

**THE LEGAL THOUGHT OF ROBERTO UNGER: CONTEMPORARY
SIGNIFICANCE, PROBLEMS AND POSSIBILITIES**

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ABSTRACT

This thesis provides an explanation and critique of the legal thought of Roberto Unger. Although Unger's social and political thought has generated a large literature, there has been far less scholarly work published on Unger's legal thought. Unger's jurisprudence represents an important contribution to the intersection between legal, political and social theory and many of his concepts deserve to occupy a more central place in the jurisprudential canon. Unger's legal thought is of contemporary significance both for its insightful critique of current styles of legal analysis and for its clear rationale for the hope of achieving radical reform at least partly through law. While his critical jurisprudence is clear, coherent and persuasive, his normative jurisprudence remains problematic both in developing it in practice and in explaining how social theory can inform, or place restraints on the normative practice of institutional imagination. His radicalized pragmatist social theory does, however, offer a plausible, though necessarily incomplete, social theoretical basis for how law might be used to construct a more emancipatory politics.

STUDENT DECLARATION

I, Julian Ligertwood, declare that the PhD thesis entitled, ‘The Legal Thought of Roberto Unger: Contemporary Significance, Problems and Possibilities’ is no more than 100,000 words in length including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any another academic degree or diploma. Except where otherwise indicated, this thesis is my own work.

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I INTRODUCTION

A Background

My own interest in Roberto Unger as a legal theorist developed out of an initial interest in jurisprudence that began as an undergraduate law student. In an undergraduate jurisprudence course I studied the American legal realists and saw how ideas about law change over time, and often radically. I completed a Masters degree in which I examined how different approaches to legal thought have affected the ways that judges and lawyers engage in the process of legal reasoning. After several years of teaching jurisprudence courses to undergraduate law students at Australian universities, I began to consider more closely the problem of legal theory and practice and how the study of legal theory could be improved so that students might be able to see more clearly its contemporary relevance to legal culture and to society more broadly. While consideration of the major jurisprudential traditions such as natural law and legal positivism appears to be of some historical interest to law students, and while consideration of aspects of critical legal theory and identity based approaches to legal thought is of interest to some, I began to look for theoretical approaches that might better capture the imagination of legal scholars and educators, approaches that are both contemporary and catholic in their assumptions. I began to look within the American pragmatist tradition for such approaches, to Dewey, and Rorty and to the critical legal studies movement, from which Unger stood out in terms of the breadth, depth and uniqueness of his jurisprudential approach as well as in his potential relevance to contemporary legal, political and social thought. Although his academic writing often focuses on law in the United States, Unger's work is potentially of significant relevance in the current globalised context because many of his claims about law and legal thought are universal.

The central question in relation to legal thought for Roberto Unger is: In what form have we received it and what should we turn it into? This is a question that Unger has addressed in a number of his works and his response involves both explanatory and normative elements; a method of 'mapping and criticism' in addition to an external normative vision. By reorientating legal thought as institutional imagination, Unger proposes to put legal analysis in the service of democratic experimentalism as the best way to advance a society's ideals and interests. Such

a reorientation of legal thought, Unger claims, would represent an intellectual revolution capable of a practical transformation of society, economics and politics. This is a serious claim that requires careful consideration. Part of the purpose of this thesis is therefore to update and build on the analysis of Unger's work on law and social theory carried out over thirty years ago by Allan Hutchinson and Patrick Monahan.¹ Although there has been a significant literature generated since then on Unger's social and political thought², there has been surprisingly little scholarly work published on his legal thought.³ In the author's view, however, Unger's jurisprudence represents an important contribution to the intersection between legal, political and social theory and many of the ideas that he invokes deserve to occupy a more central place in the jurisprudential canon. While Unger has written extensively on social and political theory⁴, the focus of this thesis is on Unger's legal thought, that is, on his jurisprudence although, as will become apparent, there is a close relationship between his legal thought and his political and social thought so that these fields cannot always be neatly separated.

In the following sections of the introduction, the broader intellectual context is discussed to help explain why Unger's legal thought may be of interest to contemporary legal scholars and educators, before the thesis methodology and structure is set out.

B Normative Decline in Modern Legal Thought?

Proponents of normative thought, including proponents of normative legal thought, or normative jurisprudence, argue that it is both possible and desirable to ask, and to attempt to provide normative responses to 'big' questions such as 'What is society?' 'How is society made and remade?' 'What is law?' or 'What is justice?' In their view the 'change in fashion' that rendered the consideration and discussion of such 'big ideas' obsolete was just that – a fashion,

¹ See Allan Hutchinson and Patrick Monahan, 'The "Rights" Stuff: Roberto Unger and Beyond' (1984) 62 *Texas Law Review* 1477.

² See 'Symposium: Roberto Unger's Politics: A Work in Constructive Social Theory' (1987) 81 *Northwestern University Law Review* 4, Dennis Patterson, *Patterns of American Jurisprudence* (Oxford University Press, 1995) 480-81.

³ There are a few exceptions: See Jeremy Waldron, 'Dirty Little Secret' (1998) 98 *Columbia Law Review* 510; William Lucy 'What Should Legal Analysis Become? By Roberto Mangabeira Unger' (1997) 56 (2) *The Cambridge Law Journal* 419; Hugh Collins, 'Roberto Unger and the Critical Legal Studies Movement' (1987) 14(4) *Journal of Law and Society* 387; Kevin Walton, 'A Realistic Vision? Roberto Unger on Law and Politics.' (1999) 5 *Res Publica* 139.

⁴ For an exhaustive list of Unger's publications see his website; roberto unger.com and Wikipedia entry.

and that while there may have been various causes of a decline in normative thought in many areas of social life, including within legal thought, during the 20th century, there are strong arguments to revive normative thought in the 21st.⁵

Not only have big ideas such as sociology and Marxism become significantly less popular today than they were at various points in the 20th century, but the very idea of posing big questions has been seriously questioned and criticised not only intellectually but also in terms of its effectiveness as a political strategy.⁶ There are several factors that have produced such an intellectual climate, however, it is possible to point to at least three significant historical factors that contributed to the rise of a culture of ‘anti-normativity’ in the 20th century that have flowed through to the 21st. The first factor is the dramatic collapse of European and Soviet style socialism, symbolised by the dismantling of the Berlin Wall in 1989. The collapse of socialism in Eastern Europe has been interpreted by many in the West, in particular by those on the political right, to be a historic victory of capitalism over Marxist style socialism leaving neo liberalism as the new horizon for practical politics.⁷

A second significant factor may have been a general loss of faith in the possibility of absolute notions of truth and reason. Under several intellectual movements including postmodernism, deconstruction, and post-Marxism, the modernist idea that it is possible to discover universal truths that are necessarily on the side of progress has been gradually discarded. The result is that there is less inclination to ask and attempt to respond to big social questions and more inclination to focus on more narrow, modest or local questions and concerns.⁸ The collapse of Eastern European and Soviet style socialism is often used by scholars to argue that grand social experiments planned and carried out by a central authority are to be rejected at all costs on historical grounds. While the left critique of modernity suggests the impossibility of truth and

⁵ Wade Mansell, Belinda Meteyard, and Alan Thomson, *A Critical Introduction to Law* (Routledge, 2015) 168 – 9.

⁶ Ibid.

⁷ Ibid. One of the leading defenders of neo liberalism was Francis Fukuyama. In *The End of History* (1989) he argued that western liberal democracy and its balancing of liberty and equality could not be ideologically bettered. That no other country, or legal theorist, could claim an ideology that pretended to be better. By 2012 in the aftermath of the GFC this was being challenged. See Alain Badiou, *The Rebirth of History: Times of Riots and Uprisings* (Verso, 2012); Seamus Milne, *The Revenge of History: The Battle for the Twenty-First Century* (Verso, 2012). One of the most strident published in an otherwise respectable law journal is Conor Gearty, ‘Neo-democracy: “Useful Idiot” of Neo-liberalism?’ (2016) 56 *British Journal of Criminology* 1087-1106. Even Fukuyama’s views have altered: Howard Williams et al, *Francis Fukuyama and the End of History* (University of New South Wales Press, 2016). With the potential decline of neo liberalism following the GFC, Brexit and Trump, now is the time to re-evaluate alternative models for legal thought.

⁸ In Chapter V Unger and other sociological jurisprudents’ attempts to reunite jurisprudence and social theory is discussed.

reason supporting large scale social change. These views combine to provide a road block on both sides to the creation of viable alternatives to the neo liberal status quo, a political state of affairs that Unger describes as a ‘dictatorship of no alternatives’.⁹

A third significant factor in the general loss of interest and subsequent decline in normative thought is the power of the idea of the ‘free market’. Most people in western societies are highly constrained and influenced by the everyday demands of market forces which ‘swallow the space for big ideas and undermine their relevance’. One effect of the dominance of the market in people’s lives is that for personal or practical reasons, people (including students and academics) tend to naturalise the current institutional form of the market and any suggestion of ideas that run counter to the existing market reality, that is, ideas that run counter to the existing structure of the market economy, are usually rejected as highly implausible and therefore largely irrelevant.¹⁰

It has been suggested in the preceding paragraphs that there has been a broad and pervasive normative decline in western intellectual and political culture throughout the late 20th century and I have briefly discussed some possible factors in this decline that has coincided with the establishment of a neo liberal intellectual and political culture. However, even if we are sympathetic to this broad view of the trajectory of western intellectual and political culture, is there evidence of a corresponding trajectory within western *legal* thought? Several legal scholars have argued that normative legal thought (or normative jurisprudence) has been in decline over the past half century and is in urgent need of a revival beyond the limits of traditional natural law theory.¹¹

Robin West, for example, has argued that there has been a decline in normative legal thought and scholarship in the 20th century that mirrors the broader decline in normativity within western intellectual and political culture outlined above. In West’s view, legal thought has today mostly turned away from normative questions such as: what are the demands of justice, what are the qualities that good laws possess and that bad laws lack, what kinds of society do our laws promote, what kinds of society do we want to promote, is law and legal thought complicit in contemporary injustices, and if so how? In her view these normative questions

⁹ Roberto Unger, *The Left Alternative* (Verso, 2009).

¹⁰ Mansell et al, above n 5, 169.

