzle in the philosophy of science. Indeed, it is a close relative¹²⁶ of an older problem, posed by Berkeley's philosophy of perception: If all our knowledge of external objects—other people, sticks, stones—is derived by sense-perception, and if there is no independent possibility of comparing these sense-perceptions with objects in the external world, then what

Physical objects are conceptually imported into the situation as convenient intermediaries—not by definition in terms of experience, but simply as irreducible posits comparable, epistemologically, to the gods of Homer. *For my part I do, qua lay physicist, believe in physical objects and not in Homer's gods; and I consider it a scientific error to believe otherwise.* But in point of epistemological footing the physical objects and the gods differ only in degree and not in kind. Both sorts of entities enter our conception only as cultural posits. *The myth of physical objects is epistemologically superior to most in that it has proved more efficacious than other myths as a device for working a manageable structure into the flux of experience.*

W. QUINE, *Two Dogmas of Empiricism*, in *FROM A LOGICAL POINT OF VIEW* 20, 44 (1961) (emphasis added, footnote omitted). In the Foreword to this volume, Quine notes, "in likening the physicists' posits to the gods of Homer . . . I was talking epistemology and not metaphysics. Posited objects can be real. As I wrote elsewhere, to call a posit a posit is not to patronize it." *Id.* at viii.

123. KP, *supra* note 1, at 133.

124.

If there are no intelligible essences, there is no predetermined classification of the world. We can distinguish among objects-events only by reference to a standard of distinction implicit in a theory. It is the theory that determines what is to count as a fact and how facts are to be distinguished from one another. In other words, a fact becomes what it is for us because of the way we categorize it. . . .

Yet we also believe that the history of science is progressive and that ultimately one can make a rational choice among conflicting theories about the world. Some theories describe the world more accurately than others. . . . The conception that there is a realm of things, independent of the mind, and capable at some point of being perceived as it truly is, seems necessary to the notion of science. Yet this conception also appears to rely on the doctrine of intelligible essences or of plain facts, assumed to be inconsistent with the modern idea of science.

Id. at 32-33 (endnote omitted).

125. *Id.* at 33.

126. See C. MCGINN, *THE CHARACTER OF MIND* 37-58 (1982).

basis do we have for believing that the external world exists? If all we can ever know is sensations, how can we justify a belief in things that are *not* sensations? This problem (the problem of the "veil of ideas") has been the starting point of all modern epistemology, and one could fill many volumes with an account of the attempts that have been made to state it precisely and to obtain clarity about the exact nature of the issues involved. The replies to Berkeley—from Dr. Johnson's kicking the stone¹²⁷ to Kant's *Critique of Pure Reason*—are too well known to need recounting here; suffice it to note that no philosopher thinks that merely *stating* this problem is sufficient to show that knowledge of the external world is impossible.

The modern problem of the "theory-ladenness" of observational terms can be stated in a way that parallels the old problem of the external world: If all our evidence for a scientific theory comes from observation, and if observation is inherently theory-laden (so that there is no possibility of obtaining pure observations uncontaminated by theory), then what becomes of the notion of scientific truth? This well-known problem (or family of problems) in the philosophy of science is related to a host of other topics in the philosophy of mind and the philosophy of language. Like Berkeley's idealism, it has provoked many different analyses and solutions. The most celebrated, Quine's, is worth mentioning here.

In *Two Dogmas of Empiricism*, Quine argues for what is known as the "thesis of holism" or the "Duhem-Quine thesis," namely, that our statements about the external world do not correspond to experiences in a one-to-one fashion.¹²⁸ From this thesis, Quine draws the conclusions, first, that it is "folly to seek a boundary between [the analytic and the synthetic]";¹²⁹ second, that "it is nonsense, and the root of much nonsense, to speak of a linguistic component and a factual component in the truth of any individual statement."¹³⁰ The second conclusion raises the general problem of the theory-ladenness of observation (or, in Unger's terminology, of the "mediation of all facts through theory"); indeed, Quine's text is the starting point of the modern discussion.

But Quine does not rest with these conclusions. He goes on to argue that the collapse of the analytic/synthetic distinction entails epistemological naturalism. Epistemology is to be pursued *as a part of natural sci-*

127. J. BOSWELL, *THE LIFE OF SAMUEL JOHNSON, ANNO 1763* (1799).

128.

[T]he total field [of science] is so underdetermined by its boundary conditions, experience, that there is much latitude of choice as to what statements to reevaluate in the light of any single contrary experience. No particular experiences are linked with any particular statements in the interior of the field, except indirectly through considerations of equilibrium affecting the field as a whole.

W. QUINE, *supra* note 122, at 42-43.

129. *Id.* at 43.

130. *Id.* at 42.

ence, on a par with chemistry or empirical psychology.¹³¹ Far from inferring "the incoherence of our idea of science, indeed of knowledge in general," Quine infers that we are to *use* science—the best science of the day—to answer philosophical questions about the foundations of natural science. The old epistemology goes by the board, but the enterprise of science remains.¹³²

This sketch of Quine's argument will suffice to bring out the salient point: Precisely the same considerations that militate against the separability of theory and observation can also be marshalled in favor of a robust scientific realism. Unger appears to be unaware of this possibility, for he jumps straight from the contention that facts are theory-laden to the conclusion that the modern view of science is incoherent. He seems not to realize that he needs an argument to support this rash leap. Unger has, in fact, simply presented a crude variant of a familiar problem, labelled it an antinomy, and congratulated himself for having brought down the edifice of modern thought. The few remarks he supplies in support of his conclusion are so vague and equivocal that they can be used to prove the impossibility of just about anything. It is strange that Unger should have based his refutation of modern thought on the works of Quine and taken so little care to verify his arguments. A simple walk across the Harvard Yard would have sufficed to set him straight.

From this unpromising start, Unger goes on to give us his views on mathematics and physics. He pauses to praise Kant for his "alleged solution to the antinomy,"¹³³ then presents an analysis of the ultimate source of the antinomy, and finally describes a solution.

d. *The Diagnosis and the Solution*

Unger's traces the antinomy to the "radical separation of form and substance."¹³⁴ He does not explain why this "radical separation" and its

131. See W. QUINE, *Epistemology Naturalized*, in *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* (1969). In this essay, Quine links these various considerations together in the way I have tried to do here. *Id.* at 82.

132. For instance:

Our talk of external things, our very notion of things, is just a conceptual apparatus that helps us to foresee and control the triggering of our sensory receptors in the light of previous triggering of our sensory receptors. The triggering, first and last, is all we have to go on.

In saying this I too am talking of external things, namely, people and their nerve endings. Thus what I am saying applies in particular to what I am saying, and is not meant as skeptical. There is nothing we can be more confident of than external things—some of them, anyway—other people, sticks, stones. But there remains the fact—a fact of science itself—that science is a conceptual bridge of our own making, linking sensory stimulation to sensory stimulation; there is no extrasensory perception.

W. QUINE, *THEORIES AND THINGS* 1-2 (1981). These ideas are explored at greater length in his *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS*, *supra* note 131, especially in the essay *Epistemology Naturalized*.

133. KP, *supra* note 1, at 34.

134.

The true source of the antinomy of theory and fact is the radical separation of form and

harmful effects are peculiar to LIBERAL thought. One thinks immediately of Plato, whom Unger takes to be the originator of the doctrine of "intelligible essences," and who drew a radical distinction between the Forms and particulars. One wonders how he managed to escape the antinomy. Aristotle, too, repeatedly stresses that we cannot know the particular, only the universal; so the same question applies to him.¹³⁵ Unger continues with some remarks about the senses and about the anatomy of horses.¹³⁶ These remarks are mistaken in laying the responsibility for "the ineffability of the individual" at the door of modern science. The view that we can know only universals, not particulars, was in fact promulgated by the supporters of the doctrine of "intelligible essences"—most notably, Plato and Aristotle.¹³⁷

Unger, having stated the antinomy, commented on Kant's failure to solve it, and traced its origins to the relationship of the universal to the particular, now dips into the philosophy of mathematics for a solution. Here it is:

A different conception of the relation of the universal and the particular would not produce the antinomy of theory and fact. Take, for example, our understanding of geometrical truths. As Euclidean ge-

substance, of the universal and the particular

The view that it is necessary to attain universality through abstraction from particularity rather than through the direct elucidation of the particular, as we do in art, is the core of the antinomy of theory and fact.

Id. at 35-36.

135. Plato, in the *Theatetus*, in the *Republic*, and elsewhere, contends that knowledge is of the Forms, and not of particulars. See ARISTOTLE, *POSTERIOR ANALYTICS* bk. 1, chs. 1-5, at 71a-74b5 [hereinafter *POSTERIOR ANALYTICS*]; ARISTOTLE, *METAPHYSICS* bk. 3, ch. 4, at 999a26 [hereinafter *METAPHYSICS*]; ARISTOTLE, *NICOMACHEAN ETHICS* bk. 6, ch. 3, at 1139b16-35 [hereinafter *NICOMACHEAN ETHICS*]. (The last numbers in each citation refer to the page, column, and line numbers of the Prussian Academy edition of Aristotle; they are reproduced in the margins of most translations.)

136.

[P]recisely because science has become more formal, it can never fully describe what the senses see. It cannot replace their kind of knowledge. On the contrary, science must constantly go from substance to form, and from the particular to the universal.

. . . Physics may have little to say about the anatomy of horses, but even zoology will be incapable of accounting for everything that is peculiar to an individual horse. The ineffability of the individual is the necessary consequence of the modern view of science. To attribute the limitation simply to a stage in the development of scientific knowledge is to misunderstand the way science develops.

KP, *supra* note 1, at 35.

137. Just as Unger fails to link the "true source" of the antinomy to LIBERAL thinkers, he neglects to tie the alleged downgrading of the senses by modern science to LIBERALISM. The idea that sensory observation cannot yield knowledge of universals has an ancient pedigree. Plato, for example, argued that the man who seeks truth ought to "cut himself off as much as possible from his eyes and ears and virtually all the rest of his body, as an impediment which by its presence prevents the soul from attaining to truth and clear thinking." See PLATO, *PHAEDO* 65e-67a. Aristotle does not regard the senses so harshly; he points out that they can lead us to the universal. But he too says that "it is impossible by perceiving to understand anything demonstrable," *POSTERIOR ANALYTICS*, *supra* note 135, bk. 1, ch. 31, at 88a9 (Barnes trans. 1975); and for him as for Plato scientific knowledge is of necessary, universal, eternal connections, not of particulars. *Id.* bk. 1, chs. 1-5, at 71a-74b5; *NICOMACHEAN ETHICS*, *supra* note 135, bk. 6, ch. 3, at 1139b16-35.

ometers, we know both perfectly and completely because the subject matter of our thought is pure form without substance and pure universality without particularity. Each particular example of a circle is fully defined by the geometrical idea of a circle. Nothing can be known about any particular circle, except the dimension of its radius, that is not part of the knowledge of the theorem of its construction.* Such a geometry knows nothing of the issue of classification of particulars under general categories, and therefore it never need face the antinomy of theory and fact.

*[Unger's Endnote:] The example of the circle is taken from Lask, *Fichtes Idealismus, Gesammelte Schriften*, vol. I, p. 45.¹³⁸

This paragraph is open to at least four objections. First, recall that Unger began by accusing science of *separating* universal and particular; he told us that the contradictions of liberal thought arise because modern science pursues abstraction rather than the "direct elucidation of the particular." His discussion of geometry is supposed to solve these problems by providing us with a new way of conceiving the *relationship* of universals to particulars. But his geometrical paradigm offers us "pure form without substance and pure universality without particularity"—which sounds rather like the *elimination* of the particular. It is unclear how to fit these various propositions together in such a way as to provide a solution to the "contradictions" of modern thought.

Second, Unger's remarks about the philosophy of mathematics make it clear that he is ill-equipped to discuss the subject. Apart from his peculiar terminology ("dimension of its radius"; "theorem of its construction"), the fact is that, ever since the days of Klein and Hilbert, geometry (including Euclidean geometry) has been intertwined with the theory of groups, and, like the rest of mathematics, is inextricably bound up with abstract algebra—a subject whose very purpose is to classify particular mathematical entities under abstract structural laws.¹³⁹

Third, Unger's solitary footnote in this paragraph is to Emil Lask's book on Fichte. *Fichtes Idealismus und die Geschichte* is an obscure work, written at the turn of the century, now dated even as a work on the history of German Idealism, and in any case having nothing to do with

138. KP, *supra* note 1, at 35–36; endnote at 299.

139. Felix Klein and David Hilbert were two eminent mathematicians of the late nineteenth and early twentieth century. Klein is responsible for the "Erlangen Program" (1872) of classifying geometries in group-theoretic terms; Hilbert is responsible for the first strict axiomatization of Euclidean geometry. See D. HILBERT, *GRUNDLAGEN DER GEOMETRIE* (1899). The field is vast, but the following writings give an overview of the philosophical issues raised by the growth of abstract algebra and formal axiomatic systems: O. BECKER, *GRUNDLAGEN DER MATHEMATIK 185–370* (1954); F. KLEIN, *VORLESUNGEN ÜBER DIE ENTWICKLUNG DER MATHEMATIK IM 19. JAHRHUNDERT* (1926); D. HILBERT, *Axiomatisches Denken, Naturerkennen und Logik & Neubegründung der Mathematik*, reprinted in *GESAMMELTE ABHANDLUNGEN* (1935). Some of the relevant articles are translated in W. EWALD, *THE PHILOSOPHY OF MATHEMATICS: BASIC TEXTS* (forthcoming 1988); a general account can be found in M. KLINE, *MATHEMATICAL THOUGHT FROM ANCIENT TO MODERN TIMES* chs. 26, 32, 36, 38, 40, 42, 43, 49 (1972).

the developments in mathematics and logic that have taken place in the past century and a half. It is irrelevant to the matter under discussion.¹⁴⁰

Fourth, even if Unger's description of geometry *were* correct, the general consequences he seeks to draw would not follow without a considerable amount of further argument. If some feature of empirical science is causing you trouble (say, to take Unger's example, the anatomy of horses), it is an inadequate solution to point out that that feature is absent in mathematics. Mathematicians are able to carry out their research without the use of telescopes, but this does not prove that astronomers can do the same. If Unger wants to generalize his mathematical speculations into a new foundation for the sciences, he has a great deal of work ahead of him.

e. *Recapitulation*

I have been discussing the section entitled "The Antinomy of Theory and Fact" for a long while. I have done so because this short passage is the core of Unger's book. As the crucial step in his attempt to refute the "dominant elements of modern thought," it deserves close attention.

This brief, self-contained passage deals with the familiar problem of how scientific theories relate to the world—a problem that is commonly discussed in freshman courses on the philosophy of science. In these five-and-a-half pages, Unger makes some sweeping remarks about the definition of experience, about *Book Zeta*, about Spinoza's views on "intelligible essences," about the modern view of science, about Quine. He states the "antinomy," which in fact is a well-known problem whose complexities he has not understood. He compliments Kant for his "alleged solution," then goes on to talk about zoology, about the anatomy of horses, about the relationship between universals and particulars, and about Euclidean geometry; these last remarks he backs up with learned footnotes to the obscure and irrelevant Lask. For all the parade of learning, for all the huffing and puffing, Unger is in control neither of the literature he cites, nor of his own arguments.¹⁴¹

140. Incidentally, Unger misunderstands Lask's argument; but to go into the details would take us too far afield.

141. I should like in this footnote to discuss an issue that is raised by Unger's reference to the book by Lask. Unger cites many works in foreign languages; in particular, he cites many works from or about the classical period of German philosophy (say, Kant to Nietzsche), and he cites them in German. By my count, there are in *Knowledge and Politics* 79 citations of this sort; in only three are the sources not readily available in English translation. One of these footnotes is to a paragraph in Kant's *Nachlass*; the other two, both of which appear in the passage I have just discussed, are to the work by Lask.

The only example I have been able to find in *Knowledge and Politics* where Unger directly quotes a work written in a foreign language is this:

Shall we not be forced to adopt the view that "the owl of Minerva spreads its wings only at the full of dusk,"* and that theory must therefore serve as the witness of history, waiting if it is modest, prophesying if it is rash, but denied the power to rebuild?

* [Unger's endnote:] Hegel, *Grundlinien der Philosophie des Rechts*, preface, *Sämtliche Werke*, vol. VII, p. 37.

2. *The Antinomy of Reason and Desire*

According to Unger, LIBERALISM's denial of intelligible essences is directly linked to its psychological and political shortcomings. For by re-

KP, *supra* note 1, at 17; endnote at 297. Unger has not in fact been working with the German text but with the standard English translation, HEGEL'S PHILOSOPHY OF RIGHT 13 (Knox trans. 1942). The German is: "*die Eule der Minerva beginnt erst mit der einbrechenden Dämmerung ihren Flug*"—i.e., "the owl of Minerva begins its flight only at the fall of dusk." The phrase "spreads its wings" is not in Hegel; it is Knox's invention. Apparently, Unger's habitual citation to works in foreign languages, even when translations are available, stems from neither a real need to work from the original nor his own familiarity with it.

Unger's argument rests upon his interpretation of the historical development of Western thought, and the plausibility of his work depends on what his followers have called "the sheer breadth of his knowledge." We have, in the five-page section under discussion, seen what he says about *Book Zeta*, about Spinoza's view of "intelligible essences," and about Quine. Earlier we saw some extremely questionable remarks about the rationalists and the empiricists; and there is more to come. But if Unger has only a superficial understanding of the Greeks, the rationalists, the empiricists, and the modern philosophers, all that remain are the classical German metaphysicians and the scholastics.

To judge from his footnotes, Unger's knowledge of German philosophy is not, in fact, very deep. He makes no mention of the important continental legal philosophers of the nineteenth century, many of whose works have never been translated; and I see no evidence that he is acquainted with the mass of secondary literature that Hegel or Kant scholars—including Anglo-Americans—are expected to have mastered. If he were versed in modern Kant scholarship, for instance, he would not have made the mistakes that I discuss in note 120 *supra*.

As for the Scholastics, Unger says, in the letter quoted in note 153 *infra*, that "the primary source of the conception of universals I defend is the Aristotelian doctrine that the priests who taught me as a boy used to call 'hylemorfism'" [sic]. So perhaps he has a solid knowledge of medieval philosophy. We shall have to wait and see. See *infra* text accompanying notes 180–83.

Unger's habit of citing obscure works in foreign languages has led to his reputation for knowledge "that can only be regarded with something approaching awe"; and this reputation has given CLS one of its characteristic defenses against criticism—namely, the contention, "You are not able to understand the tradition of philosophy in which we are working." For example:

One CLS member who asked not to be identified speculated that Dean Carrington's views were the fruit of frustration. "Carrington read Unger and doesn't get it," the professor said.

"He freaked out because of his inability to deal with Roberto. Unger is the least appropriate to be attacked as a nihilist. He's an affirmative Catholic radical social activist."

Kaplan, *A Scholarly War of Words*, Nat'l L.J., Feb. 11, 1985, at 28. Unger is not, of course, responsible for the anonymous comments of his supporters; but he has said similar things himself. See *infra* note 153.

I should like to emphasize that my criticisms of CLS are not directed against "Continental" (as contrasted with "Anglo-American") philosophy. These labels do not make much sense (most of the great "Anglo-American" philosophers—Frege, Carnap, Wittgenstein, Reichenbach, and the Vienna Circle—were in fact Austrians or Germans), and I am inclined to think that Unger exaggerates the cleavage in his remarks in note 153 *infra*. More importantly, most of the best writing on the philosophy of law comes from Continental Europe, and has done so ever since Kant; Germany in particular has perhaps the most impressive body of jurisprudential literature in any language, with the possible exception of Latin. Very few of the leading texts have been translated. An introductory reading list would include: I. KANT, ANFANGSGRÜNDE DER RECHTSLEHRE (1797); P. FEUERBACH, ÜBER PHILOSOPHIE UND EMPIRIE IN IHREM VERHÄLTNIS ZUR POSITIVEN RECHTSWISSENSCHAFT (1804); F. v. SAVIGNY, ÜBER DEN BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (1814) and SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS (1840); G. PUCHTA, CURSUS DER INSTITUTIONEN (1841); R. v. JHERING, SCHERZ UND ERNST IN DER JURISPRUDENZ (1885), DER ZWECK IM RECHT (1904), and *Unsere Aufgabe*, in 1 JAHRBUCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS 1 (1857); B. WINDSCHEID, GESAMMELTE REDEN UND ABHANDLUNGEN (1904); E. EHRLICH, FREIE RECHTSFINDUNG UND FREIE RECHTSWISSENSCHAFT (1903); H. KANTOROWICZ, DER KAMPF UM DIE RECHTSWISSENSCHAFT (1906); L. NELSON, PHILOSOPHISCHE RECHTSLEHRE (1920). Nineteenth-century German legal philosophy is rarely discussed in American legal periodicals, although it had a great influence on such scholars as Karl Llewellyn, Roscoe Pound, and Lon Fuller. An exception is the fine recent paper by James Q. Whitman, Note, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987), which contains further references.

jecting intelligible essences, LIBERALISM is led to the "principle of arbitrary desire" and to the "principle of rules and values." But the impossibility of reconciling these principles with the denial of intelligible essences is precisely what causes the antinomies; and the antinomies are what doom LIBERAL adjudication and legislation.¹⁴² To show that LIBERALISM is sturdier than Unger says, I shall now consider his psychological and political arguments in turn. My treatment will be brisker than before.

Unger accuses LIBERALISM of separating reason from desire, the understanding from the appetites.¹⁴³ He says that this separation compels LIBERAL theorists to adopt one or the other of two moralities: the morality of reason or the morality of desire. But "both these theories are caught in a paradox, the antinomy of reason and desire."¹⁴⁴ The morality of desire fails because every time a desire is satisfied, a new desire springs up to take its place; the morality of reason fails because it is merely an empty formalism, devoid of moral content.¹⁴⁵

Modern German legal philosophy is well represented by R. ALEXY, *THEORIE DER JURISTISCHEN ARGUMENTATION* (1978) and *THEORIE DER GRUNDRECHTE* (1985); and by R. DREIER, *supra* note 85. All three works contain extensive bibliographies. Alexy's *THEORIE* (which will shortly appear in English translation) is an elaboration of the work of Jürgen Habermas, who is often cited by CLS. Unfortunately, the use of Habermas by CLS has led to popular misunderstanding of his work. For example, *Time Magazine* reported that "the crits have borrowed from philosophical realms outside legal thought, including structuralism, semiotics and the 'Frankfurt school' of such neo-Marxist theorists as Jürgen Habermas and Theodor Adorno. They propose that law is no more than a means by which unjust power relations are dressed in the costume of eternal truths." Lacayo, *supra* note 23, at 87. The Habermas-Alexy theory is not in fact "nihilistic," and the bulk of Alexy's work is devoted to the presentation of a set of rules for rational normative argumentation. All of this "Continental" philosophy seems to me to be of very high quality. I should not like my criticisms of Unger or CLS to be misinterpreted as criticisms of a tradition with which CLS has little to do, and which it has taken little trouble to understand.

142.

There can be no coherent, adequate doctrine of legislation or adjudication on liberal premises. When viewed together, as a set of related answers to questions of rulemaking and rule application, liberal political and legal doctrines are like a spider's web with a hole. If one pushes over a thread of the web to cover the hole, another hole opens up someplace else. In the end, one may conclude that something is wrong with the spider.

KP, *supra* note 1, at 83; *see id.* at 41, 77, 79, 92-93.

143. *Id.* at 39.

144. *Id.* at 49.

145.

The morality of desire is paradoxical. It canonizes contentment as the good, and defines contentment as the satisfaction of desire. But contentment cannot be achieved so long as we lack criteria with which to judge and to order our ends. Once a desire is satisfied, another must come to take its place, for according to liberal psychology we are striving beings who covet as long as we live. There is no reason to think that the number of dissatisfied desires diminishes over time.

Id. at 52-53. The morality of reason is in equally bad shape:

Coherence demands that the universal principles of the morality of reason be, like the golden rule, neutral toward the purposes of specific individuals. Given the postulate of arbitrary desire, there is no basis on which to prefer some ends to others. But as long as this formal neutrality is strictly maintained, the standards it produces will be, like the golden rule itself, empty shells. Until the shells are filled up by more concrete principles, they are capable of accommodating almost any pattern of conduct and incapable of determining precisely what is commanded or prohibited in particular situations of choice. Do unto others as we would have them do unto us, but what is it that we ought to want them to do unto us?

Id. at 53-54.

There are several objections to this analysis. First, a separation of reason from desire is hardly unique to LIBERALISM. It is a central idea in Greek philosophy,¹⁴⁶ and although there are important differences between Greek and modern moral psychology, Unger does not state them very clearly. His "principle of reason and desire" is so vaguely worded that it blurs the differences between the Greeks and the modern philosophers as well as the differences between such modern thinkers as, say, Hume and Kant.¹⁴⁷

Second, Unger does not show—he simply assumes—that LIBERAL moral theories must adopt one or the other of his two moralities. But many moral theories do not fall into either camp—for example, the account of morality given in H.L.A. Hart's *Concept of Law*, which is based on a theory of human conventions.¹⁴⁸

Third, the arguments Unger advances against the moralities of desire and reason are, like his arguments against "the antinomy of theory and fact," merely restatements of old controversies. The argument against the morality of desire is a commonplace. It is referred to in the philosophical literature as "the paradox of hedonism";¹⁴⁹ it was well-known to Socrates, and was discussed at length by the classical utilitarians. But Unger's version of this old argument¹⁵⁰ is no threat to a utilitarian. Specifically: (1) Contentment, conceived of as a *state* in which all desires, of whatever sort, have been satisfied, is not the *summum bonum* for this tradition—in contrast to the *activity* of satisfying *rational* desires, which is a different mat-

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"Of our unnecessary pleasures and appetites there are some lawless ones, I think, which probably are to be found in us all, but which, when controlled by the laws and the better desires in alliance with reason, can in some men be altogether got rid of, or so nearly so that only a few weak ones remain, while in others the remnant is stronger and more numerous."

"What desires do you mean?" he said.

"Those," said I, "that are awakened in sleep when the rest of the soul, the rational, gentle and dominant part, slumbers, but the beastly and savage part, replete with food and wine, gambols and, repelling sleep, endeavors to sally forth and satisfy its own instincts. You are aware that in such case there is nothing it will not venture to undertake as being released from all sense of shame and all reason. It does not shrink from attempting to lie with a mother in fancy or with anyone else, man, god or brute. It is ready for any foul deed of blood; it abstains from no food, and, in a word, falls short of no extreme of folly and shamelessness."

PLATO, *REPUBLIC* bk. 9, at 571c (P. Shorey trans. 1930).

147. Unger formulates this principle as follows:

The first principle of liberal psychology states that the self consists of understanding and desire, that the two are distinct from one another, and that desire is the moving, active, or primary part of the self. The mind machine, by itself, wants nothing; desire, unaided by understanding, can see nothing. This might be called the principle of reason and desire.

KP, *supra* note 1, at 39. I note in passing that one of the most influential liberal political theorists—Kant—rejects the idea that desire is the primary part of the self.

148. H.L.A. HART, *THE CONCEPT OF LAW* (1961), especially chs. 5, 6, & 8. Other moral theories that seem to me to fit uneasily into either camp are those of Burke, Hume, and T.H. Green.

149. The term originates with Sidgwick. See H. SIDGWICK, *THE METHODS OF ETHICS* 48 (1907) ("Here comes into view what we may call the fundamental paradox of Hedonism, that the impulse towards pleasure, if too predominant, defeats its own aim."). Sidgwick describes this paradox as "almost a commonplace," *id.* at 46; for his lengthy discussion of it, see *id.* at 119–61.

150. See *supra* note 145.

ter altogether.¹⁵¹ (2) Even if the utilitarian concedes that "there is no reason to think that the number of dissatisfied [sic] desires diminishes over time," it remains true that the number of satisfied desires increases. This is both the more reasonable quantity to measure and the one that utilitarians have in fact adopted. (3) There are some fairly obvious and plausible devices whereby a utilitarian can avoid Unger's paradox (for example, by saying that, on pain of perpetual disappointment, a successful utilitarian life requires the cultivation of a particular second-order desire, namely, the desire to become the sort of person who is not governed by unsatisfiable first-order desires—such as an insatiable greed for money or the like). I do not myself believe that classical utilitarianism is a tenable moral theory, and I am sympathetic to Unger's criticisms. But he does not mention the serious objections to utilitarianism that have been discussed in the recent literature;¹⁵² the one problem he does mention is minor.

Unger's argument against the morality of reason is equally familiar. It was advanced against Kant by the German Romantics, by Hegel, by John Stuart Mill, by Bradley, and by Sidgwick. As a consequence, every important study of Kant's ethical writings discusses the problem;¹⁵³ and as in the case of utilitarianism, there are many well-known and plausible replies.

151. See H. SIDGWICK, *supra* note 149, at 23–26.

152. See, e.g., the contribution of Williams to B. WILLIAMS & J. SMART, *UTILITARIANISM: FOR AND AGAINST* (1973).

153. H. PATON, *THE MORAL LAW* 74–77 (1948); O. NELL, *ACTING ON PRINCIPLE* (1975). There are further references and a helpful discussion in Professor Kronman's impressive and devastating review of *Knowledge and Politics*. See Kronman, Book Review, 61 MINN. L. REV. 167, 183, 197–98 (1976). Kronman points out that Unger's criticisms of the two LIBERAL moralities are to be found in Hegel. Unger replied: "The suggestion that my view is Hegelian has been made by various people in the United States and England. Frankly, I think it is mistaken People interested in philosophy who have read the book in Brazil, France, and Italy don't find it especially Hegelian at all." *Id.* at 200. But this is irrelevant. Kronman is quite specific in his charge of unoriginality. He confines it to Unger's critique of Kantian ethics and to his "vision of humanity," of which Kronman says: "To be honest, I find very little in Unger's 'vision of humanity' which isn't already there—and for the most part explicitly so—in Hegel's philosophy." This assertion Kronman supports with a long string of citations to Hegel's works. See *id.* at 182–83. Unger ignores this documentation; instead, he tells us:

The effort to participate in the dialogue between Christianity and modernism is one of the ruling ambitions of the work. And the primary source of the conception of universals I defend is the Aristotelian doctrine that the priests who taught me as a boy used to call "hylemorfism" [sic] and which, despite what you say, is utterly alien to the dominant strands in modern philosophy.

I write this not merely to defend myself against an unfairness which I think you have done me, and to reject a misinterpretation of my thought, but also to make two points about the politics of philosophical culture in the Anglo-American world. . . . I believe that the resources available for the critique of liberalism have been enormously impoverished by the widespread ignorance of Christian tradition among contemporary Anglo-American academics. One of the consequences is to subsume under some familiar category—like Hegelianism—or some even more general rubric—like collectivism—whatever seeks to break with liberalism and capitalism.

Id. at 200–01. I find this reply unpersuasive. It simply ignores Kronman's citations. In view of the facts I discussed in note 141 and that I shall discuss in text accompanying notes 180–83, the remarks about "Anglo-American" academics ought to be taken with a considerable dose of salt.

I do not wish to exaggerate my criticisms of this section. It does not contain any major historical errors, and the objections Unger raises are not pseudo-problems. But this philosophical ground is already well-trodden, and if one wishes to show that modern moral philosophy culminates in self-contradiction, it is not enough merely to gesture towards two familiar and well-explored lines of attack, neither of which, despite much effort, has succeeded.

3. *The Political Antinomies*

I now come to the part of Unger's argument most directly occupied with problems of legal theory. He is going to unfold his argument that the denial of "intelligible essences" is the source of the antinomies of liberal political theory. Unger's argument, which I quote at length in the footnote, can be split into three propositions.¹⁵⁴

154. "[T]he intelligible essence of each thing in the world is its ideal. So, for example, according to this view, there is a universally valid ideal of perfected human life. We call this ideal humanity because it distinguishes man from all other kinds of beings. It is his intelligible essence." KP, *supra* note 1, at 41.

From the start, liberal political thought has been in revolt against the conception of objective value. [Here Unger cites to Hobbes' *Leviathan*.] If we were able to perceive such values, they would become the true foundation of the social order. Public rules would be relegated to a subsidiary role, as devices for the specification of the objective standards Even the premises of liberal psychology would be affected by an objective theory of value. Ends would be at least as intelligible as facts. They would be things that exist in the world, like triangles, if not like tables.

Id. at 76-77.

The doctrine that there are no intelligible essences is the ultimate basis of the principle of subjective value. The theory of intelligible essences states that there are a limited number of classes of things in the world, that each thing has characteristics that determine the class to which it belongs, and that these characteristics can be known directly by the mind.

Id. at 79.

Now, however, a difficulty arises. If there are no intelligible essences, how do we go about classifying facts and situations, especially social facts and social situations? Because facts have no intrinsic identity, everything depends on the names we give them. The conventions of naming rather than any perceived quality of "tableness" will determine whether an object is to count as a table. In the same way, convention rather than nature will dictate whether a particular bargain is to be treated as a contract.

. . . .

Properly understood, the system of public rules is itself a language. Every rule is addressed to a category of persons and acts, and marks its addressees off from others. To mark off is to name. To apply the rules to particular cases is to subsume individual persons and acts under the general names of which the rules consist. Hence, the theory of law is a special branch of the general theory of naming.

At last, I can state the great political problem toward which I have been winding my way. The resort to a set of public rules as the foundation of order and freedom is a consequence of the subjective conception of value. The subjective conception of value in turn presupposes the abandonment of the doctrine of intelligible essences. In the absence of intelligible essences, however, there are no obvious criteria for defining general categories of acts and persons when we make the rules. (The making of rules is legislation.) Nor are there clear standards by which to classify the particular instances under rules when we come to the stage of applying the rules we have made. (The application of rules is adjudication.)

Id. at 80.

a. *The Role of Rules*

The first proposition is that "the resort to a set of public rules as the foundation of order and freedom is a consequence of the subjective conception of value."¹⁵⁵ One way to refute this contention is to notice that public rules in this sense are not unique to political orders where LIBERALISM prevails. One need only reflect on the nature of adjudication in any actual non-LIBERAL legal system. Roman law, Canon law, and Islamic law all resort to public rules, and all encounter familiar problems of jurisprudence. The resort to public rules is not a consequence of a belief in the subjectivity of values, but of the fact that, even in the most theocratic of legal systems, people (1) disagree about how the values are to be applied; (2) need guidelines to help them decide hard cases; and (3) need conventions to settle the issues that are not resolved by objective values. (In the terminology of Aquinas, we need human law to *particularize* matters that are left open by the natural law.¹⁵⁶)

It is furthermore not clear what sort of metaphysical features one would have to add to the world in order for people to be able to dispense with public rules. In particular, it is not clear that "intelligible essences" would help solve the problem. How are they supposed to decide a hard case or interpret a clause in a contract? What would the universe look like if it *did* contain objective values? These are old questions; I shall have more to say about them later.¹⁵⁷

Moreover, nobody—least of all the Greeks—has ever believed that we are in possession of a standard of objective goodness so self-evident that it would eliminate all moral disagreements and settle all legal questions without controversy. The *Medea* is not the work of a man who believes in a realm of "intelligible essences" that tidily and unproblematically "classify social facts and situations"; and, like Plato and Aristotle, Euripides is well aware that nature and convention—*physis* and *nomos*—are inextricably intertwined with questions of morality.

It is therefore perplexing to be told that (1) LIBERALISM's rejection of the "Aristotelian theory of intelligible essences" is the reason why (2) "convention rather than nature will dictate whether a particular bargain is to be treated as a contract." In fact, the argument for (2) is straightforward, and does not depend on (1): The world contains many diverse legal systems, and what is a contract in Persia is not necessarily a contract in Athens; nature can perhaps determine that promises ought in general to be kept,¹⁵⁸ but only convention can dictate whether a bargain that has been signed at the top of the page is to be treated the same as one that has

155. *Id.*

156. T. AQUINAS, *SUMMA THEOLOGIAE prima secundae*, Question 95, Article 2 (ca. 1265–73) [hereinafter cited in the form: S.T. 1a2ae, Q.95, A.2.].

157. See *infra* text accompanying notes 173–79.

158. As Hume believed. D. HUME, *supra* note 99, bk. 3, pt. 2, § 1, at 484.

been signed at the bottom, or whether a youth of seventeen is competent to make a legally binding agreement. The idea that *nature* might be able to resolve such ambiguities borders on the unintelligible, and the fact of cultural diversity shows that, although some aspects of justice may be determined by nature, others must be purely conventional. This argument is not particularly LIBERAL. Although it occurs in writers such as Hume,¹⁵⁹ the classical statement is in Aristotle¹⁶⁰ and Aquinas.¹⁶¹

b. *The Source of Subjective Values*

The second step in Unger's argument is his claim that "[t]he doctrine that there are no intelligible essences is the ultimate basis of the principle of subjective value."¹⁶² Unger says:

From the start, liberal political thought has been in revolt against

159. *Id.*

160.

Now of political justice. There are two forms of it, the natural and the conventional. It is natural when it has the same validity everywhere and is unaffected by any view we may take about the justice of it. It is conventional when there is no original reason why it should take one form rather than another and the rule it imposes is reached by agreement, after which it holds good. It might, for instance, be agreed that the ransom of a prisoner of war shall be fixed at one pound, that the sacrifice in a certain ritual be one goat and not two sheep. Such are the rules prescribed by law in particular cases Some philosophers are of the opinion that justice is conventional in all its branches, arguing that a law of nature admits of no variation and operates in exactly the same way everywhere—thus fire *burns* here and in Persia—while rules of justice keep changing before our eyes. This last statement, however, needs qualification. (It can hardly be true of justice among the gods.) But in this world of ours, while natural justice undoubtedly exists, the rules under which justice is administered are everywhere being modified.

NICOMACHEAN ETHICS, *supra* note 135, bk. 5, ch. 7, at 1143b19–30 (J. Thomson trans. 1953).

161. "To pass judgement is, as we have said, to define or determine what is just. The just arises in two ways. First, from the very nature of things, and this is called natural right; second, from some agreement among men, and this, as we have seen, is called positive right." S.T., *supra* note 156, at 2a2ae, Q.60, A.5. (T. Gilby trans. 1969).

It should be noted that Karl Llewellyn, the drafter of Article II of the Uniform Commercial Code, accepted a theory that is, if anything, even more "essentialist" than Aristotle's. In what Richard Danzig calls "perhaps the key passage in *The Common Law Tradition*," Llewellyn quotes and endorses the view of the nineteenth-century German jurist Levin Goldschmidt:

Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place; it is thus not eternal or changeless nor everywhere the same, but is indwelling in the very circumstances of life. The highest task of law-giving consists in uncovering and implementing this immanent law.

For accounts of the influence of Llewellyn's essentialism on the UCC, see Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 625–26 (1975); Note, *supra* note 141. Even Goldschmidt and the *Natur der Sache* tradition he represents follow Aristotle in allowing that some aspects of the law are determined by nature and others by convention: That is the point of the remark that the immanent law is "not eternal or changeless nor everywhere the same." See generally Dreier, *Natur der Sache*, in 6 HISTORISCHES WÖRTERBUCH DER PHILOSOPHIE 478 (J. Ritter & K. Gründer eds. 1984). As a general matter, any given act of legislation will contain a blend of the natural and the conventional. Thus, it is a matter of natural law (even in Hume's restricted sense) that motorists should drive at a reasonable speed; but it is a matter of convention (even for Aristotle or Goldschmidt) that the speed limit should be precisely 55.

162. KP, *supra* note 1, at 79.

the conception of objective value.* If we were able to perceive such values, they would become the true foundation of the social order. . . . Ends would be at least as intelligible as facts. They would be things that exist in the world, like triangles, if not like tables. The distinction between the objective understanding of facts and the arbitrary choice of goals would therefore collapse.

*[Unger's Endnote:] See Hobbes, *Leviathan* ch. 6 ("good and evil apparent"), p. 48. See note 18 to my ch. 1.¹⁶³

Note 18 to chapter 1 in turn informs us: "Perhaps the most cogent statement of the principle of arbitrary desire is to be found in Hume, [*A Treatise [of Human Nature]*, bk. 3, pt. 1, § 1 pp. 455-470." Unger's argument assumes that, in the absence of intelligible essences, values must be subjective, desires arbitrary, and rules impossible. But he arrives at these conclusions by confusing the notions of *subjectivity* and *arbitrariness*.