¹¹ See Robin West, *Normative Jurisprudence: An Introduction* (Cambridge University Press, 2011). The introduction to Roberto Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso Books, 2015); Mansell et al, above n 5.

ought to be regarded as just as important as the central jurisprudential questions discussed in most contemporary jurisprudence textbooks and curricula such as: What is law? What are the sources of law's authority, what is the status of the unjust law, and what is the relationship between law and positive morality? Instead, West argues that, 'We ask neither ethical questions about a legal regime's or a law's moral goodness, nor meta-ethical questions about our...unexamined practices regarding the legal criticism in which we all necessarily engage. Jurisprudence has largely turned its back on these normative questions about law's value.'¹²

West argues that whilst proponents of the most influential jurisprudential traditions of the 20th century, that is, natural law, legal positivism and critical legal studies, have at times been very interested in asking these normative questions, over the last 50 years or so there has been a decline in normative legal scholarship within these traditions. West provides a detailed and insightful account of how natural law, positivism and critical legal studies have all largely abandoned their normative commitments in favour of approaches that 'have left our jurisprudence remarkably hollow'.¹³ First, within the natural law tradition, the most prominent Anglo American proponents of natural law in the 20th century John Finnis, Lon Fuller and Ronald Dworkin attempted through their secular natural law approaches to put forward serious claims about the nature of the goodness that law possessed or ought to possess, however, it is at least doubtful whether these approaches have been able to persuade the legal academy or anyone else. West argues therefore for a revitalisation of natural law that seeks to answer this question, a movement that Jonathan Crowe has termed ethical natural law as opposed to jurisprudential natural law which has focused on the analytical claim that there is a necessary relationship between law and morality.¹⁴

And while proponents of legal positivism from Jeremy Bentham to HLA Hart have traditionally been interested in normative jurisprudence, it seems that in more recent times legal positivists have been less interested in asking normative questions such as: Is our positive law good or just, and how could we know? These were questions at the heart of Bentham's censorial jurisprudence. For Bentham, the positivist project of separating the law that is from the law

¹² West, above n 11, 2. Note that West is more critical of the current state of normative legal thought than Twining who writes that 'Normative jurisprudence now occupies a central place on the agenda of Anglo-American jurisprudence as is illustrated by the attention given to Bentham, Dworkin, Finnis, Rawls, Raz, and modern critical theory.': William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009) 122.

¹³ Ibid 10.

¹⁴ See Jonathan Crowe, 'Clarifying the Natural Law Thesis' (2012) *Australian Journal of Legal Philosophy* 37, 159-170. Unger would be a natural lawyer in this sense.

that ought to be was to provide a clearer picture of the existing law to facilitate a more informed and directed discussion of what the law ought to be – a clear exercise in normative jurisprudence. As West puts it ‘that law is the command of a sovereign, and nothing more permits the critic to put the rose coloured glasses aside and adjudge its utility, and hence its value, or its goodness – apart from its claim to legality. Only by first seeing law as it is can we hope to evaluate its goodness.’¹⁵ HLA Hart also followed in the Benthamite tradition of engaging with positive law in order to further liberal or more radical commitments. However, contemporary (post Hartian) legal positivists have generally been less interested in the moral criticism and reform of law, focusing more on definitional, analytic accounts of law, on questions about the legitimacy of law or the relation of law to some moral or economic standard without inquiring into the content of the moral standard itself.¹⁶

Similarly, another jurisprudential tradition of the late 20th century, critical legal theory has also arguably not sufficiently enquired into the nature of the legal good. Instead it has concentrated on questions concerning the relationship of law to power, on questions such as:

Is law nothing but the product of power? If so, is that something to bemoan, celebrate or simply acknowledge? What is the relation of law, some critical legal theorists ask, to patriarchal power, or, others ask, to the power of capital, or, still others, to white hegemony, or, recently, to heteronormativity? Does law legitimate these sources of cultural or social power; does law further the false and pernicious perception that these and other hierarchical arrangements are necessary?¹⁷

These are all interesting questions but they eschew questions of law’s goodness – what makes a good law and what virtues a good law ought to have is not the object of study. As West suggests, the moral project that was once central to critical legal studies has largely been dropped in favour of the jurisprudential project. The jurisprudential projects of critical legal studies have very much focused on texts: ‘their indeterminacy, their contradictions, their genesis in power, their interpretation, the indeterminacy and contradictions of those interpretations, and their genesis likewise in power.’¹⁸ However, as West argues, it seems that

¹⁵ West, above n 11, 6-7.

¹⁶ See e.g. Scott Shapiro, *Legality* (Harvard University Press, 2011), and Joseph Raz, *Practical Reason and Norms* (Oxford University Press, 1999).

¹⁷ West above, n 11, 7. By ‘critical legal theory’ West is referring to the first wave critical legal studies movements and the subsequent movements in the States including the neo – crits. See further Robin West, ‘The New Legal Criticism’ (2017) 117 *Columbia Law Review Online* 144–164.

¹⁸ *Ibid.*

critical legal theory has gone too far in focusing on texts rather than people, becoming as it were ‘too clever by half’ and that while we ‘post-moderns’ may accept the philosophical brief of critical legal theory, that is, the view that law is the contingent product of power relations within society, the moral brief that has in the past played a central role in jurisprudential enquiry, is now largely missing.¹⁹

However, as West and others have pointed out, earlier generations of critical theorists in the United States, most notably the legal realists and the pragmatists of the early part of the 20th century, did not eschew attempts to articulate the nature of the human good that good law ought to assist. Instead scholars within these earlier traditions embraced normative jurisprudence by taking the moral brief seriously. Indeed Morris Cohen and John Dewey were exemplary exponents of normative jurisprudence providing ‘contestable but nevertheless articulable understandings of our nature and what law might do to contribute to human wellbeing...the ambition to specify a speculative account of human nature from which one might imply an account of the good that law might do and then criticise law accordingly.’²⁰ So while many versions of natural law, legal positivism and critical legal theory may be problematic, I would agree with West’s major point that many of the normative motivations behind them, for example, the promotion of the critical lawyer qua Bentham and the questions about the legal and common good qua Aquinas or Dewey, are to be encouraged.

¹⁹ This ‘moral brief’ is discussed further in Chapter III, ‘Unger and Critical Legal Studies: Common Ground and Wrong Turns’ which contrasts Unger’s approach with the critical legal studies movement in the United States. Influenced by works such as Hugh Collins, *Marxism and Law* (Oxford University Press, 1984) and EP Thompson, *The Making of the English Working Class* (Vintage Books, 1963) and *Whigs and Hunters: the Origins of the Black Act* (Pantheon Books, 1975), the critical legal studies movement in the UK appears to have been more uniformly Marxist than the United States equivalent and therefore more emphasis may have been placed on the moral brief. The *Critical Lawyers’ Handbook* (1992) begins, for example, with ‘Except in the ‘mist-enveloped’ regions of modern bourgeois ideological individualism all commodities are the products of collective labour.’

²⁰ See West, above n 11, 8. See also Neil Duxbury, *Patterns of American Jurisprudence* (Oxford University Press, 1995) 65-159 for a nuanced account of legal realism’s influence on American legal thought. While Dagan is critical of West for subscribing to a caricature version of legal realism, in fact, West would agree with Dagan that legal realists often provided ‘a subtle conception of law as a set of institutions distinguished by the irreducible cohabitation of power and reason, science and craft, tradition and progress.’ Hanoch Dagan, ‘Normative Jurisprudence and Legal Realism’ (2014) 64 *University of Toronto Law Journal* 442, 457.

C Normativity in Contemporary Legal Practice and Education

It can be argued and indeed often is argued by legal practitioners that lawyers do not need grand theories of law and society or to study philosophical or jurisprudential traditions to be able to adequately understand and criticise law. Perhaps, then, legal practice has been able to engage effectively in normative legal thought even when legal scholarship has often failed to do so. However, it seems that despite such arguments, the assumptions that lawyers make when criticising law, that is, when lawyers engage in normativity and move from the legal is to the legal ought, they invariably draw, whether unwittingly or not, from values relating to one version of the three jurisprudential traditions discussed above, that is, a version of either natural law, legal positivism or critical legal theory.

So for many traditional legal scholars and likely for most practicing lawyers, the goodness or justness of a legal decision is largely a matter of institutional fit as Dworkin described in his account of law as integrity. As both West and Unger argue however, the problem with Dworkin's approach (which for Unger provides a theoretical basis for what he calls rationalising legal analysis or the reasoned elaboration of law) is that it conflates legal or constitutional criteria with moral criteria thus conflating legal or constitutional interpretation with the merits of law.²¹ Dworkin's approach to law, whilst providing the law with a halo of rationality and morality, restricts legal critique to norms and ideals internal to the legal system and thus excludes consideration of ideals and interests that may be external to law. For Dworkin, 'legal doctrine itself, read in its best light and over an expansive period of time, exhausts the normative basis on which at least legal decisions if not new law in its entirety can be judged.'²²

In addition to the principle and policy based doctrinal analysis of law exemplified by Dworkin's jurisprudence, another popular, if unacknowledged, way for practicing lawyers to evaluate law has been the 'law and economics' approach which was a particularly popular jurisprudential school in the United States during the late 20th century. It had a significant influence on modern western legal thought. For these utilitarian lawyers, economic efficiency is the sole test for evaluating law so that 'a law or judicial decision that promotes efficiency or

²¹ See West, above n 11, 8-9, and Roberto Unger, *What Should Legal Analysis Become?* (Verso, 1996), 67-8; Larry Alexander and Ken Kress, 'Against Legal Principles' (1996) 82 *Iowa Law Review* 739.

²² West, above n 11, 9. This idea of convergence of doctrine towards an immanent moral order is an idea discussed further in Chapter V, 'Reuniting Jurisprudence and Social Theory' below.

increases wealth is sufficient to establish its goodness.²³ There is also the modern progressive lawyer, who sees herself neither as beholden to an immanent moral or legal order assumed by Dworkin, nor to a utilitarian process of wealth maximization assumed by law and economics. The progressive lawyer instead evaluates law in relation to how it either strengthens or weakens existing social structures of power, perhaps supplemented by some vague notion of equality, or of what is in the best interest of individuals or groups qua critical legal theory.

So arguably the influence of natural law, legal positivism and critical theory is reflected in the common ways that practicing lawyers evaluate law, that is, there seems to be a clear link here between legal theory and legal practice. The traditional doctrinalist loosely reflects the Dworkinian natural law view that a good decision must cohere with the past, the legal economist reflects the classical legal positivist who evaluates law on the basis of welfare and utility, while the progressive egalitarian lawyer reflects the critical legal theorist's emphasis on the contingent power politics of both law and legal analysis. Indeed it does seem as though 'the legal community has embraced quite generally these three criteria - integrity, efficiency and equality for the moral evaluation of law and legalism.'²⁴ If this is the case, then arguably legal practice could benefit from contemporary, normative approaches to law.

Beyond legal scholarship and legal practice, another aspect of legal culture in which scholars argue there is a lack of of normative thought is legal education.²⁵ It is not that there are not values or ideals promoted either explicitly or implicitly within legal education.²⁶ Those values include, for example, the importance of process to informed debate, the importance of past institutional settlements and their limits, the value of law and the rule of law over anarchy and violence, the dangers of over intrusive legalism, the value of balancing interests of various groups and the value of private law as well as the tensions at the boundaries of private and public law. As West argues, 'legal education is not, as it is often claimed to be, value neutral' and the values that are imparted 'would well serve the public need for informed moral criticism

²³ Ibid.

²⁴ Ibid.

²⁵ See for example, Nick James, 'A Brief History of Critique in Australian Legal Education' (2000) 24(3) *Melbourne University Law Review* 965; Margaret Thornton, 'Portia Lost in the Groves of Academe Wondering: What to do about Legal Education' (1991) *Law in Context: A Socio-Legal Journal* 9 ; Ian Duncanson, 'Legal Education and the Possibility of Critique: An Australian Perspective' (1993) 8 *Canadian Journal of Law & Society* 59; West, above n 9; Unger, above n 9, Nicola Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5(2) *Social & Legal Studies* 131.

²⁶ For a similar observation see, Adrian Evans, 'Best Practices: Australian Clinical Legal Education' (2013) 47(3) *The Law Teacher* 421.

of both law and its absence.' ²⁷ The problem, however, seems to be that the values that are promoted within legal education are usually viewed as necessarily internal to legal practice, and what is considered internal to legal practice is often conflated with the judicial sphere; with what judges and other legal officials consider to be internal to legal practice. Again there seems to be very little that is offered as part of a legal education that aims to critique law, on the basis of these internal legal standards, but there is even less offered that aims to critique law in relation to external normative standards, that asks how law promotes the individual, common or human good and how we would even know what this this could mean.²⁸

James provides a possible explanation for what he views to be an anti-normative influence on legal education:

A law school's claiming its intention to place a greater emphasis on legal critique may be perceived, rightly or wrongly, as a step towards making its courses more theoretical and less practical. There is a fear that taking such a step may break the connections with the profession that law schools have in recent years worked so hard to reforge. Most law schools therefore persist in their attempts to cater to the needs of the legal profession, and to teach law from a more practical perspective, focusing on technical excellence, advocacy, drafting, advocacy, court procedures and negotiation, and placing very little emphasis on critique.²⁹

This increased emphasis on clinical legal education may have had the effect of further marginalising critical legal education. In the Australian context at least, the lack of emphasis on critical and normative approaches within legal education could be seen to be the result of a desire by law schools to maintain strong links with the legal profession and the corresponding emphasis placed on both doctrinal and clinical legal education, at the expense of 'legal critique' or 'critical legal education' as James refers to it.³⁰ However there is perhaps a broader ideological explanation for the marginalisation of these approaches in legal education. As Duncanson has argued, 'law school education... because it offers guaranteed universal knowledge about its object, law, is unsympathetic to critique'³¹ That is, despite advances in insight in several intellectual disciplines, law has been slow to move from its objectivist and

²⁷ West, above n 11, 106.

²⁸ Ibid

²⁹ James, above n 25.

³⁰ There may be much value in exposing students to the gap between the law in the books and the law in practice, and perhaps in this context, clinical legal education can be unfairly misrepresented. See Robin West. *Teaching Law: Justice, Politics and the Demands of Professionalism* (Cambridge University Press, 2014) 131- 73. The question remains, however, of what to do about the gap.

³¹ Duncanson, above n 25, 59.

formalist leanings.³² Duncanson makes the important point that it is difficult for legal critique or normative jurisprudence to take hold within legal education ‘because for the progressives no less than for the conservatives in legal education, law is the privileged-because unexamined product of lawyers' discourse.’³³ Thus critical examination of legal discourse itself has been excluded from legal education almost by definition. In a section entitled, ‘A Return to Formalism’, Duncanson appears to concede that the forces that confine legal education to ‘lawyers’ discourse’ or to what Unger describes as the ‘lesser vocation’ of legal thought may be overwhelming.³⁴

Whatever the causes, however, and whatever the prospects for a change of course, as at the end of the 20th century James concluded, at least in the Australian context, that:

[L]egal education is in many ways returning to its colonial origins; the focus is becoming less ‘theoretical’ and more ‘practical’. Professional bodies are exerting an increasing influence over the curriculum, and more law courses are being taught by practitioners. Legal critique is strong in Australian scholarship, and many individual law teachers choose to incorporate critique in their teaching, but Australian law schools still place an unduly low emphasis on legal critique, ultimately it remains a marginalised approach to the teaching of law.³⁵

While obviously there is nothing wrong per se with law schools’ emphasis on clinical skills and facilitating links with the profession, if the emphasis on clinical skills and the ‘real world’ of legal practice results in the marginalisation of legal critique as James suggests it does, law students are arguably being short changed in their legal education. By marginalising the study of legal theory and legal critique, students are prevented from engaging in what Unger calls ‘the ‘larger vocation of legal thought’, that is, students are prevented from engaging in normative legal thought.³⁶

³² Unger’s critique of objectivity and formalism is discussed in Chapter II, ‘Unger on Contemporary Styles of Legal Analysis’ below.

³³ Duncanson, above n 25, 70.

³⁴ Ibid 79.

³⁵ James, above n 25.

³⁶ See Margaret Thornton, *Privatising the Public University: The Case of Law*. (Routledge, 2011) 59-109.

D Towards a Contemporary, Normative Jurisprudence

In this chapter it has been suggested that legal thought may well have mirrored a broader normative decline in western intellectual and political culture during the 20th century and into the 21st. Within legal practice, it has been suggested that when lawyers move from the legal 'is' to the legal 'ought', they invariably draw upon theoretical ideas that derive from one of three prominent jurisprudential traditions, traditions that arguably have become less focused on normative questions. Finally, within legal education, the predominant focus on the practical, that is, on conventional doctrine and clinical legal skills, comes at the expense of exposing law students to critical and normative approaches to law.

If much of legal culture continues to marginalise critical and normative approaches to law and legal thought, then one obvious question is, what is the problem with that? Many would argue that legal doctrine and clinical legal skills are essential to educating and training lawyers, and that legal theory and legal critique are always going to be peripheral to legal education due to the very nature of lawyering and what it means to be a lawyer. Indeed, this is the conventional wisdom of most Australian law schools as discussed in the previous section. However, beyond seemingly ignoring forty years of intellectual and social developments³⁷, there are at least two strong reasons to resist such views about legal thought.

First is the basic, pragmatic argument that given the existing conditions in legal education, whereby there is an increasing number of law students who do not go on to legal practice, it would seem to make good sense to educate critically engaged citizens, citizens who may have gained some insights from their studies as to how they might contribute to a better society, as well as educating lawyers as traditionally conceived (as defenders of existing legal rights and interests within an adjudicative setting). It might seem reasonable, therefore, to further encourage within the law curriculum both critical analysis of legal doctrine in addition to the development of wider normative commitments to ensure that the citizen, as well as the professional lawyer is seen as a primary addressee of legal discourse.

But a second, more fundamental reason to resist anti-normativity in legal thought and culture goes to the fundamental question of the role of law and legal thought in a society. Several scholars have addressed this question of the role of law and legal thought in modern society.³⁸

³⁷ Duncanson, above n 25, 81.

³⁸ Examples of sociological jurists who emphasise broad questions of justice, not just the rule of law version, include Marx, Weber, Thompson, Durkheim, Selznick and Unger.

One thing that they have in common is an inclination to reject Hume's famous fact/value distinction at the general level. That is, whilst at the local level there may well be no rational basis to argue what ought to be on the basis of what is, this is no reason to reject consideration of normative legal commitments at the most general level, that is, to consider the general ends of law, while at the same time responding, both within and beyond legal discourse, to changing social contexts. As Duncanson writes:

'the law' needs to be studied - and as something of shifting rather than static meaning - in the context of, say, the collective renegotiation of Aboriginalities or the politics of sexuality, gender, work and other identities, rather than the other way round. Second, since the dynamics of these resistances to power often register' outside the structure of rules studied by the conventional law discipline, the counter-responses from those whose power is being subverted frequently seems inexplicable within conventional frameworks; so much so, that...they are often ignored in legal texts.³⁹

It may seem curious then, if we accept the seemingly tautological premise that the ends of law ought to be justice, and that the various ends of law must change as the context of society changes, that legal critique and normative legal thought remain marginalised within legal culture. It is 'peculiar...to assert that legal studies should focus solely on what the law is, rather than what it ought to be.' While the past 150 years of legal education, adjudication and professional advocacy have thoroughly dismantled the view that claims regarding the content of law can be disentangled from claimants' views of the legal ideal, it remains the case that 'what we do not have in the legal academy, and what the current trend toward anti-normativity suggests we should not have, is any systematic study, or even discussion, of our normative legal commitments.'⁴⁰ This would appear odd given that today more than ever we need considered exploration of normative legal questions in relation to extant law and legal discourse to contribute to the resolution of contemporary social problems.⁴¹

Before concluding the chapter by suggesting one way to develop normative legal thought, it is first important to deal with an influential but, in the author's view, misguided objection to the view that normative legal thought and scholarship ought to be valued and encouraged. This objection has been referred to as the Schlag Kahn thesis. In the early 1990s Pierre Schlag, a

³⁹ Duncanson, above n 25.

⁴⁰ West, above n 11, 197.

⁴¹ Both West and Unger make a powerful case in a number of their works as to why normative legal thought ought to play a role in progressive social change. See e.g. Unger, above n 11, West, above n 11.

member of the critical legal studies movement published two articles which reflected and possibly to some extent caused the contemporary critique of normativity in legal scholarship.⁴² For Schlag, normative legal scholarship, can be broadly defined as legal scholarship that, ‘criticises, on moral grounds, existing law, legal doctrine or large swaths of received legal opinion and does so towards the end of reform.’⁴³ Schlag’s basic criticism was that this kind of normative argument in legal scholarship is generally too conservative, in that it usually reflects the givenness of existing legal structures and the ‘immutability of political categories of analysis.’⁴⁴ Thus, he argues, normative legal scholarship is largely inconsequential with respect to law reform, and to the extent that such scholarship does have an effect, it is unduly conservative.⁴⁵

The other half of the Schlag-Kahn thesis was the product of a book by Professor Paul Kahn entitled, *The Cultural Study of Law*.⁴⁶ Kahn also argued that legal scholarship should eschew normative legal questions. In a similar vein to the legal realists and the classical legal positivists, Kahn argued that before we can begin to suggest how things ought to be, we must first have an understanding of law’s culture, of how laws have been introduced and changed. For Kahn it is the role of the legal scholar to take the role of the external observer, to discover knowledge about law and legal culture, rather than to participate in that culture. So the Schlag-Kahn thesis is the view that ‘legal scholarship should not be normative because normative legal scholarship is unduly conservative, or, unenlightening...or both’⁴⁷ However, as West argues, normativity is not (or at least, should not be) the real target of the Schlag-Kahn critique, rather the target of the Schlag-Kahn thesis is what she has termed ‘faux normativity’. Faux normativity is concerned with truths *of* law rather than descriptive claims *about* law or moral claims about the demands of justice or the limitations or possibilities for law. So faux normative claims:

have two distinctive characteristics: first they are drawn from quasi-historical claims about what the “true” law really was; second, they are made within larger arguments about what the

⁴² West, above n 11, 178.

⁴³ Ibid.

⁴⁴ See Pierre Schlag, ‘Normativity and the Politics of Form’ (1991) 139(4) *University of Pennsylvania Law Review* 801; ‘Spam Jurisprudence’ (2009) 97 *Georgetown Law Journal* 803.

⁴⁵ A variation of this argument is advanced by critical race theorist Richard Delgado, ‘Norms and Normal Science: Toward a Critique of Normativity in Legal Thought’ (1991) 139(4) *University of Pennsylvania Law Review* 933.

⁴⁶ Paul Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (University of Chicago Press, 2000).

⁴⁷ West above n 11, 179.

current law really is. The legal ought, in other words, is implied by the legal past, rightly understood, and is a part of an argument about what the current law actually is.⁴⁸

Both West and Unger would agree with Schlag and Kahn that this faux normative legal scholarship is unduly conservative and unenlightening, but this is not an argument against normative legal scholarship. The important point that West thinks is lost on these anti-normativity arguments of Schlag, Kahn and others is that:

legal scholarship has moved away from making or even studying genuine claims of justice, or claims about what justice requires of law, or deeply critical claims about law's false promises or inauthenticity, or thoughtful claims about what the “common good” or common welfare, or even common happiness, is, toward which law should press, and hence, toward a more genuine normative stance.⁴⁹

West further points out that since the Schlag-Kahn thesis was first advanced, normative legal scholarship has been increasingly derided, particularly in elite American law schools, not just for the reasons stated by Schlag and Kahn, but simply due to the fact that it is normative. Bentham, the great advocate of censorial jurisprudence would be turning in his grave.⁵⁰

It has been suggested in this chapter that there are several anti-normative influences on legal thought and culture and that, despite the views of Schlag, Kahn and many others, normative legal thought ought to be encouraged. Further, the legal scholar should be committed to asking normative questions of law and legal thought, in addition to the more conventional legal opinion writing that engages what West describes as ‘faux normativity’. Indeed the essential message West’s *Normative Jurisprudence*, is that legal scholars can and should contribute more to criticism, reform and reformulation of law.⁵¹ In the author’s view West has identified an important deficiency in contemporary legal thought and that legal scholarship surely needs

⁴⁸ Ibid 181.