The two notions are not at all the same. To say that some property—for instance, the pain I feel when jabbed with a pin—is *subjective* is to say that it belongs to me, a particular perceiving subject, in contrast to other subjects who have other experiences. To say that something is *arbitrary* is to say that it is in some sense lawless, unpredictable, capricious, up for grabs. Consider a few examples. The motion of the wind is arbitrary; it is not subjective. My pain on being jabbed with a pin is subjective; it is not arbitrary. My decision, based on the flip of a coin, to wear this particular necktie is both subjective and arbitrary; the fact that $2+2=4$ is neither.

These examples bring out a further point, namely, that these two words are not only semantically independent, but that their use varies according to context and background interest as well. So, for instance, the outcome of the flip of a coin is arbitrary from the point of view of the flipper, but not from the point of view of the laws of physics. A similar observation holds for subjectivity. That the sky on a cloudless day is blue is an objective fact if our implicit background class of perceiving subjects is *normal members of the human species*; but if we take the background class to be all *mammals*, then the blue appearance of the sky is a subjective (but not arbitrary) feature of human visual perception. In other words, a property that is inter-species subjective can at the same time be intra-species objective.

Now, even the most superficial inspection of the writings of Hobbes and Hume reveals them to have been concerned to show that the existence of principles of justice is inter-species subjective; but this does not imply that the principles of justice are arbitrary. Hobbes and Hume were making arguments relative to the human species as it actually exists; they did

163. *Id.* at 76-77; endnote at 306.

not attempt to lay down principles of justice for the angels. They conceive of justice as an institution that arises among *humans* in conditions of *limited benevolence* and *moderate scarcity*: "[I]f men were supplied with every thing in the same abundance, or if *every one* had the same affection and tender regard for *every one* as for himself; justice and injustice would be equally unknown among mankind."¹⁶⁴

But none of this makes the principles of justice intra-species subjective; nor does it make them arbitrary. This point is particularly clear in Hobbes. Although he defines *good and evil* in terms of appetites and desires,¹⁶⁵ he assumes that some desires are so universal and powerful that they provide a solid foundation for the principles of *justice*. He grounds his entire argument on the assumption that in a state of nature *all* men will be driven by the desire for gain, for safety, and for reputation into a war of all against all; that their physical powers are so nearly equal that no single victor will emerge; but that their fear of death and desire for security will "incline men to peace" and that "reason suggesteth convenient articles of peace, upon which men may be drawn to agreement."¹⁶⁶ Hobbes not only assumes that these impulses are universal among humans, but he also assumes that the "articles of peace" are so explicit that they require absolute power to be lodged in the person of a single sovereign.¹⁶⁷ *Intra-species*, Hobbes is one of the most objectivist political philosophers who ever lived, for on his view human nature requires that political sovereignty be absolute, perpetual, and undivided. Aristotle, with his collection of constitutions and his taxonomic interest in the different forms of government, is much less strict about what human nature demands, and he places a much greater emphasis on the multiplicity of human conventions.

Hume, like Hobbes, also assumes a more-or-less constant human nature as the basis of his moral theory; and it is odd that Unger should have missed this point, because a familiar criticism of Hume accuses him of treating human nature as absolutely the same in all circumstances.¹⁶⁸ Re-

164. D. HUME, *supra* note 99, bk. 3, pt. 2, § 2, at 495.

165. T. HOBBS, *LEVIATHAN* pt. I, ch. 6, at 55 (M. Oakeshott ed. 1962). Incidentally, Hobbes never says "good and evil apparent." These words do not occur in the text; they are a marginal gloss, which Unger has misunderstood. In the accompanying text Hobbes is not saying that goodness is an illusion; he is giving a definition of what it is for something to *appear to be* good or evil: "But for so far as a man seeth, if the good in those consequences be greater than the evil, the whole chain is that which writers call *apparent*, or *seeming good*. And contrarily, when the evil exceedeth the good, the whole is *apparent*, or *seeming evil*" *Id.*

166. *Id.* pt. I, ch. 13, at 102.

167. *Id.* pt. II, ch. 17, at 132 ("And in him consisteth the essence of the commonwealth; which, to define it, is *one Person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all, as he shall think expedient, for their peace and common defence.*" (Emphasis in original. Incidentally, Hobbes used the word "person" to refer to assemblies of men as well as to individuals.)

168. In D. FORBES, *HUME'S PHILOSOPHICAL POLITICS* 113 n.1 (1975), Forbes correctly observes that the following passage "has been quoted *ad nauseam*":

Would you know the sentiments, inclinations, and course of life of the Greeks and Romans?

gardless of the truth of this criticism, the fact remains that Hume is explicit about what his argument entails:

To avoid giving offence, I must here observe, that when I deny justice to be a natural virtue, I make use of the word, *natural*, only as oppos'd to *artificial*. In another sense of the word; as no principle of the human mind is more natural than a sense of virtue; so no virtue is more natural than justice. Mankind is an inventive species; and where an invention is obvious and absolutely necessary, it may as properly be said to be natural as any thing that proceeds immediately from original principles, without the intervention of thought or reflexion. Tho' the rules of justice be *artificial*, they are not *arbitrary*. Nor is the expression improper to call them *Laws of Nature*; if by natural we understand what is common to any species, or even if we confine it to mean what is inseparable from the species.¹⁶⁹

This passage is one of the most famous in Hume; since Unger takes Hume to have furnished "the most cogent statement of the principle of arbitrary desire,"¹⁷⁰ he ought perhaps to have mentioned it.

Unger's failure to notice these distinctions—in particular Hume's remark that "tho' the rules of justice be *artificial*, they are not *arbitrary*"—is likewise fatal to his third proposition:

c. *No Essences Means No Standards*

According to Unger, in the absence of intelligible essences there are no standards for making or applying rules and, therefore, no standards for legislation or adjudication.

With this contention we are getting close to the heart of the matter. Charles Fried perceptively remarks that the reason Unger cries "subjectivism" is that he is "a disappointed super-objectivist."¹⁷¹ Unger's idea seems to be that if values do not exist out in the world as something you can break your leg on, then the legal system is entirely arbitrary. One reply to this line of reasoning is Hume's remark on arbitrariness; another reply proceeds by reflecting on the notion of "intelligible essences."

I said earlier that the phrase "intelligible essences" does not name any

Study well the temper and actions of the French and English: You cannot be much mistaken in transferring to the former *most* of the observations which you have made with regard to the latter. Mankind are so much the same, in all times and places, that history informs us of nothing new or strange in this particular. Its chief use is only to discover the constant and universal principles of human nature, by showing men in all varieties of circumstances and situations, and furnishing us with materials from which we may form our observations and become acquainted with the regular springs of human action and behaviour.

D. HUME, ENQUIRY CONCERNING HUMAN UNDERSTANDING, § 8, pt. 1 (1777).

169. D. HUME, *supra* note 99, bk. 3, pt. 2, § 1, at 484.

170. KP, *supra* note 1, at 300.

171. Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal History*, 9 J. LEGAL STUD. 335, 343 (1980).

"classical doctrine" which was "rejected" by Hobbes and his fellow LIBERALS, and that Unger uses the term to stand ambiguously for notions that the philosophers agree must be sharply distinguished, to wit, *essential properties*, *universals*, and *abstract particulars*.¹⁷² Depending on what sense we give to "intelligible essences," Unger's third proposition is either trivial or false.

If Unger contends that rules require either universals or essential properties, then his position is true. It is also uninteresting and has no force against a nominalist like Hobbes. For the Hobbesian contention is not that there are no universals; rather, he contends that the only universals are *linguistic* universals.¹⁷³ But this is a different matter altogether. If it is accepted that there are linguistic *universals*, then there is no difficulty in establishing the possibility of linguistic *rules*. One need only make the following empirical assumption: that human beings are enough alike in their subjective judgments of similarity so that, in most cases (perhaps after a considerable amount of training), they can agree about the scope of a particular term. So long as they can agree about what to call a "hawk" and what a "handsaw," it makes no difference whether an "intelligible essence of hawkishness" exists—the fact of agreement is enough. To be sure, the categories they apply will be in some sense subjective; but, as we just saw, this does not make them *arbitrary*.

On the other hand, Unger sometimes seems to take an "intelligible essence" to be some sort of *abstract object* ("existing," he says, "like a triangle"). But then we run up against a classical problem: that of explaining how an *object* can provide a foundation for the application of a rule or for the classification of other objects. *Here* is a bird, and *over here* is an abstract object—the intelligible essence of hawkishness. Now, what ties the latter object to the former in such a way as to make the bird a hawk? A rule? But if that is the answer, then you might as well accept the Hobbesian theory. Hobbes's theory is that the *bird* is related to its *name* by the application of human standards of *perceptual similarity*; the "intelligible essences" theory merely replaces "name" with "intelligible essence" and the psychological mechanism with some occult force. Or perhaps the two objects are related by a *third* object—say, "the intelligible essence of a hawk's being related to the intelligible essence of hawkishness." But if *that* is the theory, then we are headed into an infinite regress.

These problems are not new. Plato discusses them in the *Parmenides*,

172. See *supra* notes 119, 120, 154.

173.

Of Names, some are *proper*, and singular to one only thing; as *Peter, John, this man, this tree*; and some are *common* to many things, *man, horse, tree*; every one of which, though but one name, is nevertheless the name of divers particular things; in respect of all which together, it is called an *universal*; there being nothing in the world universal but names; for the things named, are every one of them individual and singular."

T. HOBBS, *supra* note 165, pt. I, ch. 4, at 35.

Aristotle in the *Metaphysics*. In consequence, every philosopher since antiquity has been careful to distinguish universals (like triangularity) from abstract objects (like triangles). And even if the "intelligible essence of goodness" existed as a sort of spooky object, we would *still* be able to disagree about how to apply it, and we would *still* need rules to settle hard cases. So not only are the intelligible essences ontologically mysterious—they are explanatorily superfluous as well. There is a deep confusion involved in the idea that moral values *could be* objects; and, incidentally, the *locus classicus* for this criticism is not in Hobbes, but in Aristotle.¹⁷⁴

Aristotle draws a sharp distinction between two kinds of knowledge: the kind of universal, necessary knowledge we can obtain in mathematics, metaphysics, and the exact sciences, and the kind of rough generalization we can obtain in ethics.¹⁷⁵ Aquinas makes similar observations.¹⁷⁶ The contrast with Plato could hardly be more extreme. Plato had taken mathe-

174. Speaking of the Platonic theory that ethics is based on the Form of the good, Aristotle says:

To examine this opinion thoroughly belongs to an investigation at once different from the present one, and in many ways, inevitably, approximating more to logic. . . . To speak in a summary fashion, we may say first that the thesis that there is a Form either of good or indeed of anything else is verbal and vacuous. . . .

Again, even if the Forms, including a Form of good exist, they are not of the least help either for a good life or for actions.

ARISTOTLE, *EUDEMIAN ETHICS* bk. 1, ch. 8 at 1217b17–25 (M. Woods trans. 1982). Aristotle developed the point more concretely in the *Nicomachean Ethics*:

Even if the good which is predicated of a number of different things exists only in one element common to them all, or has a separate existence of its own, clearly it cannot be realized in action or acquired by man. Yet it is just a good of that kind that is the subject of our present inquiry. . . . And there is another puzzle. What advantage in his art will a weaver or a joiner get from a knowledge of the absolute good? Or how shall a doctor or a general who has had a vision of Very Form become thereby a better doctor or general? As a matter of fact, it does not appear that the doctor makes a study even of health in the abstract. What he studies is the health of the human subject or rather of a particular patient. For it is on such a patient that he exercises his skill.

NICOMACHEAN ETHICS, *supra* note 135, bk. 1, ch. 6, at 1096b30–1097a13 (J. Thomson trans. 1953). 175.

Such being the nature of our subject and such our way of arguing in our discussions of it, we must be satisfied with a rough outline of the truth, and for the same reason we must be content with broad conclusions. Indeed we must preserve this attitude when it comes to a more detailed statement of the views that are held. It is a mark of the educated man and a proof of his culture that in every subject he looks for only so much precision as its nature permits. For example, it is absurd to demand logical demonstrations from a professional speaker; we might as well accept mere probabilities from a mathematician.

NICOMACHEAN ETHICS, *supra* note 135, bk. 1, ch. 3, at 1094b19–28 (J. Thomson trans. 1953). For discussion of this passage and the previous one, see W. HARDIE, *ARISTOTLE'S ETHICAL THEORY* chs. 3, 4 (1968); H. JOACHIM, *ARISTOTLE: THE NICOMACHEAN ETHICS* 23–27 (1951); G. LLOYD, *ARISTOTLE: THE GROWTH AND STRUCTURE OF HIS THOUGHT* 204–24 (1968); M. WOODS, *COMMENTARY TO ARISTOTLE'S EUDEMIAN ETHICS* 66–92 (1982).

176.

The practical reason is concerned with practical matters, which are singular and contingent: but not with necessary things, with which the speculative reason is concerned. Wherefore human laws cannot have that inerrancy that belongs to the demonstrated conclusions of sciences. Nor is it necessary for every measure to be altogether unerring and certain, but according as it is possible in its own particular genus.

S.T., *supra* note 156, at 1a2ae, Q.91, A.3 (Dominican Fathers trans. 1912–36); *see also id.* at Q.95, A.2.

mathematical and metaphysical knowledge to be the ideal towards which the statesman ought to strive; his ethics is inseparable from his metaphysics. Aristotle not only rejects Plato's metaphysics, but denies that metaphysics can be the basis of ethics. His ethical arguments do not appeal to metaphysical considerations, and one can accept his ethics without accepting his metaphysics.

Although Aristotle, unlike Plato, does not "base" his ethics on other parts of his philosophy, he does, of course, make it fit in. Aristotle's ethics starts from a theory of human nature; his theory of human nature is, in turn, connected to his views on biology; his views on biology are connected to his views on teleology; and his views on teleology are connected to more general physical and metaphysical doctrines. These metaphysical doctrines unquestionably exert an indirect influence on his ethical system, but not as great an influence as Unger's argument requires. Indeed, despite the differences in their views of metaphysics and final causation, the manner in which Hume and Aristotle approach ethics is similar. They have more in common with each other than either does with, say, Kant or Hegel. Both assume that ethics aims at attaining "the good for man"; both assume that human nature, in its broad features, is uniform; both reject any appeal to supra-human moral principles. They disagree about what happiness is, about the nature of the virtues, about the proper form of the state, and about many of the details of their ethical theories, but these disagreements are not attributable to their disagreement about metaphysics.

I dwell on these facts because of their importance for Unger's argument. Recall that Unger says of the doctrine of "intelligible essences," first, that this doctrine's "authoritative statement" is in Aristotle's *Book Zeta*,¹⁷⁷ and, second, that "this doctrine is truly a master principle, for its friends have drawn from it conclusions about language, morals, and politics."¹⁷⁸ This contention is the heart of his argument; but historically it is without foundation.¹⁷⁹

Whether Unger's contention applies any better to the Scholastics is a question I shall not attempt to answer. The Middle Ages were the heyday of Aristotelian metaphysics; they were also a great era for political theory. Unger claims that "[t]he effort to participate in the dialogue between Christianity and modernism is one of the ruling ambitions of the work. And the primary source of the conception of universals I defend is the Aristotelian doctrine that the priests who taught me as a boy used to call 'hylomorphism'. . . ."¹⁸⁰; so one would expect him to say something about

177. KP, *supra* note 1, at 297; see *supra* note 120 (discussing the difficulties of Unger's reference to *Book Zeta*).

178. KP, *supra* note 1, at 31.

179. See *supra* notes 118–20 and accompanying text.

180. See Kronman, *supra* note 153, at 200–01 (letter from Unger to Kronman).

the medieval Schoolmen. His work depends heavily on a contrast between the Aristotelian tradition and the new philosophy of the seventeenth century; so he ought to have discussed the developments that took place in the 2200 years that separate Aristotle from Hobbes. In fact, the development of medieval philosophy does show a gradual movement from realism to nominalism, and from moral rationalism to voluntarism;¹⁸¹ but this development is not uniform. Scotus, the first major voluntarist, was also the champion of realism; and Occam's political tracts are largely independent of his nominalism.¹⁸² Nonetheless, I do not doubt that there are important connections between medieval metaphysics and medieval moral theory. I do doubt, however, that these connections are sufficient to save Unger's theory. In any event, Scholasticism is not a subject he discusses.¹⁸³

E. *Organic Groups*

I have now come to the end of my discussion of Unger's refutation of LIBERALISM. I have concentrated on this section because of its importance for CLS,¹⁸⁴ because it is the philosophical heart of his book, and because a detailed examination of a lengthy passage seemed the fairest way of establishing Unger's quality as a philosopher. But before drawing my ultimate conclusions on *Knowledge and Politics*, I shall briefly consider the relationship between Unger's critique of LIBERALISM and the rest of his book. The remaining chapters contain (1) a "Theory of the Welfare-Corporate State"¹⁸⁵ and (2) a positive doctrine, consisting of a "Theory of the Self"¹⁸⁶ and a "Theory of Organic Groups."¹⁸⁷ The positive doctrine "aims to define what a union of transcendence and immanence, autonomy and community, would mean."¹⁸⁸ The book ends with a section entitled "God."¹⁸⁹ I shall not discuss the section on God or Unger's theory of the social organization of the liberal state; these issues have more to do with theology or sociology than with philosophy. Instead, I shall concentrate on his theory of "organic groups."

Unger says that the solution to the antinomies of LIBERAL thought requires two revolutions, one political, the other theoretical. Politically,

181. I.e., from the view that morality is based on reason (which is binding even on God) to the view that morality is an expression of the divine will. The best introductory account of medieval philosophy is 2, 3 F. COPLESTON, *A HISTORY OF PHILOSOPHY* (1950 & 1953); for further details, see G. LEFF, *WILLIAM OF OCKHAM* 614-43 (1975); A. WOLTER, *DUNS SCOTUS ON THE WILL AND MORALITY* (1986).

182. F. COPLESTON, *supra* note 181, provides a useful account of the development of the views of Scotus and Occam.

183. His most extensive treatment is a passing reference that comes in the middle of a discussion of Baroque art. KP, *supra* note 1, at 122.

184. See *supra* text accompanying notes 14-37.

185. KP, *supra* note 1, at 145-90.

186. *Id.* at 191-235.

187. *Id.* at 236-95.

188. *Id.* at 21.

189. *Id.* at 290-95.

there must be a "transformation of the conditions of social life, particularly the circumstances of domination, that produce the experience of the contingency and arbitrariness of values."¹⁹⁰ It is important to stress that one of the principle aims of Unger's theory is to describe a kind of social life that will not be based upon "domination" or "the hegemony of class and role."¹⁹¹ As he says: "Until the central problem of the inner circle, the problem of domination, is resolved, the search for community is condemned to be idolatrous, or utopian, or both at once."¹⁹² His attack on LIBERALISM should thus not be misunderstood as an attack on liberty.¹⁹³ As for the theoretical revolution, the world needs a system of thought based on the "flourishing of human nature."¹⁹⁴

Unger's positive theory of the good divides into two parts. The first is his "Theory of the Self." This theory leads to "the notion that the good consists in the development of the species nature in the lives of particular persons."¹⁹⁵ The second part is his "Theory of Organic Groups." This theory includes a description of "the community of life," in which individuals can "discover the organic unity of each other's personalities."¹⁹⁶ In his "Theory of the Self," Unger attempts to show "that both human nature and our understanding of it can progress through a spiral of increasing community and diminishing domination."¹⁹⁷ As Unger says:

The previous course of the argument has justified the conclusion that the good is properly viewed as an actualization of human nature and that, when so interpreted, it can be pictured in two complementary ways. If we consider the good as the ideal to which human striving is addressed and from which it receives its meaning, it can be characterized as the relationship to nature, to others, and to oneself described by the concepts of natural harmony, sympathy, and concrete universality."¹⁹⁸

190. *Id.* at 103.

191. *Id.* at 251.

192. *Id.* at 252.

193.

Many of the liberal thinkers were devoted to freedom, though their false metaphysical principle almost always kept them from grasping its true character. If for no other reason than for this devotion, they will rank forever as heroes and teachers of the human race, and all the sins of England will be forgiven because of her services to liberty.

Id. at 277.

194.

The theoretical advance consists in the development of a system of thought that would enable us to deny the contrast of description and evaluation by taking the ends men share in their groups as indications of the good or right. The intuitive idea from which one might start is that a man's choices express his nature; that common choices maintained over time and capable of winning ever greater adherence reflect a common human nature; and that the flourishing of human nature is the true basis of moral and political judgment.

Id. at 103.

195. *Id.* at 239.

196. *Id.* at 262.

197. *Id.* at 239.

198. *Id.*

This sounds very promising, and "concrete universality" has a splendid and familiar ring¹⁹⁹—but at this point one would like a bit of detail. What (one wonders) about the good considered as a source of more concrete standards of right conduct? Unger has an answer:

When we think of the good primarily as a source of more concrete standards of right conduct, it may be useful to distinguish a universal and a particular good.

Personality has two aspects: one universal, represented by sociability and the abstract self; the other particular, expressed by individuality and the concrete self. Therefore, everyone must have both a universal and a particular good. The universal good is the perfection of the species nature in which he participates by virtue of his sociability and of his abstract selfhood. The particular good is the development of the unique set of talents and capacities through which the species nature of mankind takes a concrete form in him.²⁰⁰

This "Theory of the Self" is all very well, as far as it goes; unfortunately, it contains nothing that would be of the slightest help in solving any difficult moral problem. To say that morality is to be founded on the "flourishing of human nature" is nothing new: Aristotle, Hume, and Rawls are of the same opinion.²⁰¹ But the idea is to describe human nature with enough precision so that it is possible to see what the resulting moral theory amounts to in practice. A morality that says nothing more than "Develop your species nature!" says nothing at all. (What, one wonders, would it be like *not* to develop our species nature?)

This problem becomes particularly acute when one turns to legal and political theory. Human nature might plausibly be argued to include bipedalism, say, or cannibalism, or male dominance, but not the Rule in Shelley's Case or the Traffic Regulations of New York City. Professor Unger's discussion of the political implications of his view of the good

199. It comes from Hegel. Here is Bertrand Russell's discussion:

Hegel's argument in this portion of his "Logic" depends throughout upon confusing the "is" of predication, as in "Socrates is mortal," with the "is" of identity, as in "Socrates is the philosopher who drank the hemlock." Owing to this confusion, he thinks that "Socrates" and "mortal" must be identical. Seeing that they are different, he does not infer, as others would, that there is a mistake somewhere, but that they exhibit "identity in difference." Again, Socrates is particular, "mortal" is universal. Therefore, he says, since Socrates is mortal, it follows that the particular is the universal—taking the "is" to be throughout expressive of identity. But to say "the particular is the universal" is self-contradictory. Again, Hegel does not suspect a mistake but proceeds to synthesize particular and universal in the individual, or concrete universal. This is an example of how, for want of care at the start, vast and imposing systems of philosophy are built upon stupid and trivial confusions, which, but for the almost incredible fact that they are unintentional, one would be tempted to characterize as puns.

B. RUSSELL, *OUR KNOWLEDGE OF THE EXTERNAL WORLD* 48 n.1 (1926).

200. KP, *supra* note 1, at 239.

201. See NICHOMACHEAN ETHICS, *supra* note 135, bk. I, ch. 7; D. HUME, *supra* note 168, § 8, pt. 1 (observe that his chief contribution to moral philosophy is entitled *A Treatise of Human Nature*); J. RAWLS, *supra* note 86, at 424-33.

does little to dispel the problem. He says that his doctrine of human nature leads to the "ideal of community."²⁰² This ideal is, according to Unger, a regulative ideal that can never be completely realized in history;²⁰³ but it gives rise to a set of institutional principles that characterize the *organic group*. These institutional principles (the "community of life," the "democracy of ends," and the "division of labor") are supposed to "translate . . . [the] message [of the ideal of universal community] into the language of political possibilities"²⁰⁴ and to "suggest how the situation of modern society can be used to promote the good."²⁰⁵

Organic groups are characterized by the following requirements. First, "[e]ach member of the group must have face-to-face dealings with all the other members."²⁰⁶ Second, the groups must exemplify "multipurpose organization," for "[u]nless individuals deal with one another in a multiplicity of different ways, they cannot discover the organic unity of each other's personalities."²⁰⁷ These two requirements, Unger notes, sharply limit the size of any community of life. Third, the groups must exemplify the "democracy of ends."²⁰⁸

Professor Unger does not go into very great detail about his organic groups. (He does not, for instance, tell us whether those people, like Thoreau or St. Jerome, who wish to live apart from organized human society are violating human nature.) This lack of detail is regrettable, particularly when one considers that his theory is supposed to serve as a basis for the political transformation of modern society. But let us try as best we can to imagine what a social world of organic groups would look like. One of the chief advantages of organic groups is that they are supposed to help mankind to overcome "systems of domination." But if absence of domination is the goal, then the members of one organic group ought not to be able to dominate the members of another; and this suggests that the organic groups ought to exhibit a high degree of economic and political self-

202.

When we translate natural harmony, sympathy, and concrete universality into the concepts of the universal and the particular good, we find once again that they can only be realized fully by a universal community. The species nature is revealed and developed in history through the spiral of diminishing domination and increasing community. Thanks to that spiral individuals can hope to become more secure in the sense and in the expression of personality.

KP, *supra* note 1, at 260.

203. *Id.*

204. *Id.* at 260-61.

205. *Id.* at 259.

206. *Id.* at 262.

207. *Id.*

208.

The democracy of ends in the organic group consists in the progressive replacement of meritocratic by democratic power in the ordinary institutions of society and, above all, in its occupational groups. Decisions about what to produce (whether the products be commodities, services, or knowledge), for which objectives to produce, and how to produce are increasingly defined as political and submitted to collective decision.

Id. at 268.

sufficiency. So one kind of society based on organic groups might look like this: many small social units, each one practicing collective, non-meritocratic decisionmaking, and all living in independence of one another. Each small group would be responsible for providing its own food, shelter and clothing; for the education of its children; for its own medical needs; for its own steel and mining industries; for its automobile production (if any); and so on. Obviously such a society is possible (hunter-gatherer bands, isolated jungle societies, and the Eskimos are all examples), but I doubt that many people would be eager to make the transition, or would regard life in such a society as "more expressive of human nature." And the anthropological evidence hardly supports the hope that such a society could dispense with "all systems of domination."

I presume that Professor Unger does not have this sort of simple social organization in mind, for after admitting that "[b]oth decentralization and multipurpose activity may exact a high price in the production of goods and services,"²⁰⁹ he says that this problem is to be dealt with by organizing society into, of all things, a "hierarchy" of organic groups,²¹⁰ and he would allow individuals to belong to several of these groups simultaneously.²¹¹ But this concession to economic reality brings with it two problems for his theory. The first concerns the internal structure of the organic groups. The second concerns the external relations of the groups to each other.

In describing the internal structure of the groups, Unger says that "the occupational group, exemplified by the bureaucratic institution,"²¹² is a "promising starting point for the realization of a community of life."²¹³ To take a concrete example, let us consider the staff of a large hospital. This is a group sufficiently small for face-to-face encounters and sufficiently diverse for "multipurpose activity."

Now, there are obvious difficulties with administering a hospital in the non-meritocratic way Unger says organic groups ought to be run. Clearly, a collective decision by the entire staff about brain surgery is not desirable: However such a procedure might help the staff "to understand, to develop, and to manifest human nature,"²¹⁴ it is as likely as not to kill the patient. If one wishes to retain the theory of organic groups, there are three possible responses to this problem. First, one can pursue a levelling policy (in the name of "eradicating domination"); this course would eliminate the brain surgeon. Second, one could resign oneself to a high degree of structure and "meritocratic hierarchy" in the hospital; but this would

209. *Id.* at 265.

210. *Id.* at 283.

211. *Id.*

212. *Id.* at 264.

213. *Id.*

214. *Id.* at 243.

mean renouncing the "democracy of ends." Third, one could deny that the *hospital* is capable of being run as an organic groups; instead, the "real" organic group would be smaller collectives—say, the doctors, the nurses, and the maintenance staff—such that, within each smaller collective, democratic decisionmaking could prevail. But this solution simply solves the problem by defining it away. I am unable to see that it has any radical implications. Instead of talking about "trade unions," one would talk about "organic groups," and everything else could go on as before. I do not see how it would solve the problem of domination; presumably the "organic doctors' group" would still make the major decisions.

One might think that Unger's "principle of the division of labor" could be invoked at this point.²¹⁵ But unfortunately his remarks on this subject are vague to the point of emptiness. Unger wisely concedes the necessity for hierarchies and for the division of labor. But he does not indicate how these principles are to be reconciled with his advocacy of non-meritocratic decisionmaking and face-to-face encounters—except to say that the solution to the problem is "straightforward."²¹⁶ Unger insists that his theory of organic groups is non-utopian,²¹⁷ and assures us that "the more communitarian the group becomes, the less do differentiation and community operate as antagonistic forces."²¹⁸ And his most concrete suggestions²¹⁹ are hardly earth-shattering. They sound like life on a *kibbutz*. If all Unger wants is for the doctors to sweep the halls once a week, and if he believes

215. Unger describes this principle as follows:

The community of life and the democracy of ends describe the attributes of sympathetic associations whose practices manifest the species nature. But these institutional principles fail to define the significance to the group of the individual's particular good: the perfection of his talents and the affirmation of his sense of self. To do this is the aim of the principle of the division of labor.

The ideal of concrete universality establishes the general form of the achievement of the particular good. The principle of the division of labor is the political embodiment of that ideal. It holds that the allocation of tasks should allow each individual to develop his unique dispositions so as to serve and to express values or practices whose legitimacy as signs of the species nature he can recognize.

Id. at 274.

216.

[O]ne has to determine how far to carry the change from meritocratic to democratic procedures. In a sense, the answer is straightforward. The ultimate foundation of all power in the organic group must be democratic decision. The mere possession of skills can never in itself justify material advantages or the exercise of power. Nevertheless, a relentless insistence on deciding collectively all significant matters would make work flounder in a morass of political argument. It would strike at the group's capacity to produce anything but complaints, exhortations, and eloquence. And it would undermine the possibility of a division of labor in which the talents of each could be brought to fruition, for specialization allocates meritorious power.

Id. at 273.

217. *Id.* at 237.

218. *Id.* at 276.

219. Unger recommends that in organic groups (1) "[i]ndividuals who exercise power in one respect should be subject to power in another"; (2) "[t]he rotation of tasks can be used as a moderating device"; and (3) "there may be jobs in the group whose performance is indispensable, but are generally abhorred . . . or stand at too great a distance from the ideals they serve to satisfy the aspirations of the abstract self. The group must assume these tasks as a common burden until technical progress makes them unnecessary." *Id.* at 275.

that this procedure will help their abstract selves attain concrete universality, then there seems little harm or difficulty in attempting the experiment. But Unger also stresses the impossibility of achieving his goals at any time in the history of the universe:

[T]here is a crucial flaw in the principle of the division of labor that reflects the unresolved tension in the idea of concrete universality To be perfect, the division of labor would have to express the universal ends of a universal community, for only then could it satisfy man's longing to overcome his finitude by living for the universal. But anything on earth that could be universal would also be remote from the concerns an individual has as a particular being. Only God, if He exists, would combine universality with immediate presence.²²⁰

The trouble with all this is that it is unclear just what Unger is advocating: The picture he paints is little more than a blur.

Similar problems beset the external relations of organic groups to one another. These external problems with Unger's proposal will arise in any society that is composed of a multitude of interdependent, interacting organic groups—that is, in any society not entirely composed of hunter-gatherers. To keep one group from dominating another, and to coordinate the activities of the various groups, there will have to be a state; indeed, Unger says it would be best to have a world-state.²²¹ This world-state will be charged with the task of “foster[ing] concrete universality by helping make the allocation of tasks within each community more expressive of the species nature.”²²² Presumably for this task the world-state will need coercive power over the individual organic groups; presumably also the coordination of a world-state and an industrial world-economy will require special training and skills. Again, it is hard to see how Unger can preserve his ideal of collective participation in all decisions, or how he will avoid dominance. Unger is not unaware of this problem. He says:

The achievement of a democracy of ends in the sphere of group relations builds upon the idea of a hierarchy of communities. Each higher step or organization must reflect the same preeminence of democratic over meritocratic power that prevails within the organic group. Otherwise, the activities of these overarching institutions themselves will represent a kind of dominance.²²³

“Must reflect” is undoubtedly true, but Unger says nothing about how

220. *Id.* at 276; see also *id.* at 23–24 (discussing “the impossibility of resolving these problems within history”).

221. *Id.* at 284.

222. *Id.*

223. *Id.* at 283.

this feat is to be carried out. His remarks sound more like a statement or evasion of the problem than a solution. This problem afflicts his theory generally. He is in favor of "organic unity" and "concrete universality"; he is opposed to "hierarchy," "meritocracy," and "dominance"; organic groups should be arranged in "hierarchies"; labor should be divided, giving rise to "meritorious power"; communities of life should allow face-to-face encounters; meetings should not go on too long; decisionmaking should be collective; people should not relentlessly insist on collective decisions; jobs should be rotated; and the solution to the tension between the division of labor and the democracy of ends is "straightforward." Moreover, this theory is not utopian, and only God can fully resolve the tensions in concrete universality. It's quite a jumble. In the end, what we are left with is a host of obvious problems, and the recommendation that we try to "appreciate the organic unity in each others' personalities" and to "develop the species nature in concrete universality."

Professor Unger is aware that his theory of organic groups is not very precise, and he has an explanation for this shortcoming. As he says: "Though our conception of thought becomes practical and evaluative, we can never fully bridge the gap between abstract and concrete knowledge, theory and prudence, science and art. That is why the doctrine of organic groups remains indeterminate."²²⁴

I do not wish to deny the importance of speculative sociology to political theory: Unger is entirely correct to take utopianism seriously. Ever since Plato's *Republic*, philosophers have tried to describe the ideal society, and many people—including political leaders ranging from Thomas Jefferson to Chairman Mao—have urged a "return to human nature" or a social organization based on small groups. But such theories, if they are to be of any use, and if they are to present a genuine alternative to LIBERAL society, must attempt to deal with the obvious objections; and they ought not to take refuge in empty fluff about our inability to "bridge the gap between abstract and concrete knowledge, theory and prudence, science and art."

I wish explicitly to note that nothing in my criticisms of Unger is directed against the "leftism" of his theory. My concern is with scholarship and arguments, not with politics. Indeed, I do not find Unger's theory of organic groups particularly leftist: with a few modifications, a few shifts in terminology, it would serve conservatives just as well. If you were to rewrite *Knowledge and Politics*, replacing the words "liberalism" and "organic groups" with the words "liberal secular humanism" and "organic Christian communities," you would be well on the way to a tract for the religious right. The philosophical critique of liberal secular humanism would scarcely have to be touched; the themes of tight-knit communities,

224. *Id.* at 23.

freedom from government bureaucracy, and populist democracy are already present; and the concluding sentence, "Speak, God," might well have been written by the Reverend Pat Robertson.

Unger is not, of course, a spokesman for the born-again, and Robertson would not cite Marx and Adorno. But my point is that Unger's leftism is more a matter of terminology than of philosophical argument. That his work can be read in a conservative way is not surprising. Once you have made "developing the species nature in concrete universality" the acme of political life, you face the problem of defining these fine phrases—and conservatives can play that game at least as well as leftists. Many reactionaries would argue that racial prejudice, male dominance, militarism, heterosexuality, class distinctions, and the eating of animals belong to the "concrete universality" of human nature—and this argument is not entirely without anthropological plausibility.

These reflections illustrate a general point: The left is not well-served by political theories that rest on emptily organic terminology. What it needs is solid, rigorous arguments, stated with clarity and supported by scrupulous research. And it needs these virtues primarily for its own sake. There is not much point in building a house without a blueprint, or in marching to a map that nobody can read: You are as likely as not to set out in precisely the wrong direction, and to accomplish the opposite of what you had intended. Fortunately for the left, logic and good scholarship are not the ideologically tainted product of LIBERALISM, and many leftist philosophers exhibit both virtues in high measure.²²⁵

Professor Unger's theory of the "community of life" and his declaration that the good consists in "developing our species nature in concrete universality" look silly if they are placed beside the work of a trained philosopher—if, say, one compares them to the concluding chapters of John Rawls's *Theory of Justice*. And this remark raises an important issue. Unger says: "In liberal political theory, the absence of a view of the good makes it impossible to justify any exercise of power at all, an impossibility underlined by the incoherence of all doctrines of legislation and adjudication in that system of thought."²²⁶ He also tells us that many of the failings of LIBERALISM are the result of its abandonment of the traditional Aristotelian moral psychology. But the final third of *A Theory of Justice*, the most celebrated work of liberal political theory to have ap-

225. This is conspicuously true of the "analytical Marxists." See G. COHEN, *KARL MARX'S THEORY OF HISTORY: A DEFENCE* (1978); J. ELSTER, *MAKING SENSE OF MARX* (1985). See generally *ANALYTICAL MARXISM* (J. Roemer ed. 1986). There exist many well-reasoned critiques of liberalism. E.g., A. MACINTYRE, *AFTER VIRTUE* (1981); C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1962); M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); C. TAYLOR, *2 PHILOSOPHICAL PAPERS* (1985); R. WOLFF, *THE POVERTY OF LIBERALISM* (1968). CLS would do a service to the cause of leftist political thought if it were to emulate the clarity and care of these writers.

226. KP, *supra* note 1, at 238.

peared in this century, begins with a section entitled "The Need for a Theory of the Good"—and the next 150 pages attempt to sketch the details of a moral psychology for liberalism. And the primary principle of motivation in Rawls's moral psychology is derived, not from Hobbes or from Kant, but from Aristotle; Rawls even calls it "the Aristotelian Principle."²²⁷

Moreover, Rawls, like Aristotle and many liberal political thinkers, speaks in favor of a conception of society as a "union of social unions."²²⁸ He too emphasizes the good of community.²²⁹ He explicitly denies²³⁰ that communities have only instrumental value, i.e., that their value is measured solely by the extent to which they satisfy the aims of individuals.²³¹ He has a much more clear-sighted realization than Unger that, because no individual can realize in a finite lifetime all of his or her potentialities, the full development of an individual personality can take place only in a political community that contains a diversity of groups pursuing a diversity of activities and a diversity of conceptions of the good. Rawls also realizes that some of these groups will have to be small, while others will be too large for face-to-face encounters with every other member. But, unlike Unger, he focuses his attention on the critical problem: how these groups are to be coordinated with each other. The principles of justice are the key to the solution. The various members of the society are free to live in a commune in New Mexico, or to dwell alone in the desert, or to join some more conventional sort of community, but the same principles of justice are to govern them all. Rawls devotes the main part of his book to

227. J. RAWLS, *supra* note 86, at 424.

228. *Id.* at 520-29.

229.

Thus we may say following Humboldt that it is through social union founded upon the needs and potentialities of its members that each person can participate in the total sum of the realized natural assets of the others. We are led to the notion of the community of humankind the members of which enjoy one another's excellences and individuality elicited by free institutions, and they recognize the good of each as an element in the complete activity the whole scheme of which is consented to and gives pleasure to all.

Id. at 523. It is important to emphasize these facts about Rawls's theory, because many "communitarian" critics have assumed that, when he describes the parties in the "original position," Rawls is advancing a theory of human nature, and that his project is to show how rational egoists could be led by self-interest to the principles of justice. But this is not in fact the structure of his argument. The full justification for the constraints on the parties in the "original position" comes only after Rawls has given his account of human nature in Part III. The end of the book elucidates many of the presuppositions about moral psychology, human nature, and the good that underlie Part I; for this reason, *A Theory of Justice* can profitably be studied from back to front. No careful reading of the text can support the "self-interest" interpretation, which seems to be the interpretation Unger favors. See *infra* note 232. For more on these matters, see Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985); R. DWORKIN, *LAW'S EMPIRE* 440 n.19 (1986); B. WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 78 (1985).