⁴⁹ Ibid 182.

⁵⁰ West has pointed to a significant difference between United States, and British and Australian law schools. In both PhDs are becoming more common. But in the US law academics tend to have the PhD in a field other than law. West sees this as another reason for the lack of normative legal scholarship in the States. See Robin West, ‘The Contested Value of Normative Legal Scholarship’ (2016) 66 *Journal of Legal Education* 6, 13.

⁵¹ West’s plea to legal scholars begs the question, however, what is it that the legal scholar can distinctively contribute in terms of normative reflection on law? See Brian Bix, “*Normative Jurisprudence*” and what Law Professors Should Do (21 October 2012), Concurring Opinions <<https://concurringopinions.com/archives/2012/10/normative-jurisprudence-and-what-law-professors-should-do.html>>. Waldron asks a similar question in his review of Unger’s book *What Should Legal Analysis Become?* which I respond to in chapter IV, ‘The Lesser and Greater Vocations of Legal Thought’ below.

to focus more on normative legal questions. Beyond legal scholarship, much more also needs to be done within legal education to create an intellectual environment and legal culture that normalises the exploration of normative legal questions of the kind suggested by West. As Unger has remarked, paradigm shifts can occur slowly, gradually, step by step in a process of radical reform, and in an effort to contribute to such a ‘paradigm shift’⁵² the focus of this thesis is on one particular area of legal scholarship: legal theory, or jurisprudence.

As some contemporary legal scholars have pointed out, contemporary jurisprudence does not readily provide a plausible theoretical framework within which to understand and critique past approaches to law and legal thought, or from which to develop our normative legal commitments.⁵³ It seems that our existing jurisprudence neither concerns itself with providing a critical understanding of legal thought, past or present, nor with questions of how law and society might be reformed in the name of justice or the individual or common good. As Allan Hutchinson remarked, ‘the jurisprudential juggernaut has come adrift from its philosophical and historical moorings’⁵⁴ such that we currently have no coherent, contemporary philosophical approach to law and legal thought to enable its criticism and potentially its transformation. One unfortunate result of this has been that jurisprudence is thought by many, quite understandably, to be a marginal and even largely trivial academic discipline. However, it has not always been like this and there is no reason why a contemporary critical, normative jurisprudence cannot be developed.⁵⁵

It is here that in my view the legal and social thought of Roberto Unger can make a significant contribution. Unger’s jurisprudence, rather than engaging in the ‘faux normativity’ described by West⁵⁶, instead promotes engagement in normative jurisprudence in the sense discussed in this chapter; in what Unger terms the ‘lesser’ in addition to the ‘greater’ vocation of legal thought. The lesser vocation of legal thought, usually engaged in by legal professionals, is to use legal thought in the announcement and vindication of rights, and in the settlement of

⁵² See Duncanson, above n 25, 80.

⁵³ See e.g. Margaret Davies, *Asking the Law Question: The Dissolution of Legal Theory* (Law Book Company, 2002).

⁵⁴ Hutchinson and Monahan, above n 1, 1477.

⁵⁵ The claim that it is important to develop a contemporary normative jurisprudence is consistent with the views of other scholars, see e.g. Brian Tamanaha, ‘The Third Pillar of Jurisprudence: Social Legal Theory’ (2014) 56 *William & Mary Law Review* 2235, Twining above n 12, Samuel Moyn, ‘Legal Theory among the Ruins’ in Justin Desautels-Stein and Christopher Tomlins (ed) *Searching for Contemporary Legal Thought* (Cambridge University Press, 2017) 99-113.

⁵⁶ West, above n 11.

disputes. Whilst not sacrificing the lesser vocation to the greater one, importantly for Unger this ‘does not entitle us to deny the importance of the later’.⁵⁷

According to the greater vocation of legal thought, law is not the exclusive domain of the expert; law is not solely about what courts and lawyers do. Law cannot be reduced to the provision of legal services within an unquestioned and all powerful ‘free market’ and neo liberal politics, but instead legal thought ought to be conceived in the broader sense that the Romans invoked, as ‘the science of all things human and divine’. The purpose of the greater vocation is then ‘to grasp the relation of institutions and practices to an established understanding of interests and ideals and to do so on the broadest scale, unencumbered by any restraint of professional specialisation.’⁵⁸ But in order to grasp this relation we also need to engage the extant law since for Unger law is the institutional form of the life of a people viewed in relation to the interests and ideals that make sense of such a regime. Our interests and ideals always remain nailed to the cross of the institutions and practices representing them in fact. Law is the site of this crucifixion.⁵⁹ This ‘greater vocation’ of legal thought that Unger advocates involves critically engaging with extant law, that is, with the detailed formative structures of society by asking what the formative structures of society currently are, what they might become and how those structures might relate to broader ideals and interests. These are all normative legal questions requiring engagement in normative legal thought, that is, in normative jurisprudence.

E Thesis Methodology and Structure

Concerning the methodology used in this thesis, it is unashamedly and unavoidably written from a situated point of view – that of an Australian legal scholar who is:

concerned about the health of the institutionalised discipline of law, especially in common law countries, during the next fifteen to twenty years in the face of ‘globalisation’. The aim is to develop and illustrate a vision of general jurisprudence for Western jurists in the early years of this Millennium. A jurist from a different tradition, or with a different personal background,

⁵⁷ See Unger, above n 11, 49; Duncanson, above n 25.

⁵⁸ See Unger, above n 11.

⁵⁹ Ibid.

would almost inevitably present a significantly different picture. Few of us can break away very far from our intellectual roots.⁶⁰

The field of study of the thesis could therefore be classified as general jurisprudence. Twining describes this field of jurisprudence as providing an alternative vision and agenda for legal theorising that includes creating reasonably comprehensive overviews of law in the world; critical evaluation of our stock of theories about law, justice, human rights, diffusion, convergence of laws, and legal pluralism; and the construction of a workable normative basis for co-existence and co-operation in the context of a world characterised by pluralism of beliefs and dynamic multiculturalism.⁶¹

The methodology of general jurisprudence, whilst not settled, may contain a combination of explanatory, critical and normative elements and this thesis combines these three elements in addressing the contemporary significance of Unger's legal thought. For Unger, and for the author, the fact that there is no single accepted methodology in law and legal thought may be problematic for clearly defining the field of study and setting out clear, unambiguous normative aims, but it also may present opportunities to transform legal thought to better enable shared social values such as democratic experimentalism, and shared visions of individual and collective emancipation.

Whilst there may be no one recognised methodology for legal thought, it is possible to draw on the history of law and legal thought, as Unger does, in order to map and critique existing approaches to legal analysis⁶² and to legal theory⁶³, and to attempt to transform legal thought into a normative practice that is better able to achieve shared values. The methodology of general jurisprudence is ultimately an exercise in imagination limited by the finite legal and social theoretical sources, by experience, by the subjectivity produced by political beliefs or biases, conscious or unconscious. While recognising these necessarily limited and situated cultural and intellectual roots, at the same time it is important, for the reasons discussed in this chapter, to draw on the work of Unger and other available intellectual resources to attempt to develop a contemporary and relevant normative jurisprudence.⁶⁴

⁶⁰ Twining, above n 12, xiv.

⁶¹ Ibid.

⁶² See Chapter II, 'Unger on Contemporary Styles of Legal Analysis' below.

⁶³ See Chapter V, 'Reuniting Jurisprudence and Social Theory' below.

⁶⁴ Twining also notes that the extensiveness of the writing in Anglo-American jurisprudence is a problem which can only be addressed by selection. Thus a selective approach is necessary as it is not possible to analyse all issues and literature: Twining, above n 12, 11.

Leading law and society scholar, Austin Sarat suggests that legal theory has declined as part of a wider death of metanarratives.⁶⁵ Similarly Margaret Davies suggests that legal theory is not dead but that it has been ‘decapitated’ by which she means that legal theory ‘has no idea who it is, what it is, or where it is going. It has become mutable, malleable, inessential and infinitely dispersed.’⁶⁶ Samuel Moyn goes even further, claiming recently that there is currently no such thing as legal thought.⁶⁷ This thesis is therefore part of an attempt to rescue legal theory from itself and to stake out some new territory. Whether we conceive of jurisprudence as dead, or assimilated to other disciplines such as social science or social philosophy, or whether we believe that jurisprudence remains a vital academic enterprise in its own right begs the question of methodology.

In their introductory essay to *The Methodology of Legal Theory*, Giudice and Del Mar argue that it is only in the past 20 years or so that legal theorists have given systematic attention to the aims and methods of legal theory as a distinct area of investigation in its own right, and that while still in their infancy, ‘debates about the methodology of legal theory promise to become as sophisticated and rich as theories about the nature of law itself.’⁶⁸ Through the discussion of Unger’s legal thought, in particular in Chapter V, entitled ‘Reuniting Jurisprudence and Social Theory’, and Chapter VI, entitled ‘Radicalised Pragmatism and Law’, I hope to make a small contribution to this debate about methodology in legal theory. There I argue that while the methodology adopted by Unger is unequivocally that of general jurisprudence, his approach is also consistent with the philosophical pragmatist tradition that influenced the proto realists, the realists, early socio-legal writers such as Pound and Dewey through to the later sociological jurisprudence tradition discussed in Chapter V. Similarly, the methodology of this thesis is influenced by the philosophical pragmatist tradition discussed in Chapter VI.

One common criticism of Unger is that by providing sweeping explanations and criticisms of whole traditions of legal thought and its historic context, he is engaging in a kind of universalism in his theory which is unhelpful and wrongheaded.⁶⁹ However, Unger’s engagement in general jurisprudence, and what he refers to as the method of ‘super theory’ is

⁶⁵ James Hackney, *Legal Intellectuals in Conversation: Reflections on the Construction of Contemporary American Legal Theory* (New York University Press, 2012) 111.

⁶⁶ Margaret Davies, *Asking the Law Question* (Lawbook, 2008) 30.

⁶⁷ Samuel Moyn, ‘Legal Theory among the Ruins’ in Justin Desautels-Stein and Christopher Tomlins (ed) *Searching for Contemporary Legal Thought* (Cambridge University Press, 2017) 99-113.

⁶⁸ Michael Giudice, Wil Waluchow and Maksymilian Del Mar (ed) *The Methodology of Legal Theory* (Routledge, 2010) xi.

⁶⁹ See Leslie Green, ‘General Jurisprudence: A 25th Anniversary Essay’ in Giudice et al (ed), above n 68.

consistent with his philosophical pragmatist approach given that it is also recognised that the claims made of law and legal thought, are themselves made for certain purposes in a particular social context.⁷⁰ For the pragmatist, universal claims are not a problem as long as they are themselves subject to criticism and that such claims do not involve seeking universal foundations.⁷¹

Another common misconception of philosophical pragmatism is to conflate it with crass instrumentalism. That is, often the normative element of pragmatism is overlooked. While this lack of moral vision may be a legitimate criticism of aspects of legal realism, pragmatism looks at ways to improve a state of affairs, that is, pragmatism combines idealistic ends with realistic means.⁷² In that sense it is normative. So pragmatism is consistent with engaging in normative general jurisprudence. Beyond the theoretical arguments in favour of adopting a philosophical pragmatist approach to law and legal thought, another reason to use a pragmatic approach is that it fits with the pragmatism of policy making, law reform, legal practice and public administration.⁷³

The structure of the thesis is as follows. Given that Unger's jurisprudence contains explanatory, critical and normative elements, first, the explanatory and critical aspects of Unger's legal thought are addressed, followed by his normative jurisprudence. The methodology uses is that of general jurisprudence already discussed, that is, to map and critique Unger's approach to legal analysis and legal thought, however the exercise is ultimately one of imagination limited by finite legal and social theoretical resources, and unconscious cultural and political bias.

Chapter II, entitled 'Unger on Contemporary Styles of Legal Analysis', provides an account of

⁷⁰ Unger does recognise this in his discussion of method in Chapter 7 of *The Critical Legal Studies Movement*: Unger, above n 11.

⁷¹ Unger's approach is consistent with the methodological commitment to continuity; the recognition that diverse approaches can be connected by both complimentary and conflicting relations: diverse approaches are complimentary at the level of theoretical perspective yet conflict may remain at the level of particular claims about the nature and existence of law': see Michael Giudice, 'Continuity in Legal Theory' in *Understanding the Nature of Law: a Case for Constructive Conceptual Explanation* (Elgar Publishing, 2015). There is further discussion of the meaning of what Unger term's 'super theory' and 'radicalised pragmatism' at pp.124, 137-41 below.

⁷² Siegfried Schlieder, 'Pragmatism and International Law', (2009) *Pragmatism in International Relations* 124-41.

⁷³ 'While in the mid- 20th century many policy and social science analysts could turn to foundationalist concerns, the law could not because the law had to be anchored in a relatively unclouded view of social life.': Alfonso Morales, 'Pragmatism as a Discipline: (Re)introducing Pragmatist Philosophy to Law and Social Science' in Alfonso Morales (ed) *Renascent Pragmatism: Studies in Law and Social Science*. (Taylor & Francis, 2017) xvii.

Unger's novel and insightful explanation and critique of what he regards as the prevailing styles of legal analysis. First, 'the reasoned elaboration of law' is explained. For Unger, this generalizing and rationalizing style of legal analysis became the dominant, 'canonical' form of legal analysis in western legal cultures in the later half of the 20th century and retains an influence today. Three other current analytic approaches to law are then discussed, what Unger labels, 'retro-doctrinalism', 'shrunken Benthamism' and the age old practice of analogical reasoning.

Chapter III, entitled 'Unger and Critical Legal Studies: Common Ground and Wrong Turns', sets out the major theoretical and moral strands within the critical studies movement. It explains those strands that Unger shares with the first wave critical legal studies movement but, more importantly, it explains the divergences of his jurisprudential approach away from the characteristic moral and philosophical strands of critical legal studies. These divergences advocated by Unger then point to a new direction for legal thought discussed in the later chapters.

Chapter IV, entitled 'The Lesser and Greater Vocations of Legal Thought', turns to the normative reconstructive aspect of Unger's jurisprudence and its crucial relation to classical and contemporary ideas in social theory. First Unger's proposal for a realistic and deflationary approach to adjudication is discussed, followed by his proposal to re-orientate legal analysis beyond the adjudicative setting within the realm of democratic politics. Unger argues that the 'greater vocation' of legal thought requires the development of real institutional alternatives through what he calls 'internal development,' 'deviationist doctrine' or 'mapping and criticism', as well as the development of broader normative visions of self and society.

Chapter V, entitled 'Reuniting Jurisprudence and Social Theory', examines Unger's attempt to reunite jurisprudence with its social theoretical roots to develop a contemporary, normative jurisprudence. First, Unger's argument that existing jurisprudential approaches do not adequately recognise the social nature of law is presented, his approach is then situated within the sociological jurisprudential tradition before, in the final section, some methodological questions are explored regarding Unger's preferred social theoretical approach.

Chapter VI, entitled 'Radicalised Pragmatism and Law', further examines the social theoretical basis for Unger's jurisprudence and discusses how law is implicated in his social theoretical project. In the conclusion the thesis argument is summarized, and some problems and

possibilities for Unger's jurisprudential approach discussed. Finally, some limitations and further questions are raised.

II UNGER ON CONTEMPORARY STYLES OF LEGAL ANALYSIS

In the introduction it was suggested that western legal thought and culture contains several anti-normative elements, and a revival of normative jurisprudence was recommended as one way to counteract any anti-normative tendencies in contemporary legal thought and culture. It was also suggested that Unger's legal thought may contain some useful ideas both in order to critique prevailing practical and theoretical approaches to law, and to develop a contemporary normative jurisprudence. In this chapter and the next, the 'critical' part of Unger's jurisprudence is discussed. In this chapter it is argued that the 'critical' aspect of Unger's jurisprudence is of contemporary significance in providing a clear and persuasive critique of influential contemporary approaches to legal analysis. Chapter III, 'Unger and Critical Legal Studies: Common Ground and Wrong Turns' then argues that, while Unger's critique of contemporary styles of legal analysis shares many ideas with the first wave critical legal studies movement, his jurisprudence diverges significantly from most critical legal theorists in its explicit support for an 'institutionalist' approach to legal thought; an approach that purports to be normatively grounded in social theoretical ideas. This divergence from most approaches to critical legal theory may help to explain the continuing relevance and contemporary significance of his jurisprudence.

In this chapter it is argued that Unger's jurisprudence is significant in providing a clear, insightful and persuasive explanation and critique of prevailing conventional approaches to legal analysis. In his works *What Should Legal Analysis Become?*, and, *The Critical Legal Studies Movement: Another Time, A Greater Task*, Unger has identified what he considers to be the prevailing analytical approaches to law as well as some of the problems with these approaches in order to argue for an alternative approach to legal thought.¹ In Unger's view the current analytic practice of law can be explained as comprising several distinct but overlapping approaches. The first approach is what Unger calls 'the reasoned elaboration of law' which, as he explains in his work, is a generalizing and rationalizing style of legal analysis that became the dominant, 'canonical' form of legal analysis in western legal cultures in the latter half of the 20th century and that retains an influence today.² According to Unger, the influence of the

¹ See Roberto Unger, *What Should Legal Analysis Become?* (Verso, 1996); *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso Books, 2015).

² See Roberto Unger, *What Should Legal Analysis Become?* (Verso, 1996), 34 -40.

reasoned elaboration of law diminished in the early 21st century and two legal analytic approaches that Unger identifies as ‘retro-doctrinalism’ and ‘shrunken Benthamism’ have filled the space of contemporary legal thought.³ These two relatively new legal analytical approaches are discussed in the final part of this chapter along with a much older analytic practice.

A The Reasoned Elaboration of Law

For Unger a major continuing methodological influence in legal thought is the attempt to use public law:

especially constitutional law, the law of supranational organisations such as the European Union, and the international law of human rights – as both the ultimate constraint on political struggle and the highest expression of our political ideals. Its characteristic product is the development of public law doctrine as the instrument of a high handed and high minded minimalism: the defence of fundamental rights as minimums that all political forces must respect.⁴

The preferred method of this approach, Unger argues, is a ‘transcendental formalism’ which requires a twofold defence and development of a system of rights. An assumption of this method is that it can be defended or validated by ‘constitutional documents, understandings and traditions’, but the other transcendental assumption is that these constitutional documents, understandings and traditions define and uphold the presupposed rights of a free society or a democratic state. On this view, it is the responsibility of the jurist to take care of these fundamental rights.⁵

Unger points out that the ‘chief home’ of this high handed and high minded minimalism, particularly in the United States, has been constitutional law, the field of law in which both doctrinal formalism (in the 19th century) and reasoned elaboration (in the 20th century) ‘showed

³ See Roberto Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso Books, 2015) 37 – 42.

⁴ Ibid 33.

⁵ Ibid.

their most aggressive face'. That is, for Unger, the method of reasoned elaboration found support in this older, minimalist approach to constitutional law, both practices sharing the following characteristics:

The attempt to put the best face on the established institutional regime, the disposition to treat it as the definitive template for the advancement of our ideals and the fulfilment of our interests, and the premise that a higher reason was to be found in what history had already produced, if only one brought to the task the right conceptual equipment. It was as if the method of reasoned elaboration simply generalised attitudes that had long been ascendant in dealing with the Constitution.⁶

Reasoned elaboration or 'rationalising legal analysis' as Unger has referred to this analytic practice⁷, is then succinctly defined by Unger as *the retrospective rationalisation of law in the language of impersonal policy and principle*. Unger expands on the method of rationalising legal analysis in the following terms:

Rationalizing legal analysis is a way of representing extended pieces of law as expressions, albeit flawed expressions, of connected sets of policies and principles. It is a self-consciously purposive mode of discourse, recognizing that imputed purpose shapes the interpretive development of law. Its primary distinction, however, is to see policies of collective welfare and principles of moral and political right as the proper content of these guiding purposes. The generalizing and idealizing discourse of policy and principle interprets law by making sense of it as a purposive social enterprise that reaches toward comprehensive schemes of welfare and right. Through rational reconstruction, entering cumulatively and deeply into the content of law, we come to understand pieces of law as fragments of an intelligible plan of social life.⁸

For Unger, rationalising legal analysis (RLA) can be seen to have four main characteristics. First, legal analysis is *purposive*, that is, it assumes that we can only interpret the law by first ascribing a purpose to it. Thus Unger claims that the practitioner of RLA takes this raw material and searches for elements that may plausibly be represented as social or moral ideals, separating them 'from the dross of self-dealing' with which they are commingled. The ideals discovered are not thought of as corresponding to the intentions of the lawmakers. The lawmakers' intentions are sufficiently represented by the melange of motives referred to in the

⁶ Ibid 36.

⁷ The terms, 'reasoned elaboration' and 'rationalising legal analysis' are used interchangeably: Unger, above n 2.