230. J. RAWLS, *supra* note 86, at 520-29.

231. Compare Unger's "Principle of Individualism," *supra* note 86 and accompanying text (which he takes to be part of the "deep structure" of LIBERALISM), with Rawls's discussion of "The Idea of Social Union" in J. RAWLS, *supra* note 86, at 520-29. Rawls emphatically rejects this principle.

the elucidation of a suitable set of principles, and devotes considerable energy to the problems of social stability and of a well-ordered society. In contrast to Unger, he sees what is at stake and comes to grips with the central problem.

I do not know why Unger does not mention these facts, or why he asserts that LIBERALISM has no "view of the good." *A Theory of Justice* would seem to be an obvious target for him to attack in detail. But although Unger is very free with his references to ancient and early modern philosophy, his critique of LIBERALISM says little about the work of modern liberal political theorists. He devotes a mere paragraph to "[t]he work of J. Rawls, the American moralist."²³²

I have been discussing *Knowledge and Politics* for many pages. Although this is Unger's first book, it is the most philosophically sophisticated of his writings, it has had the most influence on CLS, and it contains his most complete critique of LIBERALISM. Here, if anywhere, is the evidence for his claim to have "undermined the central ideas of modern legal thought." My discussion concentrated on the most influential part of his book, particularly on "the epistemological analysis for which . . . *Knowledge and Politics*, is so justly famous"²³³; but I also discussed his theory of "organic groups."

The failings I have identified are of a magnitude and a profusion that would never be accepted from a graduate student in philosophy, whether in America or in Europe. So it is perhaps not surprising that professional philosophers have failed to take Unger's work seriously. Despite his claim to have found "the context of ideas and sentiments within which philosophy and politics must now be practiced," despite the fact that his followers compare him to Marx, Durkheim, Weber, and Spinoza, the philosophy journals contain scarcely a mention of *Knowledge and Politics*.

This fact may leave us in some perplexity, however, as to the source of Unger's stature within CLS. Perhaps his weaknesses as a philosopher are outweighed by his strengths as a legal scholar. To explore this possibility, I now turn to his work that most directly concerns legal theory, *The Critical Legal Studies Movement*.

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The utilitarian and social contract versions of the substantive theory of freedom can be collapsed into a third. It appeals to the conception of an ideal system of procedures for lawmaking that all men might accept in self-interest and the operation of which can be shown to lead to certain specific conclusions about the distribution of wealth and power. The work of J. Rawls, the American moralist, illustrates this view.

KP, *supra* note 1, at 86. Compare my remarks on the "self-interest" interpretation of Rawls, *supra* note 229.

233. Boyle, *supra* note 8, at 1082.

III. THE CRITICAL LEGAL STUDIES MOVEMENT

Professor Unger's slim book, *The Critical Legal Studies Movement*, contains a statement of the goals and methodology of CLS. It has been an influential work, and was well-received by the critical legal public: Shortly after it appeared, two of his admirers compared him to Dante and Virgil.²³⁴

In this book, Unger briefly discusses the broad implications of critical legal thought for "normative commitment"²³⁵ and for "freedom and structure in modernist experience"²³⁶ as well as for social theory. Just as *Knowledge and Politics* claimed to have found "the context of ideas and sentiments within which philosophy and politics must now be practiced,"²³⁷ the new work claims that CLS has discovered "the axis around which the most basic controversies of social theory must revolve."²³⁸

But the bulk of his essay is devoted to critical legal theory. According to Unger, traditional leftist legal theory had two ambitions, one theoretical, the other practical: (1) to criticize the central ideas of modern legal thought; and (2) "the purely instrumental use of legal practice and legal doctrine to advance leftist aims."²³⁹ Previous leftist movements connected these two activities only loosely and sporadically. The "critical legal schol-

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His work is a unique contribution to modern jurisprudence. His writings are evocative of the heroic style and structure of Dante Alighieri's *Divine Comedy*. . . . Virgil, the embodiment of human reason, guides Dante through the hideous depth of Hell and up the treacherous slopes of Purgatory. Yet Virgil himself cannot enter Paradise; Beatrice, the personification of divine faith, accompanies Dante on the celestial climax of his odyssey. In a sense, Unger aims to fuse the roles of Virgil and Beatrice and thus to transcend the limitations each bears in Dante's account.

Hutchinson & Monahan, *supra* note 8, at 1491.

235. CLSM, *supra* note 2, at 648-54.

236. *Id.* at 660-62.

237. KP, *supra* note 1, at v.

238. CLSM, *supra* note 2, at 665. Unger describes the central theoretical result of critical social thought as follows:

The relation of these two sets of ideas—the recognition of the shaped character of social life and the denial of a metastructure—has now become the axis around which the most basic controversies of social theory must revolve.

This shift in the starting points of social theory may seem on our part an act of intellectual self-destruction. After all, the major theoretical traditions that have served the left until now, like Marxism and structuralism, have leaned heavily on the idea of a metaorder in either its compulsive-sequence or its possible-worlds variant. Nevertheless, the theoretical result can best be seen as the victory of the fundamental intention and method of critical social thought over sets of propositions that only imperfectly applied the method and expressed the intention. From the beginning the intention has been to understand society as made and imagined rather than as merely given in a self-generating process that would unfold independently of the will and the imagination and that would condemn people constantly to reenact a drama they were unable to stop or even to understand. The method of critical social thought mirrors this intention. It is the method that, interpreting the formative institutional and imaginative contexts of social life as frozen politics, traces each of their elements to the particular history and measure of constraint upon transformative conflict that the element represents.

Id. I confess that I am unable to understand much of this passage or to detect in it any similarity to the literary style of Dante and Virgil.

239. *Id.* at 567.

ars," however, have reformulated both activities and "drawn [them] into a larger body of ideas."²⁴⁰ Specifically, they have sharpened the leftist critique of *formalism* and *objectivism* and carried this critique "to an unprecedented extreme."²⁴¹ This critique leads to their constructive program—to what Unger calls *deviationist doctrine*.²⁴² As in his theory of organic groups, Unger is not very explicit about what "deviationist doctrine" amounts to ("We agree neither on whether this expanded or deviationist doctrine can in fact be constructed nor on what exactly its methods and boundaries should be."),²⁴³ but the general drift is clear:

[T]he crucial feature of deviationist doctrine is the willingness to recognize and develop the disharmonies of the law: the conflicts between principles and counterprinciples that can be found in any body of law. Critical doctrine does this by finding in these disharmonies the elements of broader contests among prescriptive conceptions of society.²⁴⁴

Unger sees that task of CLS as one of "working from within [the] legal tradition,"²⁴⁵ of using existing "legal materials" to further radical aims.²⁴⁶

The critique of objectivism and formalism and the expansion of doctrine have broader implications for social theory and for "the terms of ideological controversy."²⁴⁷ Unger calls his new vision "superliberalism."²⁴⁸ In Unger's "radicalized version of the social ideal,"

the contrast between what a social world incorporates and what it excludes, between routine and revolution, should be broken down as much as possible; the active power to remake and reimagine the structure of social life should enter into the character of everyday existence.²⁴⁹

240. *Id.*

241. *Id.*

242. *Id.* at 576.

243. Unger claims that the traditional sort of doctrinal argument is too narrow:

The implication of our critique of formalism is to turn the dilemma of doctrine upside down. It is to say that, if any conceptual practice similar to what lawyers now call doctrine can be justified, the class of legitimate doctrinal activities must be sharply enlarged. The received style of doctrine must be redefined as an arbitrarily restricted subset of this larger class.

Id.

244. *Id.* at 578; *see id.* at 646–47.

245. *Id.* at 577.

246. *Id.* at 580.

247. *Id.* at 655.

248. He describes it as follows:

It pushes the liberal premises about state and society, about freedom from dependence and governance of social relations by the will, to the point at which they merge into a larger ambition: the building of a social world less alien to a self that can always violate the generative rules of its own mental or social constructs and put other rules and other constructs in their place.

Id. at 602.

249. *Id.* at 584.

This social ideal entails a program for "political and cultural revolution"—for the "reconstruction of the state," for the growth of "negative capability," and for a "vision of transformed personal relations."²⁵⁰

Professor Unger's argument builds upon his earlier work, and cannot be understood without it. The basic formula—complaint about the state of modern man, criticism of traditional legal theory, delineation of a "vision" of transformed personal relations—is the same as in *Knowledge and Politics*. The newer work is a sketch of the view of "our movement" and does not purport to contain a detailed argument of the sort offered in his earlier writings; it contains little mention of philosophy or philosophers.

The newer piece is vulnerable nonetheless to the same objections as the old. For example, let us examine Unger's critique of objectivism and formalism. Unger defines formalism as:

[A] commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary.²⁵¹

This definition is, like his earlier definitions of LIBERALISM and "intelligible essences," so sloshy that he can do with it whatever he wants. For example, in a passage directed against Ronald Dworkin, he says that "the rights and principles school . . . can best be understood as [an effort] to recover the objectivist and formalist position."²⁵² In Unger's view, "this school alternates confusedly between two options, both of which it finds unacceptable as a basis for legal theory."²⁵³ One option is to base the legal system on *moral consensus*; the other, to base it on a *transcendent moral order*. Unger depicts "[t]he third, mediating position for which the school grasps" as resting on

the deployment of a specific method to reveal the content and implications of [the moral] order: generalize from particular doctrines and intuitions, then hypostasize the generalizations into moral truth, and finally use the hypostasis to justify and correct the original material. The intended result of all this hocus-pocus is far clearer than the means used to achieve it.²⁵⁴

250. *Id.* at 586. Unger gives the practice of law as an example:

For us, law practice should be, and to some extent always is, the legal defense of individual or group interests by methods that reveal the specificity of the underlying institutional and imaginative order, that subject it to a series of petty disturbances capable of escalating at any moment, and that suggest alternative ways of defining collective interests, collective identities, and assumptions about the possible.

Id. at 667.

251. *Id.* at 564.

252. *Id.* at 574 (characterizing both "rights and principles" and "law and economics" schools).

253. *Id.* at 575.

254. *Id.*

As a description of Dworkin's theory, this account is so vague and ambiguous as to be unrecognizable. To begin with, Dworkin cannot be classified as a "formalist" in Unger's sense, for Dworkin believes that legal argument is a species of philosophical argument.²⁵⁵ More importantly, Unger's sketchy argument begs all the important questions. In effect, he reasons as he did in *Knowledge and Politics*: In order to engage in legal reasoning, you need some background normative theory to tell you how to interpret the statutes and to evaluate the precedents. But, Unger notes, "This is where the trouble arises. No matter what the content of this background theory, it is, if taken seriously and pursued to its ultimate conclusions, unlikely to prove compatible with a broad range of the received understandings."²⁵⁶ This argument is fallacious. Unger assumes that if people take their political theories seriously and "pursue them to their ultimate conclusions," strife will inevitably result. He ignores the possibility that people might, as a matter of background political morality, agree on a principle of tolerance. They might choose, for example, to argue their views on abortion in the public arena, but, whatever the outcome, to abide by the results of the political and judicial process. As soon as one realizes that political theories can be self-limiting in this way, Unger's argument collapses.

Similar considerations undermine Unger's discussion of the Anglo-American law of contracts.²⁵⁷ Unger argues that the "counterprinciple" of fairness is incapable of regulating the regime of contract.²⁵⁸ Again, he says that the only way of preventing considerations of fairness "from running wild and from correcting almost everything is to draw unstable, unjustified, and unjustifiable lines between the contracts that are voidable and those that are not."²⁵⁹ One might as well argue that the only way of preventing considerations of efficiency from running wild is to draw unstable, unjustifiable, and unjustified lines between children of sixteen (who are allowed to drive a car) and their slightly younger siblings (who are not)—or condemn a yardstick because it is not a micrometer. Unger seems not to have noticed that fairness itself might require the construction of a regime of clear and precise rules. *Exactly which* system is set up may be morally indifferent—the important thing is that there be *some* system on which people can rely. Morally speaking, it is a matter of com-

255. See R. DWORKIN, A MATTER OF PRINCIPLE 9-71 (1985).

256. CLSM, *supra* note 2, at 571.

257. *Id.* at 616-48. This part of Unger's work has recently been the subject of a careful and detailed critique. See Finnis, *supra* note 27.

258.

The fairness correction must be focused and sporadic rather than pervasive if the regime of contract is not to be superseded by an overriding method of allocation. Yet in its limited and contract-preserving form, the correction becomes arbitrarily selective: for every situation corrected, there seems to exist another similar to it that is left untouched.

CLSM, *supra* note 2, at 632-33.

259. *Id.* at 629.

plete indifference whether people drive on the left or the right; but the state needs to make an "arbitrary" decision about which it is to be. (And after that decision has been made, it is no longer a morally arbitrary matter which side of the road you drive on—not because rules make morality, but because morality requires you to abide by rules that have been enacted to protect life and limb.)²⁶⁰

As for Unger's critique of "objectivism," it too suffers from excessive vagueness. Unger does not, in fact, argue against objectivism; instead he appeals to the work of other scholars:

[T]he insight required to launch the attack against objectivism—the discovery of the indeterminate content of abstract institutional categories like democracy or the market—with its far-reaching subversive implications, was partly authored by a cadre of seemingly harmless and even toadying jurists. Those who live in the temple may delight in the thought that the priests occasionally outdo the prophets.²⁶¹

He informs us further that "[h]istorical study has repeatedly shown that every attempt to find the universal legal language of the democracy and the market revealed the falsehood of the original idea. An increasing part of doctrinal analysis and legal theory has been devoted to containing the subversive implications of this discovery."²⁶²

Unfortunately, *The Critical Legal Studies Movement* contains no footnotes. Unger mentions the names neither of his opponents, nor of the "toadying jurists" on whose works he relies. He does not say who attempted to find "the universal legal language of the democracy and the market"; still less does he attempt to explain what this sonorous phrase means.

Unger's critique of objectivism and formalism, then, does not amount to much—vague arguments backed by sweeping and undocumented assertions about what "historical study has repeatedly shown." As for his positive program for "political and cultural revolution," it succumbs to the same objections as his theory of organic groups. His account of "negative capability" contains a heavy dose of purple prose,²⁶³ but it is no more

260. These points were made long ago by Aristotle. See *supra* note 160. They are also in Aquinas:

By mutual agreement the human will can establish that which is just in matters which of themselves do not conflict with natural justice. It is here that positive right has its place. Hence Aristotle says that the legally just is that which is morally neutral in principle and can be decided in one way or the other, though once decided it remains no longer neutral.

S.T., *supra* note 156, at 2a2ae, Q.57, A.2 (T. Gilby trans. 1975). The passage of Aristotle referred to is most likely NICOMACHEAN ETHICS, *supra* note 135, bk. v, ch. 7, at 1134b20.

261. CLSM, *supra* note 2, at 570.

262. *Id.* at 568.

263.

Negative capability is the practical and spiritual, individual and collective empowerment made

meaningful than his talk about "natural harmony and concrete universality" in *Knowledge and Politics*.²⁶⁴ The same is true of his "vision" of a new society,²⁶⁵ a vision which is supposed to provide the basis for the "reconstruction of the state."²⁶⁶ Naturally, one wonders how these improvements are to be carried out. Unger is ready with a three-point program for reforming the organization of government:

First, the branches of government should be multiplied. To every crucial feature of the social order there should correspond some form and arena of potentially destabilizing and broadly based conflict over the uses of state power. . . . Second, the conflicts among these more numerous branches of government should be settled by principles of priority among branches and of devolution to the electorate. These principles must resolve impasses cleanly and quickly. . . . Third, the programmatic center of government—the party in office—should have a real chance to try out its programs.²⁶⁷

This is a disappointing conclusion. Unger's theoretical work started out with the bold claim that his discoveries place philosophy, sociology, and legal theory on a new foundation. The intellectual daring of his enterprise is admirable, and his writing is occasionally inspired. He is eloquent in deploring the "loss of self" in modern society and effusive in depicting the joys of a more "organic" world; but when you ask how he plans to get from the one state to the other, all he has to offer is lame statements like "the party in office should have a real chance to try out its programs."

So far, I have avoided discussing Unger's politics: My critique has focused on his philosophy and on his scholarship. His concrete recommendations for achieving transcendental wholeness in a community of organic groups have been utopian and silly, but harmless. However, there is evi-

possible by the disentanglement of formative structures. Disentanglement means not permanent instability, but the making of structures that turn the occasions for their reproduction into opportunities for their correction. Disentanglement therefore promises to liberate societies from their blind lurching between protracted stagnation and rare and risky revolution.

Id. at 650.

264. See *supra* text accompanying notes 195–200.

265.

[Our theoretical] ideas generate the animating vision: the conception of a society in which the effacement of the contrast between revolutionary struggles over the established order and routine deals within it has more fully liberated exchange, production, and personal attachments from the vitiating force of dominance and dependence and from the compulsions of an unexamined sense of possibility.

CLSM, *supra* note 2, at 673.

266. This reconstruction is supposed to help achieve what he describes as: the cumulative emancipation of personal relations from the constraints of some background plan of social division and hierarchy, as the recombination of qualities and experiences associated with different social roles, and as the development of an ideal of community no longer reduced to merely the obsessional and stifling counterimage to the quality of practical social life.

Id. at 598.

267. *Id.* at 592–93.

dence that this *style* of thinking about politics can go sour. There is a certain kind of high-flown, Promethean philosophy that yearns for the "transcendent" and the "organic," that pays little attention to practical details, that writes in bombastic prose, and that has on occasion developed embarrassing political links. One thinks of Martin Heidegger, the great German philosopher who publicly supported the Nazis during the Thirties,²⁶⁸ or of Paul DeMan, the Yale deconstructionist who spent the war in Belgium writing anti-Semitic polemics.

Not that all high-flown philosophers have these links: There are numerous exceptions. But, as we shall soon see, Unger calls Heidegger one of the central influences on his theory of "cultural revolution",²⁶⁹ and his philosophical style has more in common with the oracular philosophers than it does with the logical positivists and Anglo-American philosophers whom he deplores.²⁷⁰ So it is at least worth inquiring about the details of his political recommendations. To this topic I now turn.

IV. UNGER'S POLITICS

Unger's three latest books are collectively entitled *Politics: A Work in Constructive Social Theory*.²⁷¹ In discussing these massive volumes, I shall confine my attention to the passages that are most relevant to his politics. I shall attempt to indicate both why I think his theory is mistaken and why I am uneasy about its political drift.

Politics is supposed to provide a new theoretical vision for the left. It is opposed at every level to rigidity, structure, hierarchies, necessity, and roles. It argues that the "liquefaction of established social structures is needed to develop the richness of our subjective life and to advance our attempts to reconcile more fully the enabling conditions of self-assertion."²⁷² Instead of rigidity, Unger's work "seeks the individual and collective empowerment that can result from the creation of institutional arrangements that undermine the forms of dependence and domination, and that do so in part by effacing the contrast between routine and revolution."²⁷³

His theory is intensely practical, and his writings are aimed not only at the world of speculative academia, but at the world of concrete political struggle. In several illuminating passages of autobiography,²⁷⁴ Unger says

268. For a popular account of the recent debate in France and Germany about Heidegger's Nazi past and its implications for modern "Continental" philosophy, see Pasquier, *Le cas Heidegger: entre Hitler et l'humanisme*, L'EXPRESS 46 (Feb. 5, 1988); see also V. FARIAS, HEIDEGGER ET LE NAZISME (1987).

269. See *infra* note 319.

270. See *supra* notes 141, 153.

271. See *supra* note 10.

272. FN, *supra* note 4, at 586.

273. *Id.* at 25.