⁸ Ibid 36.

above quotation. The aim of the analysis is to put a good face on this messy legal reality so as to guide its future development, not flatter its producers.⁹

Ascribing purpose to the legal materials is necessary, according to the rationalising legal analyst because it is no longer credible, or at least it would be highly controversial today, to view legal analysis as a ‘naïve positivist’ would, that is, as the mere the application of the literal or plain meaning of words without regard to ideals latent in a particular piece of law.¹⁰ Through the practice of RLA, by attributing purpose to a piece of law, the interpretation of that particular piece of law can then be explained in the face of disagreement. Even where there is little or no disagreement over the meaning or application of a piece of law to a particular case (a situation described by Hart as an easy case) the proponent of RLA will tacitly attribute purpose to the piece of law, however the purpose will only become explicit in the face of controversy over the proper or best interpretation of a piece of law.¹¹

The second major characteristic assumption of RLA is that legal analysis is *contextual*, that is, legal analysis occurs within the context of the norms and attitudes of the particular community. For Unger, the ascription of purpose takes place on the basis of the engagement of the interpreters in a community of discourse that is also a form of life. This engagement then takes place on two levels. First at the level of the professional tradition, the legal experts versed in a legal doctrinal discourse. These experts act as insiders, as active participants in the development of the discourse of RLA. Unger therefore sees the jurist as acting within a collective discourse that develops in historical time and prevails over the individual mind acting within the experience of biographical time. The second level of contextual engagement is engagement at the level of the form of social life, in real society, in real history. As Unger puts it, ‘Just as a theologian always speaks with regard to a particular religion, a particular community faith, so a jurist always speaks with regard to a particular legal system or legal tradition and the real societies with which it is connected.’¹² As a result of this contextual engagement in the community discourse and the form of social life, Unger suggests that legal

⁹ Jeremy Waldron, ‘Dirty Little Secret’ (1998) 98 *Columbia Law Review* 510.

¹⁰ Both originalists and textualists can be regarded as ascribing purpose to law in that they ascribe the purpose consistent with what is regarded as either the original or plain meaning of the relevant law.

¹¹ Presumably the originalist or textualist would deny that there is any tacit ascription of purpose in such cases.

¹² Roberto Unger, ‘Legal Thought Now Lecture 3’ (18 January 2016), *Roberto Mangabeira Unger: Lectures and Courses* <http://www.robertounger.com/en/2017/01/18/legal-thought-now-spring-2016>.

analysis becomes a radically different enterprise to that of social science, which does not adopt this internal perspective.

These first two assumptions of RLA, that legal analysis is both purposive and contextual are consonant with the traditional common law practice of analogical reasoning.¹³ It is in the next two aspects of the method of RLA that it distinguishes itself from analogical reasoning and it is these following characteristics of RLA that are problematic for Unger. The third characteristic assumption of RLA is that legal analysis is *generalising*, which means that while particular acts of interpretation may be localised or episodic, the ambition of the practice over time is to make sense of the law as a whole. Any policy or principle, in order to be endorsed or legitimated through the practice of RLA, must be seen to converge or cohere with a larger set of policies and principles. The set of policies and principles that constitute the law are supposed to represent a ‘flawed, fragmentary approximation to an intelligible form of social life.’¹⁴ Finally, the practice of RLA is *idealising* so that any policy or principle articulated by the legal analyst must not only provide an explanation of how a piece of law coheres with most of the larger body of law, but according to RLA the legal analyst must then be able to *justify* most of that larger body of law. This idealising characteristic of RLA takes the characteristic form of the use of the vocabulary of impersonal policy and principle.

To engage in the practice of RLA the legal analyst must not be an outsider critic of the legal system as assumed by Bentham’s censorial jurisprudence, but must act as an insider participant in this reiterative practice of RLA. As Unger puts it, ‘[T]he repeated practice of policy oriented and principle based analysis should, so the most ambitious and influential views of the practice teach, lead to ever higher standards of generality, coherence, clarity and the rational representation of law.’¹⁵ Thus the practice of RLA strives through a cumulative approach for a higher account of the law so that all of the law can be seen as moving towards intelligible, comprehensive schemes of the various areas of social life such as the market economy, free civil society or political democracy. These ideal representations then provide the source of the ideas that are expressed in the language of impersonal policy and principle, that is, they are

¹³ Analogical reading as a form of legal analysis is discussed further below at 49 -50.

¹⁴ Unger, above n 2, 177.

¹⁵ Ibid 37. Without ever explicitly mentioning legal theorists who clearly endorse the practice of RLA, Unger nevertheless refers to schools of legal theory - legal process, law and economics and theories of right which provide the ‘operational ideologies’ for the practice of RLA.

seen to already exist to some extent in the legal materials, the analyst is not permitted to make them up. However, neither are they present in a 'single, unambiguous form':

Rationalizing legal analysis works by putting a good face indeed the best possible face on as much of law as it can, and therefore also on the institutional arrangements that take in law their detailed and distinctive form. It must restrict anomaly, for what cannot be reconciled with the schemes of policy and principle must eventually be rejected as mistaken. For the jurist to reject too much of the received understanding of law as mistaken, expanding the revisionary power of legal analysis, would be to upset the delicate balance between the claim to discover principles and policies already there and the willingness to impose them upon imperfect legal materials. It would be to conspire in the runaway usurpation of democratic power. Thus, deviations and contradictions become intellectual and political threats rather than intellectual and political opportunities, materials for alternative constructions.¹⁶

Therefore the legal analysis must, according to the method of reasoned elaboration, not only recognise the ideal elements embedded in law but also improve their received understanding. The underlying ideal conceptions of policy and principle are developed by the practitioner of RLA at the same time as pieces of law that provide an insufficient fit are rejected, and thereby the body of law is seen to be improved by the practitioner of RLA.

Three examples can be provided to illustrate the influence that this approach to legal analysis has had on western legal culture in the 20th century and into the 21st. A first example can be seen in the public statements about legal analysis, or legal interpretation expressed by members of the higher judiciary.¹⁷ While it is not asserted that all, or even most judicial officers advocate the practice of RLA, some members of the higher judiciary have at times openly advocated a style of legal analysis consistent with RLA. In a paper entitled, 'Concerning Judicial Method', former High Court Chief Justice Sir Owen Dixon said the following in relation to ultimate courts of appeal:

Such courts do in fact proceed upon the assumption that the law provides a body of doctrine which governs the decision of a given case. It is taken for granted that the decision of the court will be 'correct' or 'incorrect', 'right' or 'wrong' as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges

¹⁶ Ibid 40.

¹⁷ See Michael Coper, 'Concern about Judicial Method' (2006) 30(2) *Melbourne University Law Review* 554; Justice Kenneth Hayne 'Concerning Judicial Method - Fifty Years On' (2006) 32 *Monash University Law Review* 223.

themselves. It is a tacit assumption. But it is basal. The court would feel that the function it performed had lost its meaning and purpose, if there were no external standard of legal correctness.¹⁸

In discussing the relevance of such an assumption to contemporary legal reasoning in 2006, High Court Justice Hayne asks: Is this statement, with its reference to 'correct' or 'incorrect', 'right' or 'wrong' and its reference to 'a standard of reasoning which is not personal to the judges themselves, an 'external standard of legal correctness', still correct? Does it have any application to the constitutional work of the High Court of Australia? Have changes in the understanding of law and the judicial process made what Dixon said irrelevant or wrong? Hayne in response provides a view which seems to represent a combination of RLA and what Unger calls 19th century doctrinal formalism:

Judges, lawyers who practise in the courts, and the academy would all accept, at least if pressed, that it is useful to debate not only whether the reasons advanced in support of the conclusion reached in any case are compelling but also whether they are right. All would, I think, accept Dworkin's weak and commonsensical claim that even in a hard case it is both possible and useful to ask whether the law, properly interpreted, is for one side or the other.¹⁹

And the following appears to be a strikingly explicit endorsement of the generalising and idealising assumptions of RLA and the view that that RLA is the antidote to arbitrariness in legal reasoning, an argument that is criticised below:

There is no point in the court giving reasons for decision, and there is no point in there being any debate about those reasons for decision, unless the trite but basal assumption is made that the reasons may be assessed according to an external standard – a standard that is not personal to the judges themselves. Discard the assumption and you discard a fundamental basis for the legal system itself.²⁰

¹⁸ Sir Owen Dixon, 'Concerning Judicial Method', (1956) 29 *Australian Law Journal* 468 in Hayne, above n 17, 223.

¹⁹ Hayne, above n 17, 235.

Ibid 228. It is not claimed that most or all Australian High Court judges have adopted RLA, or doctrinal formalism as the proper judicial method, see e.g. Selway 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234-250; Rachael Grey, *The Constitutional Jurisprudence and Judicial Method of the High Court of Australia: The Dixon, Mason and Gleeson Eras* (Presidian Legal Publications, 2008); A.J. Brown *Michael Kirby: Paradoxes and Principles* (Federation Press, 2011). Unger's alternative view on the necessity of RLA in the adjudicative setting is discussed in Chapter IV, 'The Lesser and Greater Vocations of Legal Thought' below.

A second example of the continuing influence of an argumentative style similar to RLA can be seen in law review articles and legal textbooks, which represent and influence the future direction of legal scholarship and teaching, and which imply certain assumptions about the analytic practice of law. Textbooks on particular subject areas of law have traditionally represented discrete areas of law as the expression of a coherent body of developing doctrine; as systems that approximate ideal or rational forms of social life.²¹ It would appear to continue to be the norm rather than the exception that these legal texts embody an argumentative style that is consistent with RLA, and that although many of these texts may provide some social context and historical background to the legal materials, and even elements of criticism and discussion of anomalies in the law, the authors of these doctrinal texts, simply by adopting the perspective of the legal insider, the legal expert, the literal or figurative judge, often inadvertently reinforce the generalising and idealising assumptions of RLA. Again, the generalising assumption is that most of the legal materials considered relevant to the particular area of law can and ought to be represented as a coherent scheme of connected policies of social welfare and principles of political right. The idealising assumption is that the resultant coherent set of policy and principle that represents a particular subject area of law can be justified as approximating a rational, intelligible scheme of social life.

One further example of the continuing influence of RLA may be found in the academic discipline of legal theory. Unger and other critical legal scholars have argued that RLA is often assumed and therefore acquiesced in, by much of mainstream legal theory. At least since HLA Hart's seminal jurisprudential text *The Concept of Law* was published in 1961, the central question in jurisprudence has been 'What is law?' or 'What is a legal system?' and the supplementary question has become 'How should judges decide cases?'. Because the academic discipline of jurisprudence since this time has been concerned primarily with these questions, Unger characterises much of recent mainstream legal theory as narrow and parochial attempts to ground, or to provide the 'operational ideology' for the practice of RLA.²² For Unger and other critical legal scholars, jurisprudence, in attempting to either describe or interpret the law, has assumed the structural background of law as real (although largely unexplained and unjustified) and therefore has not addressed the question of structural or social transformation.

²¹ An exception is the cases and materials approach to legal textbooks developed by the legal process school: see William Eskridge and Philip Frickey, 'The Making of The Legal Process' (1994) 107 *Harvard Law Review* 2031-2055.

²² See Chapter III, 'Unger and Critical Legal Studies: Common Grounds and Wrong Turns' below.

For Unger this question of the relationship between legal thought and the structural transformation of society should be the central question for jurisprudence, but is largely ignored by mainstream legal theory.

These aspects of legal culture discussed above, in particular assumptions about law implicit in statements made by members of the higher judiciary and within legal academic scholarship, indicate the continuing influence of a generalising and idealising style of legal analysis identified by Unger as RLA. It is important here to again clarify the claim made by Unger which is that his account of RLA describes an influential style of legal analysis in the later part of the 20th century and into the 21st. The claim is not that RLA is the only discourse that exists within the space of contemporary legal thought. Indeed, Unger admits that the legal consciousness is messy and confused; the product of at least three historical ‘moments’ in the history of legal thought.²³ But Unger does argue persuasively in my view that RLA represents the most influential legal discourse at least in the later part of the 20th century and that this ‘canonical’ style of legal analysis gained hegemony in legal thought and culture at that time precisely because of the apparent lack of reflective criticism of the discourse itself.

According to Unger, the discourse of RLA was repeatedly regarded by jurists in this historical period as necessary or natural, or at least as instrumental to achieve certain political purposes. Law was rarely viewed by jurists as the contingent product of historical events, or as a practice that can be understood within a broader historical context and, if necessary, transformed.²⁴ In discussing the hegemony of RLA, Unger borrows from Antonio Gramsci’s notion of hegemony:

that the most effective kind of domination takes place when both the dominant and dominated classes believe that the existing order, with perhaps some marginal changes, is satisfactory, or at least represents the most anyone could expect, because things pretty much have to be the way that they are.²⁵

Unger argues that RLA achieved its dominance not because the legal and political elites necessarily believed in the practice itself, but because they realised that it can serve the political

²³ See Unger, above n 2, 41 – 51.

²⁴ Unger’s theoretical project, which takes a contextual, historicist approach to legal thought, differs to much of traditional legal theory, see further below Chapter V, ‘Reuniting Jurisprudence and Social Theory’.

²⁵ Robert Gordon, ‘New Developments in Legal Theory’ in *The Politics of Law: A Progressive Critique* (1990), 413-25.

goal of preserving the social status quo and therefore the interests of the propertied classes. As Waldron put it, ‘traditional legal scholars proceed very, very cautiously in their reconstructive work...They take care not to attempt any radical transformation of the ideals they discern and do not propose anything much more than the minimum reforms that are required to make rational sense of the current regime of rules and doctrines.’²⁶ That is, mainstream legal scholars and judges are aware that:

No society, not even the United States, will allow a vanguard of lawyers and judges to reconstruct its institutions little by little under the transparent disguise of interpreting the law. The mass of working people may be asleep. The educated and propertied classes are not. They will not allow their fate to be determined by a closed cadre of priestly reformers lacking in self-restraint. They will put these reformers in their place, substituting for them successors who no longer need to be put in their place.²⁷

In the view of both Unger and Waldron then, whilst legal scholars have been on a ‘rather short political leash’, mainstream legal analysis has ‘taken that leash, sanctified it, and made it into a method’ such that reforms must not be proposed, nor critical analysis proceed except on a scale and at a pace that is amenable to the institutional competence and the political legitimacy of courts in a modern society.²⁸ Thus for both, institutional conservatism and an orientation towards courts and judges have been problematic consequences of adopting this legal analytic approach, however, as Unger clearly explains, it is also the *method* of RLA itself that is problematic in several ways.

B Critique of Reasoned Elaboration

1 Upholding a Regime of Rights?

In order to provide a critique of the method of reasoned elaboration, one approach that Unger takes is to address a common defence made by practitioners of reasoned elaboration. One of the most common ways proponents of the reasoned elaboration of law defend the practice is to insist that the integrity of a regime of rights or of the rule of law requires an approach similar

²⁶ Waldron, above n 9, 517.

²⁷ Unger, above n 2, 31 – 32.

²⁸ Waldron, above n 9, 517.

to RLA. On this view, ‘the principle-based and policy-oriented style of legal doctrine is the indispensable antidote to arbitrariness in legal reasoning.’²⁹ In examining the idea that upholding a regime of rights requires an objectivist, rationalizing discourse such as RLA or the high minded minimalism described by Unger, he asks the question, ‘What exactly is the regime of rights, or its reverse side, the rule of law?’ He answers as follows:

The rule of law exists when power holders remain bound by general rules, even if these are rules established by the power holders themselves. For them to be bound means, in part, that the rules must be interpreted, applied, and enforced in ways that can be publicly understood. The reasons for decision must not turn on case-by-case judgments of strategic interests bearing no general and reasonable relation to the rules. The consequences of an interpretation may be relevant to its persuasiveness, but only so long as they draw weight and meaning from impersonal goals of welfare or right.³⁰

Unger’s synopsis of the ‘rights based’ justification for RLA is that the rule of law conceived in terms of upholding a regime of rights requires RLA, or something very much like it, as the public method for the understanding of law and for its development through justified application. The justification essentially says that RLA provides an antidote to the arbitrariness of legal analysis conceived in terms of interest group pluralism or analogical reasoning. The view that the reasoned elaboration of law represents an antidote to arbitrariness in law and law making then requires the assumption that there is a significant overlap between what Unger describes as the prospective and retrospective genealogies of law. These two genealogies are essentially the prospective genealogy of law as conflict and compromise, that is, interest group pluralism and the retrospective genealogy of the reasoned elaboration of law. But as Unger asks, ‘On what assumptions could these prospective and retrospective genealogies substantially coincide in their results?’ In order for there to be such an overlap:

We must suppose that the lawmaking forces are not as distinct and opposed as they think they are...They must provide an evolutionary logic, moving law over time in the direction of a plan that we can, after the fact, redescribe in the language of developing and consistent ideal conceptions. From the dark battlefield, where ignorant armies clash, comes the rational plan The intersection of the prospective and the retrospective genealogies of law depends upon

²⁹ Unger, above n 2, 63.

³⁰ Ibid, 64. Justice Hayne provides an example of a current high ranking judicial officer who subscribes to a variant of this type of argument, see Hayne, above n 17, 228.

the belief in an immanent evolutionary rationality, practical or moral, commanding the development of law and dwarfing the apparent antagonism of the lawmakers.³¹

And although the contrast between the prospective and the retrospective genealogies of law may apply less clearly to judge-made law, such as the Anglo-American common law, than to the interpretation of legislation, the contrast still exists. That is, ‘to the extent we see judges and judicial decisions, in a system of judge-made law, as agents of contentious, factional interests and visions, the problem of the two genealogies reappears.’³² These assumptions that Unger sets out in the above paragraph that would enable a substantial overlap between the two genealogies have become ‘literally unbelievable’ within contemporary social thought. As Unger says, ‘We hardly need take a very controversial stand in the disputes of contemporary social theory to recognize that the related ideas of a short list of possible institutional systems and of a predetermined evolutionary sequence of stages of institutional development have both taken a beating.’³³ And even if these now defunct ideas in social theory were true, they would have the effect of weakening the significance of what it means to live in a democracy since as Unger puts it, ‘A hidden rational plan, retrospectively manifest in the development of law, empties both individual and collective self-determination of much of their power. It turns them into the unconscious instruments for affirming a higher, providential necessity.’³⁴

Despite these criticisms, it remains the view of many jurists, whether practicing lawyers or within the academy, that the law ought to look different to these people, from how it may look to a citizen, an historian, or a social scientist.³⁵ Unger believes therefore that contemporary jurisprudence continues to carry with it two ‘dirty little secrets’. The first is a ‘right wing Hegelian view of social and legal history’, and the second is what Unger describes as a ‘discomfort with democracy: the worship of historical triumph and the fear of popular action.’³⁶ In the following forceful passage Unger discusses how jurisprudence’s discomfort with democracy shows up in almost every area of legal practice:

³¹ Ibid 69.

³² Ibid 70.

³³ Ibid.

³⁴ Ibid 72.

³⁵ Even Waldron who calls for a ‘democratic jurisprudence’ is equivocal on this issue. See Waldron, above, n 9, 528 -9.

³⁶ Unger, above n 2, 72.

In the ceaseless identification of restraints upon majority rule, rather than of restraints upon the power of dominant minorities, as the overriding responsibility of judges and jurists; in the consequent hypertrophy of countermajoritarian practices and arrangements; in the opposition to all institutional reforms, particularly those designed to heighten the level of popular political engagement, as threats to a regime of rights; in the equation of the rights of property with the rights of dissent; in the effort to obtain from judges, under the cover of improving interpretation, the advances popular politics fail to deliver; in the abandonment of institutional reconstruction to rare and magical moments of national refoundation; in the single-minded focus upon the higher judges and their selection as the most important part of democratic politics; in an ideal of deliberative democracy as most acceptable when closest in style to a polite conversation among gentlemen in an eighteenth-century drawing room; and, occasionally, in the explicit treatment of party government as a subsidiary, last-ditch source of legal evolution, to be tolerated when none of the more refined modes of legal resolution applies. Fear and loathing of the people always threaten to become the ruling passions of this legal culture.³⁷

But beyond the ‘literally unbelievable’ social theoretical assumptions and the antidemocratic influence, Unger further points out that the idea that the reasoned elaboration of law can provide an antidote to arbitrariness in legal reasoning is absurd given that it itself contains ‘overlapping and complementary forms of arbitrariness’ some of which are discussed in the following sections.³⁸

2 The Method of RLA

For Unger, the method of RLA is to ‘deflate’ rationalism and ‘inflate’ historicism thereby ‘splitting the difference’ between these two philosophical approaches. By ‘rationalism’ Unger is referring to ‘the idea that we can have a basis for the justification and criticism of forms of social life, and that we develop this basis through deliberation, which generates criteria of judgement cutting across our traditions, cultures, and societies.’ And by ‘historicism’ Unger is

³⁷ Ibid. Unger was referring to legal culture in the United States but the point would apply to a greater or lesser extent in other Western democracies.

³⁸ Ibid. One objection that the RLA adherent might make to this line of argument is that the effect of the element of arbitrariness inherent in the practice of RLA is smaller than the ‘homely uncertainties of context-bound and open ended analogical reasoning.’ Unger argues however that the element of discretion in rationalizing legal analysis is both ‘less transparent and more ambitious’ than it is within the discourse of analogical reasoning.

referring to ‘the idea that we have *no* standards of judgement with an authority transcending particular, historically located forms of life and universes of discourse.’³⁹ For Unger the problems with RLA discussed in this section ‘turn out to illustrate the fundamental weakness in this larger philosophical campaign to deflate rationalism and to inflate historicism, and to find the imaginary middle point between them.’⁴⁰

Unger describes the predicament of the modern rationalist as problematic which in turn requires a ‘deflation’ of the rationalist approach:

The characteristic modern form of this rationalism seeks to identify a type of social organization that remains neutral with respect to the life projects of individuals and the outlooks of particular groups. We can also redefine this modern rationalism affirmatively as the effort to infer a blueprint of social organization from the abstract idea of voluntary society; that is to say, from the idea of a chosen association among free and equal individuals. This modern rationalism seems at every point either to remain too indeterminate to provide the guidance it promises, or to become determinate only by abandoning the neutrality it claims.⁴¹

Modern rationalists also have to deal with the challenge from the experience of ‘the churning up, the recombination, and the reinvention of forms of social life, making us ever more aware of the extent to which ideal conceptions have roots in historically located practical arrangements.’⁴² For Unger, the same churning and recombination ‘undermine the claim of any particular version of a market economy or a representative democracy to embody a reliable version of the idea of voluntary society.’⁴³ Although modern rationalists attempt to suppress the actual social experience, at the same time they perceive the need to ‘deflate’ the claims of rationalism to bring its claims more into line with the lived experience of social churning up, recombination and reinvention. An example of the ‘deflation’ of rationalism in the history of legal thought is the move away from 19th century legal formalism in favour of RLA itself, which replaced the distinction between pre political and political law, with a weaker, or softer, distinction between law as factional fighting on the one hand, and law as embodying a public morality or public interest on the other.⁴⁴

³⁹ Ibid 171.

⁴⁰ Ibid.

⁴¹ Ibid 172.

⁴² Ibid 173.

⁴³ Ibid.

⁴⁴ Ibid 174.