274. See ST, *supra* note 10, at 67-79; FN, *supra* note 4, at 604-05.

that his book was inspired by his experience as a political activist in the "murky but hopeful politics of Brazil,"²⁷⁵ where he "took up partisan propaganda and intrigue, believing that grassroots popular movements were helpless unless they gained the means with which to participate in the struggle over governmental power."²⁷⁶ While acknowledging that "[n]obody could reasonably hope to ride to power on the crest of a wave of books or to reverse in the library defeats sustained in practical politics," he nevertheless found that "[i]deas had spoiled the contest for power," and says that he "began to feel toward the inherited radical theories a little as Machiavelli had felt toward Christianity"—with the result that he "wanted to write a book to set things straight."²⁷⁷ He notes that "[m]uch in this work can be understood as the consequence of an attempt to enlist the intellectual resources of the North Atlantic world in the service of concerns and commitments more keenly felt elsewhere."²⁷⁸ Arguing that, in a radical sense, "everything is politics,"²⁷⁹ he dreams of a new kind of society, to be born of a combination of the pop culture²⁸⁰ of "the rich, polished, critical and self-critical but also self-consciously disintegrated and Alexandrian culture of social and historical thought that now flourishes in the North Atlantic democracies" and the radical politics of places like Brazil, "a country at the forward edge of the third world, where, at the time of writing, at least some people took seriously the idea that basic institutions, practices, and preconceptions might be reconstructed in ways that did not conform to any established model of social organization."²⁸¹ As he says, "If only the unsettled nations could achieve the institutional forms that might transform a temporary struggle into a lasting structure they would become the testing ground on which society would be more thoroughly cracked open to politics."²⁸²

One of the central notions of Unger's theory is "negative capability"—which he defines as "all the varieties of individual and collective empowerment [that are] connected in one way or another with the mastery the concept of disentanglement or denaturalization describes."²⁸³

275. FN, *supra* note 4, at 604.

276. ST, *supra* note 10, at 75. This quotation, like the quotation *infra* note 319, is written in the second person, but the reference to Unger is clear.

277. *Id.* at 78–79.

278. FN, *supra* note 4, at 604.

279. *Id.* at 3; ST, *supra* note 10, at 151–65.

280. *See infra* note 319.

281. FN, *supra* note 4, at 604.

282. ST, *supra* note 10, at 66.

283. FN, *supra* note 4, at 279. "Disentanglement" is defined as follows:

One aspect of disentanglement is the degree to which a formative context can be challenged in the midst of ordinary social life. A structure is entrenched or naturalized to the extent that it prevents such challenge, and it is disentrenched or denaturalized insofar as it facilitates the challenge. On an equivalent definition, disentanglement implies a shortening of the distance to traverse before our context-preserving activities can become context-transforming activities. It is the relative facility with which we can interrupt the oscillation between the narcoleptic routines and the revolutionary interludes of history and achieve conscious mastery in the midst

Unger's main thesis about "negative capability" is that "[d]isentrenchment of formative contexts provides societies with a range of material and intangible advantages, all the way from the encouragement of the development of productive capabilities to the exercise of a more conscious mastery over social circumstance."²⁸⁴

A considerable part of Unger's work is devoted to illustrating the military advantages of his theory²⁸⁵—to showing that "negative capability" can help to develop "the destructive powers of society."²⁸⁶ He delves into history to establish his thesis (one of his chapters is entitled "Plasticity or Death: Mamluk, Norman, and African Examples"²⁸⁷) and he displays an impressive grasp of late medieval military strategy, as well as of the decisive battles of Chinese and Japanese history.²⁸⁸ But Unger's interest in warfare is not merely antiquarian, and he stresses that his military theory applies even in an age of nuclear weapons: "In the atmosphere created by such a conflict, the shock of mass destruction must be followed—if anything can follow it at all—by efforts to impose the rudiments of order and to disarm the remnants of resistance, in an atmosphere in which all established bonds have been torn violently apart."²⁸⁹ Ungerian "plasticity" is supposed to help a society cope with such tasks.

Given the practical orientation of Unger's theory, it is legitimate that he should discuss military theory, but this part of his argument proves less than he claims. It is uncontroversial that a flexible, innovative military machine will have the edge over an army commanded by the ossified and the unimaginative. But it is also uncontroversial that military success depends upon strict discipline, a clear chain of command, and obedience to orders—in short, upon hierarchy. Too much flexibility can be as fatal as too little; and Unger's arguments, while they convincingly establish the first platitude, do not refute the second.

of civic peace. . . .

The other aspect of disentanglement is the relative disengagement of our practical and passionate dealings from a preexisting structure of roles and hierarchies. . . . It is the lifting of the grid of social division and ranking from our practical and passionate relations to one another.

Id. at 278–79.

284. *Id.* at 279. The passage continues:

In fact, all the varieties of individual and collective empowerment seem to be connected in one way or another with the mastery the concept of disentanglement or denaturalization describes. I call these varieties of empowerment "negative capability" when considering them in relation to the context change that makes them possible. Thus, we may use the poet's turn of phrase to label the empowerment that arises from the denial of whatever in our contexts delivers us over to a fixed scheme of division and hierarchy and to an enforced choice between routine and rebellion.

Id.

285. *See, e.g., id.* at 282–85. As the full title suggests, half of the volume PP is devoted to the "conditions of military success"; in particular, see PP, *supra* note 10, at 153–213.

286. FN, *supra* note 4, at 282. The phrase recurs *id.* at 586, and in PP, *supra* note 10, at 154.

287. PP, *supra* note 10, at 162.

288. *See id.* at 192–206.

289. *Id.* at 156.

Unger provides a practical set of guidelines describing how a political movement devoted to "context-transformation" could come to power, either at the ballot box or in "the violent seizure of the state against a background of revolutionary action."²⁹⁰ He discusses the necessity for "linking grassroots mobilization with the contest for governmental power,"²⁹¹ for "encourag[ing] militant collective self organization,"²⁹² and for not losing the goodwill of the mass of the population. He gives instructions for the recruitment and management of the "cadres, activists, or militants [who] are the people whose relatively privileged social circumstances and intimate psychological identification with the movement enable them to devote themselves to its work." He adds that "[t]hese militants make the movement, and they can break it."²⁹³ As for the revolution itself, the cadres are instructed to draw upon "the irrepressible ability of context-preserving activities to escalate into context-transforming struggle."²⁹⁴ They "must master the practice of the disturbance-maximizing response."²⁹⁵ And, as in much previous revolutionary theory, "[t]he goal of the transformative movement is . . . to exploit the controversies that will inevitably take place: to expand and intensify them and to meet them in ways that also represent steps in the direction of the transformative program."²⁹⁶

This discussion is undoubtedly important from the point of view of revolutionary praxis, and it does contain elements that cannot be found in the writings of Lenin or Gramsci or Trotsky or Mao Zedong, but the innovations lack the precision and plausibility of the earlier theorists. Too often, Unger's ideas take the form of vague directives that, in practical terms, are almost unintelligible.²⁹⁷

290. FN, *supra* note 4, at 432.

291. *Id.* at 407.

292. *Id.*

293. *Id.* at 416.

294. *Id.* at 424.

295. *Id.* at 425.

296. *Id.* at 427.

297. For example, one of Unger's recommendations is preceded by the following reasoning:

At the extreme of escalation of conflict all rigid social relations collapse into the twofold circumstance earlier described. On the one hand, society passes into the Hobbesian conflict of all against all. Each person grabs whatever he can and gives himself to the relentless search for preemptive security. On the other hand, the contest of class and communal interests dissolves into a struggle of parties of opinion, animated by alternative programmatic visions. On the one hand, the man in tooth and claw steps outside the social station: all are equalized by the brutal struggle for defense and self-defense. On the other hand, the successor to the interest-determined agent is the individual as a context-transcendent being whose commitment to certain ideals and opinions is not determined by his membership in particular classes and communities. The strongest assertions of spiritual independence resemble the most brutish contests for material advantage in their power to weaken the constraints that social stations impose upon the will and imagination of the individual. In this circumstance of maximum conflict the perspective of the transformative militant becomes, in part, the standpoint of the theorist and the prophet.

Then comes the practical conclusion:

Thus, at each stage of escalation, the transformative activist must change his attitude toward

Having discussed "The Movement in Quest of Power," Unger turns to a discussion of "The Movement in Power"—of the institutional structure of a society that has been "cracked open to politics." He calls the result a "constitutionalism of permanent mobilization" or an "empowered democracy."²⁹⁸ The "constitutionalism of permanent mobilization" is supposed to keep the entire society liquid and permanently open to the "disentrenchment of formative contexts." Unger says that the traditional separation of powers will have to be abolished (it gets in the way of change);²⁹⁹ and that a variety of political and economic reforms will have to be introduced, of which the most novel and interesting is a system of "destabilization rights"—rights which "protect the citizen's interest in breaking open the large-scale organizations or the extended areas of social practice that remain closed to the destabilizing effects of ordinary conflict and thereby sustain insulated hierarchies of power and advantage."³⁰⁰ These destabilization rights are to be supported by the state, perhaps even a special branch of government. Governmental action to disrupt and reconstruct the overprotected and subjugation-producing arrangements may be needed not only because the people in charge of the organizations or practices at issue may be the biggest beneficiaries of the insulated hierarchies but because there may be no people visibly in charge. Such a situation is especially likely to occur when the claimant seeks to disrupt an area of social practice rather than a discrete organization.³⁰¹

Unger's new theory seems to me to suffer from precisely the same afflictions as his old theory of "organic groups." That is to say, it is excessively vague, and it does not convincingly answer any of the obvious questions about life under a "constitutionalism of permanent mobilization." For instance, Unger does not give any clear indication of which "social practices" are open to destabilization, of which roles are "up for grabs." He talks about the "collective interest in ensuring that *all* institutions and practices can be criticized and revised";³⁰² but this clearly goes too far. He cannot mean to destabilize the practice of discouraging rape, the practice of preserving works of art from destruction, or even the practice of reliably delivering the mail. But he gives no standard for deciding which practices ought to be left intact and which are subject to "role defiance and role jumbling."³⁰³ Nor does he say how far "trashing the script"³⁰⁴ is to

the established system of group interests: first finding his allies within the constraints this system imposes and then helping to overthrow such constraints.

Id. at 422-23. It is hard to see what this vague directive means or what guidance it could offer to the militant in the field of combat.

298. *Id.* at 462.

299. *Id.* at 455.

300. *Id.* at 530.

301. *Id.* at 531.

302. *Id.* at 530 (emphasis added).

303. See *infra* text accompanying note 315.

304. FN, *supra* note 4, at 319.

proceed. These problems are not trivial: It makes a difference whether the roles you envision "jumbling" are merely those of halfback and quarterback or those of halfback and mathematician.

Moreover, Unger's moral psychology seems based on faulty observation, on the assumption that people function best in times of chaos. It is far from clear that "jumbling" and "destabilizing" and "liquefaction" and "disturbance-maximizing" are attractive ideals, either for the individual or for society. Life is unstable enough as it is. We already have AIDS, nuclear weapons, atomic power plants, political terrorists, auto wrecks, and airline crashes—not to mention cancer and heart attacks. Do we really need a Department of Destabilization as well? Unger wants "something of the quality of the hot moments of social life—the periods of accelerated collective mobilization—to pass into the cold moments—the ordinary experience of institutionalized social existence."³⁰⁵ Those who long for the hot experience of "accelerated collective mobilization" ought to contemplate what warfare and revolution have done for the quality of life in the jumbled city of Beirut.

The problem here affects every part of Unger's theory. Just as a series of one-night stands does not add up to a worthwhile personal relationship, just as a series of part-time jobs does not add up to a worthwhile career, so a series of disruptions by the Bureau of Liquefaction does not add up to a worthwhile scheme of human association. Unger does not realize that human society and human lives have to be patiently constructed, and for all his emphasis on creativity, he has not noticed that the great creative intellects have taken stability where they could get it.³⁰⁶ This point is not confined to Einstein or Kant or Milton. An ordinary human being who wants to live a tolerable and productive life has no more reason to embrace Unger's ideals than an architect has to join the Society for the Propagation of Earthquakes.

What is attractive in Unger's theory—the idea of self-development and of the individual's power to create new roles—seems to me already well catered for in traditional liberalism, and with far greater realism in its

305. *Id.* at 433.

306. Schopenhauer made the following observation on this subject:

Kant wrote an essay on the *living forces*; but I would like to write a dirge and threnode thereon, for their excessively frequent use in knocking, hammering, and banging has been throughout my life a daily torment to me. There are certainly those, quite a number in fact, who smile at such things because they are not sensitive to noise. Yet they are the very people who are also not sensitive to arguments, ideas, poetry, and works of art, in short, to mental impressions of every kind; for this is due to the toughness and solid texture of their brain substance. On the other hand, in the biographies or other accounts of the personal statements of almost all great authors, such as Kant, Goethe, Lichtenberg, Jean Paul, I find complaints about the torture which thinkers have to endure from noise. . . . [E]minent minds have always thoroughly disliked every kind of disturbance, interruption and diversion, but above all the violent disturbance caused by din and noise.

2 A. SCHOPENHAUER, *PARERGA AND PARALIPOMENA* 642 (E. Payne trans. 1974).

psychological underpinnings—in Mill, say, or von Humboldt, or in the final third of *A Theory of Justice*.³⁰⁷

Moreover, Unger has no plausible institutional account of how his professional destabilizers are to be kept under control. If they are to make radical changes in people's lives, they will need a considerable degree of coercive power, especially if they have as large a charter as Unger seems prepared to give them. But what is to keep them from gross invasions of personal liberties—particularly if, like Unger, you want to do away with the separation of powers? To be sure, Unger does allow for a set of “immunity rights” to personal security and to welfare entitlements. He does not, however, allow property rights, and he says that the immunity rights are to “impose a minimal rigidity upon the organization of society.”³⁰⁸ But merely expressing the pious hope that rights will be respected is not enough—not, that is, for a theory that claims to be about practical politics. Mao's constitution, like Stalin's, guaranteed freedom of speech, freedom of religion, freedom of the press; but there were no institutional arrangements to back up the guarantees, and in practice the government could do as it pleased.³⁰⁹

Unger's answer to this problem is in effect to say that the citizens will get used to the new system, and that they (or their children) will eventually revise their conception of personal security:

[I]f the ideals and understanding underlying this institutional program hold up, people will have reason to change their views of what essential security consists in. They and, if not they, their children will discover that the security that matters does not require the maintenance of a narrowly defined mode of life. They reach this conclusion in part by finding senses and varieties of security compatible with an ever greater jumbling up of distinct styles of life and in part by awakening to a conception of the personality as both dependent upon context and strengthened through context smashing.³¹⁰

I do not find this answer even remotely plausible. As in his earlier theory that we could “develop the species nature in concrete universality” if we were to live in “communities of life” and attempt “to discover the organic unity in each others' personalities,”³¹¹ Unger, rather than confronting the difficulties that beset his theory, takes refuge in pious hopes and empty phrases.

307. See J. RAWLS, *supra* note 86, at 520–29. I note in passing that, once again, Unger has nothing to say about “the American moralist, J. Rawls.” See *supra* notes 226–32 and accompanying text.

308. FN, *supra* note 4, at 527.

309. See, e.g., R. EDWARDS, L. HENKIN & A. NATHAN, *HUMAN RIGHTS IN CONTEMPORARY CHINA* 102–09 (1986).

310. FN, *supra* note 4, at 514–15.

311. See *supra* notes 184–232 and accompanying text.

I now come to the most revealing part of Unger's new work, his "program for the transformation of personal relations."³¹² He explains that:

The authority of the radical project lies in its vision of the individual and collective empowerment we may achieve by cumulatively loosening the grip of rigid roles, hierarchies, and conventions upon our experiments in practical or passionate association. We can lift the burden of dependence and depersonalization, in part by changing the character of our relations, as individuals and as collectivities, to the institutional and imaginative frameworks of social life.³¹³

Unger then says—this after twelve years and seven books totalling 2,133 pages—that he is going to "suggest the outline of a vision that needs to be worked out later."³¹⁴ (One might think that it is a bit late in the day for this sort of thing—that if Unger intends his theories to be used in practical grassroots revolutionary politics, he ought first to supply some details about the society he envisions. But we have seen this problem before.)

Unger's "vision" is of a "cultural-revolutionary attack on rigid roles"; he calls it "role defiance and role jumbling."³¹⁵ He explains:

The roles that deserve to be targets of this cultural-revolutionary subversion are, above all, those that mark a place within a preestablished scheme of class, communal, or gender divisions Specialized work roles are neither inherently suitable nor intrinsically unsuitable as subjects for role defiance and role jumbling. The more the technical and the social divisions of labor present themselves in everyday life as a rigid grid of functional allocations, the more they deserve to be smashed up at the microlevel of cultural-revolutionary defiance and incongruity as well as at the macrolevel of institutional innovation.³¹⁶

Having thus described his "cultural-revolutionary program," Unger proceeds to list "some of the truncated but rich materials that lie at hand, ready to assist us in our efforts to develop this part of our programmatic ideas and of our transformative practice."³¹⁷ These materials are an eclectic blend of two elements: international pop culture and the writings of "third world ultra-leftists."³¹⁸ The first element is typified by Unger's apparently serious endnote (the last in his book) to the *TV Guide*.³¹⁹ As for

312. FN, *supra* note 4, at 556.

313. *Id.* at 558.

314. *Id.* at 560.

315. *Id.* at 563.

316. *Id.* at 564.

317. *Id.* at 560.

318. *Id.* at 630-31.

319. Unger says that a major inspiration for his theory of cultural revolution is the worldwide pop culture. One way to understand its cultural-revolutionary message is to watch and compare television soap operas in different countries. These melodramas express the

the element of ultra-leftism, one is not surprised, after all the talk of revolutionary struggle and of the "constitutionalism of permanent mobilization," to learn that one of the "truncated but rich materials" for Unger's theory is the Chinese Cultural Revolution. He particularly admires the Maoist technique of "criticism and self-criticism": "In the hands of its most radical practitioners, it became part of an attempt to chasten and, if possible, to destroy the established bureaucracies of party and state and to produce a new man or woman, new above all in their attitude toward authority."³²⁰ This technique, one gathers, was designed to loosen the grip of rigid hierarchies and to encourage new styles of "practical or passionate association." It worked as follows:

The victim now appeared often as the mere pretext for the reenactment of a collective denunciation of every trace that the inherited contrast of masses and elites had imprinted upon the style of direct personal relations. Because that contrast had amounted to a hierarchy of value as well as to a system of control, its subversion had all the seductive and liberating force of an attack upon the distinction between the pure and the impure.³²¹

It is very important to keep in view what Unger is talking about and not to be swept away by his jargon—not to think that he is being "philosophical" or "deep" when he is merely being vague. (As Wittgenstein used to say, "Don't treat your commonsense like an umbrella. When you come into a room to philosophize, don't leave it outside, but bring it in with you."³²²).

The Cultural Revolution began as a campaign against the "four olds" (old ideas, old culture, old customs, old habits).³²³ Let us consider first its contributions to culture. In Tibet, the Red Guards began by demolishing the Buddhist monasteries; of the several thousand temples that existed

anxieties and longings of particular classes and communities in particular societies. They also rehearse the ancient, sentimentalized formulas of the Christian and pagan romance. But both the distinctive, local concerns and the familiar romantic tropes come out transformed by their combination with role jumbling and role defiance. See *TV Guide*.

Id. at 631. Other "inspirations" mentioned in the endnote are the middle works of Heidegger and Sartre, Hegel's *Phenomenology of Mind*, and Kierkegaard's *Either/Or*. *Id.* at 630. Unger adds that "[o]nly in the efforts of contemporary feminist theorists and in the occasional writings of third world ultra-leftists have I found a shared discourse that develops the speculative themes of these nineteenth and twentieth century philosophers into the beginnings of a cultural-revolutionary program." *Id.* at 631. He also lists Proust, Joyce, Musil, Virginia Woolf, Clarice Lispector, and Chung-shu Ch'ien as influences on his thought. *Id.* And in the text he mentions Gandhi's "method of pedagogic defilement" as an example of a cultural-revolutionary attack on the "contrast . . . between the pure and the impure." *Id.* at 568–69.

320. *Id.*

321. *Id.*

322. L. WITTGENSTEIN, *LECTURES ON THE FOUNDATIONS OF MATHEMATICS* 68 (Diamond ed. 1975).

323. Y. DAIYUN, *TO THE STORM* 394 (1985). I have relied on the books by Daiyun and Terzani, see *infra* note 324, because, as a Chinese Communist and a former Maoist, respectively, their works seem less likely to be ideologically biased.

before the Cultural Revolution, approximately a dozen still stand.³²⁴ The situation in China was little better. Most of the architecture of Imperial Peking was razed; little of the ancient city now remains.³²⁵ As for personal relations, religion was proscribed; Buddhist nuns and monks were forced to marry or to participate in the destruction of their temples.³²⁶ The keeping of pets was considered a "bourgeois" habit, and the pets themselves were denounced as parasites and killed.³²⁷

The Maoist practice of "criticism and self-criticism" seems to have amounted to little more than the mindless repetition of standardized "confessions" of class crimes.³²⁸ Many "enemies of the people" committed suicide, or perished in concentration camps, or were simply killed.³²⁹

324. There are many accounts of these events. The sources disagree about the exact numbers, largely because there was no accurate count of the Tibetan monasteries that existed before the Cultural Revolution. Harrer puts the number at 3,800, of which 13 survive, H. HARRER, *RETURN TO TIBET* 46 (1984); Terzani, at 2,464, of which 10 survive, T. TERZANI, *BEHIND THE FORBIDDEN DOOR* 145 (1985); van Praag at 6,000, of which two dozen survive, M. VAN WALT VAN PRAAG, *THE STATUS OF TIBET* xv (1987). For more eyewitness accounts, see D. NORBU, *RED STAR OVER TIBET* (1987); R. TARING, *DAUGHTER OF TIBET* (1970). It is not plausible to argue that this destruction was undertaken for the benefit of the Tibetan masses. Many of the treasures could have been sold on the international art market, and the proceeds used to feed the populace. Nor is it plausible to claim that China was threatened by the Tibetans—a society of devout Buddhists, whom the Chinese outnumbered by more than a hundred to one.

325. For an account of the destruction of Peking, see T. TERZANI, *supra* note 324, at 22–59. Terzani, an Italian journalist and a former Maoist, spent several years in China:

[M]any [in my generation] were caught in the illusion projected by Mao's China. If our world was old and imperfect, if past hopes had turned into great delusions, here was a new chance. . . .

Looking for the unique form of socialism that had allegedly been built there, I found only the ruins of an utterly failed experiment. Looking for the new culture that had supposedly sprung out of the revolution, I came across only the stumps of the old culture that had been methodically, systematically destroyed in the process.

Among the many doors Deng Xiaoping had opened were those of the concentration camps and reeducation schools to which some 20 million intellectuals had been sent. . . .

It had been inspiring, within the protected atmosphere of Columbia University in New York, to read Mao's slogans, such as "Do not cut off people's heads for, unlike cabbages, they do not grow again." But it was a different matter to discover that, behind the facade of propaganda, heads had rolled, people had been tortured, and that, at the end of the Great Proletarian Cultural Revolution, China was like a barren desert full of dispirited, disoriented people.

Id. at 10.

326. See, e.g., *id.* at 147.

327. *Id.* at 49–50. Terzani records that "people in Peking thought that dogs were eliminated because the secret police did not want to be bothered by their barking while going around at night to arrest spies, landlords and counter-revolutionaries." In Tibet, the Red Guards began the Cultural Revolution by killing all the dogs—by electrocution, by hanging, or by forcing Tibetans to stone them to death. (This last method had a special twist. Devout Buddhists believe in reincarnation and are forbidden from killing any living thing, so this method had the subtle advantage of attacking their religion as well as their pets.) Accounts of the killing of the dogs occur repeatedly in the Tibetan literature. See *id.* at 146; H. HARRER, *supra* note 324, at 46.

328. Y. DAIYUN, *supra* note 323, at 184; see T. TERZANI, *supra* note 324, at 248–62.

329. Daiyun has this account:

Filled with passion for the new movement and eager to conduct the struggle against their own enemies, they had forced the president of their school, famous as one of the first Chinese women to be educated, to climb through a narrow underground cement drainpipe. When she finally emerged, they had brutally beaten her to death. Most of the girls at this middle school were from high-ranking intellectuals' families and thus, I guessed sadly, felt compelled to demonstrate their commitment to revolutionary goals.

Y. DAIYUN, *supra* note 323, at 183. Nor was the suffering confined to China proper. The following

Maoist ideas did not work any better outside of China and Tibet. Mao's ally and disciple Pol Pot returned to Cambodia from Peking in 1966, the year of the outbreak of the Cultural Revolution.³³⁰ His Khmer Rouge attempted to reform the personal relations of the Cambodians along Maoist lines.³³¹ A third of the population died in the process—somewhere between one and two million people.³³² In Tibet, with a population of six million, more than one million people died under the Chinese occupation.³³³ The number of deaths in China proper is impossible to determine: Reliable figures do not exist.

It may be objected that it is unfair to Unger to bring up the details of the Cultural Revolution—that I should try to see his theory and this period of Chinese history in the best possible light. But this objection is unsound. In the first place, it would insulate any theory from criticism, for almost anything can be labeled a detail—as when Jean-Marie LePen, the leader of the French National Front, brushed aside the use of the gas chambers in Hitler's Germany as a “detail of World War II.” Second, Unger himself offers the activities of the Red Guards as a “truncated but rich” precedent for his “constitutionalism of permanent mobilization”;³³⁴

account by a Tibetan refugee is typical:

I went to see the village close to Kambum where I was born. It was very sad; more than twenty of my relatives were dead. Only one cousin was still living, and I visited her home and met her child. When I asked her what happened to her father, she replied, “He is dead.” When I asked her how and where, she did not know. Their farm had been taken and their house torn down. Many of the people I talked with had such sad stories. When I asked them about their life now, they would just cry; they had no words. Others told me how their families and friends were killed, imprisoned, sent to labor camps, maimed and crippled. Some were beaten so severely over and over again with clubs and boards that they lost their hearing or sight. Others had bodies that were bent or twisted from being forced to pull heavy carts, like animals. Many were compelled to stand in public places while people were forced to pull their hair in “struggle” (thamzing) sessions. Thousands died from exposure and starvation, unable to survive on the worms, garbage, dead dog bones, pig food etc. which hunger drove them to eat.

T. NORBU, *TIBET IS MY COUNTRY* 273–74 (1986).

330. See B. KIERNAN, *HOW POL POT CAME TO POWER* viii–xii, 222–24 (1985). Shapley notes Pol Pot's sympathy for Chinese Communism and suggests that Mao's “Great Leap Forward” was the model for Pol Pot's social reforms. R. SHAPLEY, *BITTER VICTORY* 222–24 (1986). The influence on the Cambodian Communists of Maoist ideology is well attested in, e.g., H. NGOR, *SURVIVING THE KILLING FIELDS* 201 (1988):

[E]verything about the Khmer Rouge was alien, from China. They borrowed their ideology from Mao Tse-tung, like the concept of the great leap forward. Sending the intellectuals to the countryside to learn from the peasants was an idea of the Chinese Cultural Revolution. Their AK-47s and their olive green caps and their trucks were Chinese. Even the music they played from the loudspeakers was Chinese, with Khmer words.

This account is corroborated by Shawcross, *The Terrible Story that Nobody Wanted to Hear*, *Times* (London), Mar. 27, 1988, at G-5.

331. Pol Pot's revolution aimed to sever family relations, B. KIERNAN, *supra* note 330, at 338, to abolish property, *id.* at 368–71, to abolish markets, and to compel communal eating, *id.* at 415–16.

332. Kiernan puts the figure at 1.5 million, *id.* at v; Shapley at somewhere between one million and two million, R. SHAPLEY, *supra* note 330, at 198.

333. See Rosenthal, *Selling Out Tibet*, *N.Y. Times*, Jan. 8, 1988, at A31, col. 6 (citing report of U.S. Congress); the same figure is given by M. VAN WALT VAN PRAAG, *supra* note 324, at xv. It should be noted that these figures apply to the entire period since the Chinese invasion in 1950, and not to the Cultural Revolution alone.

334. FN, *supra* note 4, at 462.

he thereby invites inspection of their conduct. Unfortunately, even the most sympathetic reading of the behavior of the Red Guards—a reading that ignores the bludgeonings and concentrates entirely on the aspect of “criticism and self-criticism”—will find it hard to distinguish between the forced confessions of the Cultural Revolution and the forced confessions of the Stalin show trials,³³⁵ or between the destruction of Buddhist monasteries and the destruction of Jewish synagogues. It is hard to detect in the eyewitness accounts anything of “the seductive and liberating force of an attack upon the distinction between the pure and the impure.”³³⁶

My general unease about the political drift of Unger’s political romanticism should now be apparent. The twentieth century has suffered a great deal of destructiveness in the name of incoherent philosophical “visions.” Various leaders have sought to bring about the Kingdom of Heaven on Earth—after first destroying the obstacles that stood in the way. They have told their followers to crush: the counter-revolutionary Ukrainian peasants; the Jews; the monasteries of Tibet; the “four olds”; or the urban population of Cambodia. In each case, a glorious future—a “new man or woman”—was to be the result.³³⁷ In each case, the offending objects were removed, but the expected glories failed to appear.

These political experiments share certain similarities. Let us begin with the least important. All were militant. All were preoccupied with questions of military effectiveness. All thought earnestly about the strategy of political revolution. All were determined to seize political power—peacefully if possible, violently if need be. All had a demonology and used colorful epithets (vampires, running dogs, beetles, CIA spies, toads, vipers) to describe their enemies.

It is unfortunate but not in itself worrying that Unger’s work should share these characteristics. His vocabulary of abuse (toadying jurists, spiders, slavery, prison guards, poison, groveling subjects) may be exaggerated, but it is no worse than the rhetoric of the American revolutionar-

335.

Violence, brutality, tragedy became commonplace at Beida that August. Every day and every night small groups of four or five would be picked up to be criticized in their departments and then paraded through the campus to “accept struggle from the masses.” The targets of these “mass ground struggle sessions” would always be forced to balance on one of the high, narrow dining hall benches and told to answer questions. If the answers were considered unsatisfactory, the person’s head would be pushed down or he would be instructed to bend low or he would be held in the agonizing jet plane position, continually begging the people’s pardon for his past offenses.

Y. DAIYUN, *supra* note 323, at 180–81.

336. FN, *supra* note 4, at 569.

337. J. NORBU, *WARRIORS OF TIBET* 103 (1979). One sceptical Tibetan was assured by a Chinese Maoist, “It is only common sense to realize that after the Third World War, the whole world will embrace socialism. After that there will be no more wars and no more governments. Even the Communist Party will be disbanded and we will live in a world of peace and plenty.” *Id.*

ies;³³⁸ as for military strategy and revolutionary subversion, they can be put to good uses as well as bad.

But the movements I mentioned share a second set of characteristics, all, broadly speaking, involving the lack of a sense of reality. All the movements were based on grandiose theories. All were messianic. All appealed to the emotions rather than to reason. All offered a "vision" of an ideal new society. All believed that the "new man" was just around the historical corner—at most a generation or two away. All claimed to be "scientific," but all were based upon theories that can only be regarded as the work of crackpots: Stalin rejected relativity theory and orthodox genetics because of their "bourgeois" origins,³³⁹ and Hitler did not care in the least that his theory of Aryan racial superiority was without anthropological foundation. There was nothing particularly profound about their theories, nothing particularly worthy of philosophical refutation. The intellectual work was based on faulty scholarship and shoddy arguments, and the practical disasters are directly attributable to this source.³⁴⁰ The utopian plans were straightforwardly unworkable. For the most part, the problems should have been obvious to common sense.

The combination of these two elements—militancy and the lack of a sense of reality—is an unpromising foundation for practical politics. Silly theories can be forgiven; so can a fascination with military strategy. But when a political leader asks his followers to kill for nonsense, he is unlikely to better the lot of humanity at large. There are many examples, and the logic behind them is not difficult to follow. The leader will never get his "new man and woman," but he will certainly get resistance, real or imaginary, from the "parasites" and "class enemies." And in his rage against reality, he is more likely to attempt to exterminate the opposition than to question the premises of his own theory. It may perhaps be logically possible to combine these two elements without courting disaster; but history offers no example.

If Unger is to avoid this trap, if he is to build a plausible political theory on the dubious precedent of the Chinese Cultural Revolution, he ought to proceed with a certain degree of scholarly care, both towards the events of the past and towards his hopes for the future. In particular, he ought explicitly to acknowledge the destructiveness of the Cultural Revolution; he ought to explain, in precise and unambiguous terms, why

338. See generally B. BAILYN, *THE ORDEAL OF THOMAS HUTCHINSON* (1974).

339. Kamenka, *Communism, Philosophy Under*, in 2 *ENCYCLOPEDIA OF PHILOSOPHY* 166 (P. Edwards ed. 1967).

340. I do not deny that there are differences between these ideologies, nor do I deny that they have inflicted different quantities of suffering. It is of course worse to kill two million people than one million; but the point I am trying to make has more to do with psychology than with statistics. Somebody whose political theory can accommodate the deaths of one million people is unlikely to flinch at six or twenty; and anybody who can turn a blind eye to the extermination of Tibetan culture is unlikely to be moved by the extermination of anything.

the Maoist experiment went awry; and he ought to give a persuasive account of the safeguards he intends to introduce so that his own theory of "role jumbling" and "context smashing" will not lead to similar destructiveness.

This Unger does not do. Of his safeguards I have already spoken; to his historical analysis of the Cultural Revolution I now turn.

Unger does indeed grant that the Revolution was a failure, but his reasoning seems singularly misplaced. To his mind, the Red Guards focused their attentions too narrowly on the contrast between masses and elites: "[A] single-minded focus on these concerns to the exclusion of others narrows the front on which cultural revolution can be staged and leaves untouched much of the structure of social life."³⁴¹ The trouble with the Cultural Revolution is not that it was a moral and economic disaster, not that it was an experiment that could not possibly have worked, but that it was "truncated," that it challenged too little of the "established structure of social life"—not that it went too far, but that it did not go far enough. This striking thesis, contained in his discussion of "role defiance and role jumbling," is supported by another long passage devoted entirely to analyzing the history of the Cultural Revolution and the reasons for its failure. Unger calls the Revolution "a possible breakthrough into a different form of industrial society," but regrets that the political leaders of China were "halfhearted and confused" in implementing it. He notes that under the "political intensification" brought about by the Red Guards, "the boundaries of what could be done to people, who could be reached, and what could be attacked began to fall apart"—which could be interpreted as a rebuke, were it not that the entire passage takes the side of the innovative Red Guards against their "halfhearted" superiors. He describes the technique of "criticism and self-criticism" as "a subtle psychology of the way an individual can be made to render himself transparent to his fellows." His chief regret is that the party bureaucrats called the interesting experiment to a halt—that "not all surprises would be allowed to happen"—that "[t]he economy remained as if subject to built-in forces but

341. The full comment on "elites and masses" reads as follows:

The crudest allocations of personal role, or the most rigid conceptions of the style of association suitable to each domain of social life, could be accepted so long as they did not overtly involve the feared contrast between elite and mass.

.....

The ideas, attitudes, and power relations implicated in the contrasts between mass and elite or the pure and the impure do indeed act as a bar to the realization of the cultural-revolutionary program. But the single-minded focus on these concerns to the exclusion of others narrows the front on which cultural revolution can be staged and leaves untouched much of the established structure of social life. Stubborn fighting over the mastery of the state and the organization of the economy often occurs side by side with the rebirth of styles of personal association characteristic of an earlier, destroyed social order.

FN, *supra* note 4, at 569–70.

only because, at the moment of opportunity, its two-hearted political enemies had not dared invade it in the name of possibilities it excluded."³⁴²

342. Unger's quotation on the Cultural Revolution is as follows: "The Chinese Cultural Revolution offers a contrasting case [to the Soviet Union]: the failure to achieve in fact what at one point had looked like a possible breakthrough into a different form of industrial society strengthened by the very forms of production and control that were initially jeopardized." (As we shall soon see, Unger identifies the time of the possible breakthrough with the high-point of Red Guard activity.)

The Chinese Cultural Revolution highlights the difficulties encountered in the course of [a] . . . confused and halfhearted attempt to establish a stabilized order capable of perpetuating a higher measure of collective mobilization and context-challenging conflict in the midst of everyday social life. . . .

Consider the basic march of events. The first stage was one in which Mao and his faction attempted to execute an internal coup within the elites. . . . Even at its most radical, however, this commitment seems never to have allowed for the possibility of reorganizing power on a radically new basis and institutionalizing popular participation on an unprecedented scale.

The second stage of the events started when the faction that had begun the quarrel within the elites attempted to enlist broader mass support in order to do its will. . . . The call for mass agitation became progressively more shrill, as befitted the confused, halfhearted assault on bureaucratic power. The popular response, however, soon began to exceed the expectations of its architects. Its major source of support lay in the dispossessed (such as the temporary and contract workers—the Chinese underclass) and in the youth that had not yet acquired the knack of discounting the value of words. Its centers were a few cities. Its major forms of action were the mass demonstration and the transformation of self-criticism techniques. Self-criticism had been a subtle method for reasserting consensus and control through contained conflict—the very image of routine politics, drawn into the microcosm of the enterprise, the work gang, or the neighborhood and supplemented with a subtle psychology of the way an individual can be made to render himself transparent to his fellows.

At this stage, one should recall what these "subtle methods" amounted to in practice: Unger is talking about the height of the Cultural Revolution, the time of maximum chaos, when the Tibetan monasteries were being destroyed and schoolteachers bludgeoned to death. His thesis is that the Red Guards were reined in before their interesting experiment could turn against the bureaucrats and the established social structures. The passage continues:

The fundamentals of power at every level would remain out of bounds to conflict and complaint. In the hands of the practicing cultural revolutionaries, however, self criticism became a device for humiliating alleged enemies and bureaucratic superiors; the boundaries of what could be done to people, who could be reached, and what could be attacked began to fall apart.

One might hope that Unger would register disapproval of these Red Guard innovations, but the continuation of the passage makes it clear whose side he is on:

This evolution, a paradigm of the way the very instruments of routine politics may turn into the agencies of political intensification, was symbolized by the assault on Liu Shao-chi, at once leader of the party elites and consummate theorist of the mainstream tradition of self-criticism. The widening conflict forced the politicians behind the Cultural Revolution and their allies in the army to choose between two options, which presented themselves in ever starker and more dangerous contrast as agitation grew. One option was to support the insurrectional movement unequivocally, attempting to lead its temper. The other was to reassert control so that the basic structure of party leadership at the top levels and managerial authority at the lower ones would not be destroyed; the popular tumults would then not depart too far from the purpose originally meant for them: that they should serve as a weapon of intimidation in an elite conflict. Not all surprises would be allowed to happen.

This reassertion of control was the death of the Cultural Revolution:

The definitive choice of the latter option inaugurated a third stage: the effort to bring events under control once again . . . [T]he more radical factions among the political elites lost any independent channel by which to communicate with their potential supporters below. The extent of the loss became clear only later. The nonarmy radicals found themselves reduced to the condition of favorites at court with a tenure dependent on the survival of their master.

Unger does not mention the destructiveness of the Red Guards; nor does he explain what constraints they were under. (The eyewitness accounts do not sound as though the constraints could have been very severe.) He brushes aside the question whether Mao's cultural innovations might have worked, and simply asserts that the experiment never was properly tested:

So, once the assertion of control had taken place, the Cultural Revolution as a mass movement was lost. . . . [Y]ou do not have to believe that anyone in the Cultural Revolution—elites or

This argument is wildly unpersuasive, and for reasons that go to the heart of Unger's theory. Unger, recall, is trying to sell the ideals of "context smashing" and "role jumbling" and "disentrenchment," ideals which he finds partially exemplified in the Chinese Cultural Revolution. Now, it seems to many observers (including the present Communist leaders of China) that these ideals themselves are precisely what was amiss with the Cultural Revolution—that urging the masses to smash the contexts of social existence inevitably leads to chaos, and that, if the Red Guards had not been reined in, the disaster would have been even worse. Certainly there is ample evidence for this view: The Maoist experiment has been tried in China, Tibet, and Cambodia, and the results have not been felicitous. But Unger dissents from this view. He believes in the context-smashing ideal and regrets that "not all surprises were allowed to happen." Perhaps he is right. But at the least he should say what surprises he has in mind and offer an argument to show that a more zealous pursuit of his ideals would have produced the "new man and woman" for which he yearns. As matters stand, he is merely brushing aside the empirical evidence against his theory. (I note in passing that, for all his praise of the Red Guards, Unger has nothing to say about the suffering caused by their experiments in human relations, nothing to say about the cultural destruction: These matters are passed over in silence.)

Similar problems with Unger's ideals are evident in his long discussion of "The Spirit of the Constitution." Unger describes a "typical example" of the esthetic presentation of the ideals of "empowerment" and "context smashing"—ideals that his constitution is meant to serve. The example is Abel Gance's 1934 film about Napoleon:

masses—was close to coming up with workable alternatives, or even that such plans of association as they might have found would have represented a change for the better. The point is that no alternatives were really put to the test and that the collective process of searching for them was paralyzed close to the start.

Here, then is a case of failure in breakthrough toward an alternative mode of socialism and industrialism

. . . .

A much more immediate factor in the outcome, however, was the illusion of an elite faction that thought it could have it both ways with mass mobilization, that it could use the agitated populace at will as a club with which to beat its enemies at the center of power, and yet keep this mass following from posing any serious challenge to the basic structure of power. . . .

Just as the liberal identification of freedom and efficiency with a very detailed system of vested rights played a crucial part in the nineteenth-century American events discussed in an earlier section, so too the equation of the impersonal needs of organized power and national development with the maintenance of a concrete system of vested rights performed an equally important role in this episode of twentieth-century Chinese history. But whereas the American belief was largely a mistake that helped cause the result it did not describe, the Chinese belief more truly described a situation. This truth, however, had been brought into being by an illusion, the illusion of those who tried to play fast and loose with mass mobilization. The economy remained as if subject to built-in forces but only because, at the moment of opportunity, its two-hearted political enemies had not dared invade it in the name of possibilities it excluded.

Id. at 241-46.

There he is—the great hero, the man of will, embodying to the highest degree the rage of transcendence and the transformative vocation. He refuses to take the established contexts of action for granted and repeatedly smashes, or threatens to smash, them. He combines an acute insight into the opportunities and dangers of his situation with an ability to imagine possibilities that the logic of this situation excludes. He conducts himself within the established world as if he possessed secret knowledge, and indeed he does.

The context smasher puts himself into situations that others would regard as ridiculous and demeaning (e.g., Napoleon's awkward and self-deceiving pursuit of the philanderer Josephine). He doesn't feel tainted; he just doesn't give a damn. For one thing, his efforts are all turned toward his great enterprise and away from the petty ambitions and fears of ordinary life. For another thing, he transvalues the hierarchies of his contemporaries: his greater freedom from the context enables him to judge by another hierarchy of value. Therefore, he appears to be shameless when he is in fact guided by an alternative moral vision. This vision does not merely replace one hierarchy of values by another; it partly liberates moral judgment from the constraining effect of any clearly defined hierarchy.³⁴³

The tone of this passage is already disturbing, not least because the triumph-of-the-will theme reminds one of several other European political leaders, all of whom were in power in 1934. But the passage continues:

Then there are the piercing eyes, the intense, wild expression that the man of will shares with all the secondary characters and even the ordinary mobs drawn into the momentous events he commands. It reminds you of those books of nineteenth- and early twentieth century photographs of Chinese, Japanese, and Russians. The subject looks into the camera with the same crazed expression. Perhaps his disquiet comes from the unfamiliarity of the camera, which seems to puncture the shell of social routine and produce a moment of dazed incongruity in which the familiar limits and aims of action fall away and deeper, wordless concerns rise up. . . . The fierce-eyed subjects, amid their ornate or ragged trivia, look as if they had seen beyond the photographer and their circumstance to a reality previously hidden from their eyes. They had seen something of the God who says, No man sees me and lives.³⁴⁴

Unger does not say precisely which photographs evoke this response in himself; but they certainly sound very interesting. I have already mentioned what I find disquieting about the anti-reality approach to politics, and merely note its presence as the passage continues:

343. *Id.* at 581–82.

344. *Id.* at 582.

Similarly, in the Gance film, the actors looked at the moving camera as the exotic photography subjects had looked at the still one. The revolutionary interlude replaced with advantage the Western shock. All the way from the transcendent man of will to the agitated crowds, the participants seem in touch with another, higher reality, with the things you see and feel when one conditional world has been destroyed and another not yet emerged, as if this crack in the finite provided a glimpse into the absolute. At any moment, this context-breaking brio might be converted into an idolatrous delusion: people might treat their particular historical endeavors as if these undertakings were themselves the absolute. Such were the risks and complications of a more radiant vitality.³⁴⁵

The rhetoric in this passage is out of control—overblown, if it is meant as a film review. One must wonder what it is doing in a book entitled *Politics*. The answer is that Unger's discussion is not about the aesthetics of film or about the historical Napoleon, but about the dictators of the 1930's and the "agitated crowds" that followed them.³⁴⁶

Unger's attitude is certainly not one of undiluted approval. The entire passage is entitled "empowerment imagined and perverted."³⁴⁷ The film, he says, "shows the extraordinary force of this longing [for the empowerment ideal] and the perverse forms it assumes when left unrealized in the ordinary lives of ordinary men and women."³⁴⁸ Moreover, "[t]hese fantasies are not even meant to be lived out. When, in exceptional circum-

345. *Id.*

346. Unger says that in "the antinovelistic style of works of art like these" the aesthetic of empowerment "reached its most crudely and overtly political but also most revealing form." *Id.* at 584. He devotes pages 582-83 to discussing the political implications of the Gance film; part of this discussion is quoted *infra* note 356. The references to movements that exemplified "pseudorevolutionary nationalism" and "the cult of warlike force" seem to me entirely clear.

Unger's more abstract discussion of "empowerment" occurs in the previous section, entitled "The Spirit of the Constitution: The Ideal of Empowerment." He says of his constitution that "[i]ts higher spiritual significance consists in the assertion of transcendence as a diurnal context smashing," and he describes "empowerment" as follows:

[T]he ideal effect and demand of the constitution upon personality consists in the accumulation of three mental tendencies, all of which meet in the practice of fantasy and enactment. The first tendency is the accentuation of desire, of its scope and intensity. This goal holds for desire in general, whatever its specific aim or relative weight. It applies, however, with special force to those desires that aim at particular aspects of freedom itself. For such desires differ from others in contributing directly to the central experience of human empowerment. They do not—at least not inevitably—destabilize the regime within which the ordinary person can experience this enhancement of the will nor do they have the quality of an obsessional fixity that crowds out other desires. The second mental disposition is the enlargement of the imagination. The person imagines a broader spectrum of circumstances within which desires can be satisfied. . . . The third mental tendency is the broadening of the actual opportunities to realize in practice the transformed desires produced by the first two tendencies. Such expansion saves the enhancement of the will and the imagination from issuing in a self-destructive experience of constantly frustrated insatiability.

Id. at 579-80. The only place where Unger gives a concrete example of empowerment is in the discussion of the Gance film.

347. *Id.* at 581.

348. *Id.*

stances, people have taken them seriously and acted upon them, the results have often been disastrous."³⁴⁹

But although Unger admits that such political rallies have risks, he calls them "the risks and complications of a more radiant vitality."³⁵⁰ Not everybody would put the point in quite this way. Indeed, there are several possible answers to the question, "What is wrong with a fascist rally?"—and it makes a great difference which one you choose.

One answer worth considering is that "the frenzied pursuit of the transformative vocation"³⁵¹—the untrammelled striving for what Unger calls empowerment and Aristotle calls incontinence—is itself a political and moral vice. With this answer we are on familiar philosophical ground, for there is nothing particularly modern about the "transcendent man of will" Unger describes, or about his "display of impenitent grandeur."³⁵² One thinks of Milton's Satan, striving against God and reality, transvaluing the moral hierarchies ("Evil be thou my good"³⁵³), and "embodying to the highest degree the rage of transcendence":

To reign is worth ambition, though in Hell:
Better to reign in Hell than serve in Heaven.³⁵⁴

Aristotle would regard the Napoleon-Hitler-Mussolini psychology depicted in the Gance film as unworthy of emulation, and he would regard the following passage as a childish delusion:

All the way from the transcendent man of will to the agitated crowds, the participants seem in touch with another, higher reality, with the things you see and feel when one conditional world has been destroyed and another not yet emerged, as if this crack in the finite provided a glimpse into the absolute.³⁵⁵

But Unger's analysis is not that of Aristotle. He does not object to the empowerment ideal, but to the way it is distributed—to the fact that the audience are merely passive spectators, that their longing for the "psychological experience of empowerment" is "left unrealized in the ordinary lives of ordinary men and women."³⁵⁶ His constitutionalism of permanent

349. *Id.*

350. *Id.* at 583.

351. *Id.*

352. *Id.* at 584.

353. J. MILTON, *PARADISE LOST* bk. 4, l. 110 (1667).

354. *Id.* bk. 1, ll. 262–63.

355. FN, *supra* note 4, at 582–83.

356. His analysis is as follows:

The leader achieved empowerment in a basically different fashion from the other people. He alone took events by the hand and thereby realized the transformative vocation in all its purity. . . .

The exceptionalism of the leader was connected, obscurely but significantly, to the form of his historical enterprise. In different degrees and in different ways, pseudorevolutionary na-

mobilization is supposed to do better—to “do justice to the human heart,” and to make “the experience of empowerment . . . real rather than vicarious.”³⁵⁷

As with his analysis of the Cultural Revolution, Unger tiptoes past the historical evidence against his ideal of “empowerment.” The twentieth century offers several examples of politicians whose rallies fit Unger’s description of the Gance film, and there is abundant reason to think that their lack of moderation, their lack of balance, their determination to smash through every impediment was the cause of the ensuing havoc. But Unger wants more “frenzied pursuit of the transformative vocation” rather than less. I see no reason to believe that the practical consequences would be an improvement on the ill-conceived experiments of the past. Nor do I find this particular “vision” attractive. A mob rally in which each member of the mob tries to exemplify “the rage of transcendence” is a meeting most people would rather not attend—even if it could be kept peaceful, and no matter how much “radiant vitality” the “context-breaking brio” might offer. Unger has allowed himself to be carried away by his vision of a society without hierarchies, a society in which there will be no constraints on self-development, and in which “role jumbling” and “context smashing” will enable us “to develop the richness of our subjective life.” Although he does explicitly say that individuals should have a (minimal) set of rights to personal security, he pays too little attention to a practical set of safeguards. It is disheartening to see him propounding a theory that is intended to guide grassroots political struggle, that promises to enhance “the destructive powers of society,”³⁵⁸ that contemplates the

tionalism and its surrogates involved the superimposition of a communal ideal upon social hierarchies that this ideal simultaneously adjusted and preserved. Such movements often embraced the cult of warlike force, wielded by the collectivity under the guidance of the leader. Thus, the psychological experience of empowerment was to be realized through social forms that constrained or negated the different aspects of freedom. Yet empowerment meant freedom if it meant anything. Here was a social experience at war with itself: a monstrous equivocation, already prefigured in the circumstance of followers whose access to the sense of empowerment paradoxically depended upon their submission to a leader or upon their absorption in a crowd.

Id. at 583.

357.

A driving force of the constitutional program is the desire to do justice to the human heart, to free it from indignity and satisfy its hidden and insulted longing for greatness in a fashion it need not be fearful or ashamed of. To this end, the experience of empowerment must be made real rather than vicarious. It must be reconciled with the ordinary needs and attachments of ordinary people. And it must be freed from its corrupting associations with the cult of leaders and of violence.

Id. at 584–85.

358. The hundred or more pages he devotes to war and revolution are fiercer in tone than they need be, and remarks like his observation on the military defeat of the Normans (“Their defeat pleases as much as it instructs,” PP, *supra* note 10, at 164–65) could conceivably give his readers the wrong impression. Even if Unger himself would balk at the idea of killing for “negative capability,” his followers in the third world might be forgiven for misunderstanding his intentions. His strident rhetoric is, to say the least, injudicious, and one wishes he had done more to temper the militant aspects of his theory.

possibility of violent revolution, that envisions a regime of "destabilization rights," and that offers Mao's Cultural Revolution as a "rich" source for his "vision" of an assault on the roles that "deserve to be smashed up at the microlevel of cultural-revolutionary defiance and incongruity as well as at the macrolevel of institutional innovation"—particularly when all this is backed by weak arguments, by an unconvincing moral psychology, and by historical scholarship that does not mention the excesses of the Cultural Revolution.

The scholarly inaccuracy and the general argumentative confusion that have dogged Unger's work since *Knowledge and Politics* are hardest to excuse when they ignore and absolve mass killing and cultural destruction; and here Unger has been remarkably lax.

V. CONCLUSION

I shall now try to bring together my main conclusions; but first a word about the reasons for Unger's success. Throughout this Article I have been critical of his writings, but I do not mean to imply that they contain nothing to admire. Unger writes with enormous energy and displays a passionate concern for social change—perhaps, at times, too passionate. In an age when academic moral philosophy is often dedicated to dry analysis or to justifying the *status quo*—or, at any rate, appears, on superficial inspection, to be so dedicated—it is refreshing to see a thinker who strives to imagine radical alternatives; and it is easy to understand why he has won such a devoted following.

But passion and political good intentions are not enough. There must also be some sort of solid intellectual foundation before Unger can plausibly claim to have "undermined the central ideas of modern legal thought and put another conception of law in their place." My aim in this Article was to evaluate Unger's philosophy and to assess the truth of this claim.

My methodology was straightforward: I proceeded *seriatim* through his most important writings, and at each stage I discussed his central arguments and his central scholarly arguments. I began with a detailed discussion of *Knowledge and Politics*. This is Unger's most influential book. It is the book on which his reputation for learning is based. It claims to have discovered "the context of ideas and sentiments within which philosophy and politics must now be practiced." It contains the most sophisticated argument by a CLS theorist for the exciting thesis that "no coherent theory of adjudication is possible within liberal political thought." So it is well worth close inspection.

For Unger's work to be useful to professional philosophers it would have to contain either some reliable scholarship or some plausible and original arguments. I examined in detail Unger's scholarship and showed that he understands neither the Plato-Aristotle-Aquinas tradition he ap-

plauds, nor the "liberal" Hobbes-Hume-Kant-Rawls tradition he deplores. His learned footnotes are wildly undependable, even on the sources that are most central to his work. These errors are fundamental, they occur in great profusion, and they cover every major period of Western philosophy.

As for his arguments, it will suffice to recall a single example. I discussed at length the central passage of *Knowledge and Politics*, the "Antinomy of Theory and Fact," where Unger employs a "third and yet undefined mode of explanation that stands beyond the boundaries of formal logic and causality" to show that "the dominant and central element in modern thought" culminates in a simple logical contradiction—a contradiction which shows the "incoherence of our idea of science, indeed of knowledge in general."³⁵⁹ It is hard to imagine a more astonishing claim, or a claim that stands in greater need of argument—and it is hard to imagine a less adequate argument than the one Unger provides. Worse, his "antinomy" rests on an elementary misunderstanding of Quine's philosophy of science—a misunderstanding that could easily have been rectified by walking across the Harvard Yard to seek Quine's opinion. The refutation of modern thought surely deserved this much checking.

His refutation of LIBERALISM, in its broad outlines, turned out to be an attack on a straw-person: It is directed against a set of six vague and self-contradictory principles that no one ever held. And his specific arguments against the principles turned out to be mere restatements of well-known problems, intertwined with some elementary confusions about subjectivity and the problem of universals. Unger's positive suggestion that we will be enabled to "discover the organic unity in each other's personalities" if we live in "communities of life" is hopelessly vague—and the vagueness is hardly remedied by his explanation that "we can never fully bridge the gap between abstract and concrete knowledge, theory and prudence, science and art. That is why the doctrine of organic groups remains indeterminate."

The tone of Unger's book is well suited to its content, and reinforces one's general impression of grandiloquent eccentricity. He tells us we need a society that will be based upon "natural harmony, sympathy and concrete universality"; he uses terms like "spiders" and "prison guards," "poison" and "tyranny," "secret empire" and "grovelling subjects" to characterize the leading thinkers and intellectual movements of the last four centuries; and he ends by saying, "Speak, God." He deals in uplift rather than arguments, edification rather than scholarship; and he seems not to have understood either the history or the difficulty of the problems he discusses. Given the low quality of his central scholarly references and of his central arguments, it is unlikely that he elsewhere soars to the level

359. See *supra* text accompanying notes 121–33.

of Spinoza or Virgil or Marx. Professional philosophers can perhaps be forgiven for not taking his work seriously.

I next discussed Unger's famous article on CLS. As an intellectual performance, it lags behind the standards of *Knowledge and Politics*. The first book contains a recognizable argument; the article is more of a ramble through the views of "our movement." The book contains footnotes; the article does not. The book purports to show that law is impossible in modern society; the corresponding passages in the article are much thinner and repeat many of his earlier mistakes. Finally, having discussed Unger's principal contributions to philosophy and to legal theory, I turned to his concrete political recommendations as expressed in the central passages of his recent *Politics*. I criticized his theories of "negative capability" and "context smashing," of the "constitutionalism of permanent mobilization," of "role defiance and role jumbling," of "cultural revolution."

Despite many shifts of terminology and position, Unger's visionary writings all suffer from the same flaw, namely, a lack of careful thought about the practical implications of his proposals. In this respect, as his theories have become more concrete, his recommendations have become less plausible with the years. His early theory of "organic groups," for all its emptiness, was, practically speaking, harmless; but the military theorizing in *Politics*, the remarks on violent revolution, his admiration of "smashing" and "trashing" and the sort of "empowerment" embodied in Gance's film about Napoleon, the praise of Mao's Red Guards and of the "rage of transcendence"—all this, if taken seriously and acted upon, has the potential of causing serious harm. I do not wish to dispute the sincerity of Professor Unger's desire for a better universe; but he is more likely to achieve his goal if he takes a bit more scholarly and argumentative care than he has hitherto displayed.

This remark suggests a word of advice to legal reformers generally. It is of course true that the present legal system contains many genuine evils. The reformers are entirely right to be concerned with social justice. They are right to reject "the calculations of Holmes' 'bad man,' who is concerned with law only as a means or an obstacle to the accomplishment of his antisocial ends."³⁶⁰ They are right to deplore the cynicism, greed, and opportunism that undoubtedly exist in the legal profession and in society at large. But amateur philosophy and ill-considered rhetoric are more likely to hinder their cause than to assist it. For the implicit message of slogans like "Law Is Nonsense" and "Trashing Is Scholarship" and "Everything Is Politics" is that careful philosophical argument—rational discussion about law and justice—is a sham, a deception, not worth the effort. In the end, law is nonsense, and so is philosophy. Ironically, there

360. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1773 (1976).

is nothing new about this particular philosophy of law. It was already old hat long before Nero put Seneca to death, and it provides the best of all possible justifications for economic exploitation and political oppression. It is precisely the legal philosophy of the "bad man"—of the person who would rather make a profit or win an election than listen to "philosophical" speculations about right and wrong.

The only way to make progress against this sort of cynicism, the only way to make the legal system more just, is by patient, piecemeal efforts—by the sort of hard thought that has always been characteristic of the best work in law and philosophy. Nothing will come of fundamentally frivolous speculations about "organic groups" and "intelligible essences" and "disentrenchment of formative structures"—however attractive such theories may appear to the gullible.

I have argued that, far from having "undermined the central ideas of modern legal thought," Unger does not live up to the standards of ordinary good scholarship, and in his philosophical writings he is far out of his depth. Certainly Unger is not in a strong position to denounce his colleagues in the legal academy for having "degraded" history and "abased" philosophy and "perverted" the social sciences:

Having failed to persuade themselves of all but the most equivocal versions of the inherited creed, they nevertheless clung to its implications and brazenly advertised their own failure as the triumph of worldly wisdom over intellectual and political enthusiasm. History they degraded into the retrospective rationalization of events. Philosophy they abased into an inexhaustible compendium of excuses for the truncation of legal analysis. The social sciences they perverted into the source of argumentative ploys with which to give their arbitrary though stylized policy decisions the blessing of a specious authority.

When we came, they were like a priesthood that has lost their faith and kept their jobs. They stood in tedious embarrassment before cold altars. But we turned away from those altars, and found the mind's opportunity in the heart's revenge.³⁶¹

As with this passage, so with Unger's philosophy as a whole: It tries very hard to impress, and it is not impressive.

361. CLSM, *supra* note 2, at 675.