The second part of the campaign to split the difference between rationalism and historicism is then to ‘inflate’ historicism. Again, by historicism, Unger is referring to the idea that we have *no external* standards of judgement that can transcend a particular, cultural historical context. In other words, according to historicism there are no criteria of judgment that ‘cut across traditions or cultures’. That is, for the historicist, there is no higher order rationality. For Unger, the contemporary form of historicism is both conservative and ironic, and uses the assumption that there is no rational, grounded justification for a particular society as a justification to re-engage in the established tradition in a passive and ironic way.⁴⁵ The established tradition then provides not only the horizon of justification and criticism, but also somehow provides a ‘source of insight into a trans-historical moral order.’⁴⁶ The claims of historicism have thereby been inflated, in the same way that the claims of rationalism have been ‘deflated’ in order to provide a more persuasive means of justification.

Unger provides two examples from political and legal culture of the inflation of historicism. The first is the treatment of existing legal and political institutions in contemporary Western democracies, particularly by people who Unger terms ‘conservative reformists’, as somehow ‘deserving special respect as a source of moral and political guidance’⁴⁷ not simply out of loyalty to those institutions and traditions but because they are supposedly the impartial embodiment of our society’s collective ideals and interests. That is, for the conservative reformist, existing institutions can somehow provide an insight into a trans-historical moral order. A second example of the inflation of historicism in contemporary legal culture can be found in the relatively recent turn in legal theory to what is commonly referred to as interpretivism. Rather than seeing the relationship between the legal analyst and his materials as uncontroversial as perhaps would the 19th century doctrinal formalist, the interpretivist recognises that the problem of interpretation plagues the field of law and legal thought. Thus, the interpretivist realises that the common culture ‘fails to exist in a unitary form. It remains anchored in the conflicting outlooks of particular classes and communities.’⁴⁸ Unger argues

⁴⁵ Unger’s account of the contemporary historicism appears to have in mind the views of liberal theorists such as Rawls, Rorty and Dworkin.

⁴⁶ Ibid 175.

⁴⁷ Ibid.

⁴⁸ Ibid 176. For further discussion of the interpretivist position, See Nicos Stavropoulos, ‘Interpretivist Theories of Law’ (2007) 2 *Social, Political & Legal Philosophy* 3; Natalie Stoljar, ‘Survey Article: Interpretation, Indeterminacy and Authority: Some recent controversies in the philosophy of law’ (2003) 11(4) *Journal of Political Philosophy* 470.

that rather than accepting and finding value in the consequences of cultural pluralism and fragmentation, interpretivists instead inflate historicism to deny such consequences and attempt to single out those parts of a culture that are somehow more authoritative or more impartial.⁴⁹

However, for Unger ‘the most important and detailed example in contemporary culture of the campaign to split the difference between rationalism and historicism is...rationalizing legal analysis itself.’⁵⁰ The rationalist part of RLA suggests that we can rationally reconstruct the law as the expression of a rational, intelligible and defensible plan of social life. The historicist part of RLA suggests that each legal tradition takes place within a specific historical context and that the specific social, economic and political circumstances need to be taken into account while rationally reconstructing the law. So RLA lends a special authority to law as the ‘rough approximation’ of a free civil society, free market economy and representative democracy. Therefore if we adopt the approach of RLA, of splitting the difference between rationalism and historicism, then law conceived as the current set of institutional and practices is ‘more than a tradition’, and provides ‘more than a context’, and with RLA it has the ‘practical and conceptual means with which to evade and correct its own particularity.’⁵¹

The problem of the two genealogies of law has already been discussed. That is, the implausibility of the assumption that the prospective genealogy of law as conflict and compromise on the one hand, and the retrospective genealogy of RLA on the other can substantially coincide. As Unger puts it:

If the law really is the product of such factional fighting, and if democratic politics are in earnest and do not operate as the unconscious or unwitting instrument of pre-set practical or moral imperatives, we cannot reasonably expect the law to display any such cohesive functional or ideal plan. At best it may contain, in varying proportions, the beginnings and residues of many such plans.⁵²

In making such implausible assumptions, Unger argues that practitioners and defenders of RLA are engaged in a practice of deception, manipulation and vanguardism. But although Unger strongly condemns the practice of RLA and the assumptions implicit in the practice, he also

⁴⁹ Unger, above n 2, 176.

⁵⁰ Ibid.

⁵¹ Ibid 178.

⁵² Ibid.

believes that RLA is only a special case of a broader philosophical campaign to split the difference between rationalism and historicism, and that it is this broader intellectual and cultural situation that ‘disarms us imaginatively’ in the criticism of the institutions and practices of society.⁵³

To understand why the essential method of the reasoned elaboration of law as Unger describes it, that is, the attempt to ‘to split the difference between rationalism and historicism’ is so implausible, it is useful to examine Unger’s critique of formalism and objectivism that he provided in *The Critical Legal Studies Movement* because the method of reasoned elaboration is consistent with Unger’s descriptions of both ‘formalism’ and ‘objectivism’.

For Unger a formalist approach to legal analysis supposes that each area of law and doctrine relies on ‘some picture of the forms of human association that are right and realistic in the areas of social life with which it deals.’⁵⁴ And without such a guiding vision, legal reasoning would collapse into ordinary analogical reasoning. However the criticism of such formalism is that, ‘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 received understandings.’⁵⁵ Doctrinal formalism must adopt therefore, the dubious assumption that the two genealogies of law, both prospective and retrospective substantially coincide, an assumption criticised in the previous section. The critique of objectivism then builds on the critique of formalism. It essentially says that formalism relies on a background theory or scheme of human association to justify the applicable policy or principle which must itself be objective, in the sense that it refers to an objective or ‘real’ structure of society. However, as Unger points out the idea of a system of social types with a built in legal or institutional content has been discredited on two levels. At a legal historical level, the attempt to provide a general theory of contract or property or constitutional law has instead revealed that there is in fact no in built structure of a market economy or a democratic state. Similarly an examination of contemporary law and doctrine reveals that there is no single unequivocal version of democracy or the market.⁵⁶

Unger reveals how supposedly objective schemes of social ordering assumed by reasoned elaboration instead contain fundamental contradictions. He argues that while contemporary

⁵³ Ibid 7.

⁵⁴ Unger, above n 3, 87.

⁵⁵ Ibid.

⁵⁶ Ibid 83 -94. See also Nicos Stavropoulos, *Objectivity in Law* (1996, Oxford University Press).

legal doctrine distinguishes at least three spheres of social life: the state, the family and the market, ‘legal disputes and broader political debates illustrate how the boundaries between these spheres are contingent and permanently subject to renegotiation.’⁵⁷ Hugh Collins provides two examples. One is a series of cases that have blurred the boundary between the family and the market. In these cases the general principle that family and friend do not intend to contract as they do not operate within the market economy has been undermined by the counter principle that informal arrangements between relatives can establish certain property rights. The second example is of courts applying public law principles of natural justice and freedom of speech in the context of employment law, an area of law traditionally governed by market based principles. The problem for the courts has been how to justify the delineation of these conflicting spheres of social life. Unger’s critique shows that there is no limit internal to law and legal doctrine so the limits have to come from elsewhere.

One prominent criticism of Unger’s critique of formalism and objectivism has been to argue that ‘he mistakes minor practical disagreements about how best to reconcile basic principles of the legal system for fundamental disputes about the basic framework of social life.’⁵⁸ However Unger responds to this criticism by asserting that it presupposes an objective scheme of human association underlying the existing legal system that cannot be challenged or changed. Fundamentally then Unger argues that the method of reasoned elaboration of law, the attempt to split the difference between rationalism and historicism represents a ‘watered down’ version of 19th century legal science. For the 19th century jurist each sphere of social life had an inbuilt, objective legal content discoverable by reason. This view in turn represented a watered down version of the conservative doctrines that preceded modern social theory. These conservative doctrines ‘pretended to discover a canonical form of social life and personality that could never be fundamentally remade and reimagined, even though it might undergo corruption and regeneration.’⁵⁹ Therefore, for Unger, reasoned elaboration represents the continuation, rather than a break, with 19th century doctrinal formalism and conservative pre-modern social theory.

⁵⁷ Hugh Collins, ‘Roberto Unger and the Critical Legal Studies Movement’ (1987) 14(4) *Journal of Law and Society* 387, 399.

⁵⁸ Ibid 398 citing John Finnis, ‘On the Critical Legal Studies Movement’ (1985) 30 *American Journal of Jurisprudence* 21.

⁵⁹ Unger, above n 3, 93.

3 Disconcerting Practical Effects

In addition to the methodological problems with reasoned elaboration (or RLA) discussed above, Unger also identifies several disconcerting *practical* effects of the reasoned elaboration of law. The first is the plight of the contemporary legal academic writing a review article:

Such an article typically presents an extended part of legal rule and doctrine as the expression of a connected set of policies and principles. It criticizes part of that received body of rule and doctrine as inadequate to the achievement of the ascribed ideal purposes. It concludes with a proposal for law reform resulting in a more defensible and comprehensive equilibrium between the detailed legal material and the ideal conceptions intended to make sense of that material.⁶⁰

Unger poses the reasonable question, why should the reform stop at one point rather than another? One answer perhaps is that practical political feasibility requires that ‘most of the institutional background must, as a practical matter, be held constant at any given time’ and ‘proposals for institutional tinkering’ should be kept to a minimum. In addition, ‘given that the author is speaking in the impersonal voice of the quasi-judge or the quasi-bureaucrat, the reform proposals should never seem too sectarian.’ So Unger sees RLA as being shaped by ‘implicit, unjustified constraints’ that remain largely unchallenged and unexplored. And through conforming to these constraints, the legal analyst often acquires a ‘sense of relative arbitrariness, of confusion between normative justification and practical strategy.’⁶¹

It is not only the legal academic who, standing in the place of the judge, experiences this sense of arbitrariness and confusion. It is also judges themselves who experience these disconcerting effects in the attempt to assign legal rights to litigants. As Unger explains:

The judge must revise received legal understandings, from time to time, but if he revises too many of them, or revises a few of them too radically, and if in so doing he challenges and changes some part of the institutional order defined in law, he transgresses the boundaries of the role assigned to him by rationalizing legal analysis. What keeps him within these boundaries? The happy assurance that most of the received body of law and legal understanding at any given time can in fact be represented as the expression of connected policies and principles? If so, how could such a harmony between the prospective history of law as a history

⁶⁰ Unger, above n 2, 49. The corollary in legal practice might be the lawyer thinking up a challenging legal argument in an appellate case.

⁶¹ Ibid 50.

of conflicts among groups, interests, and visions and the retrospective rationalization of law as an intelligible scheme of policy and principle ever occur? Or is the restraint of revisionary power by the judge something that comes from an independent set of standards about what judges may appropriately do? If so, from where do these standards come?⁶²

This claim that the proper method and function of adjudication is controversial and probably impossible to settle by way of theory is not a novel claim but a claim that is adhered to by many in the tradition of pragmatic jurists that can be traced to a movement broadly defined as legal realism.⁶³ A third example of the disconcerting practical effects of RLA can then be seen in what has come to be known in US law as the problem of complex enforcement and structural injunctions.⁶⁴ Unger describes this alternative adjudicative practice of complex enforcement as follows:

The method is the effort to advance more deeply into the causal background of social life than traditional adjudication would countenance, reshaping the arrangements found to be most immediately and powerfully responsible for the questioned evil. Thus, the remedy may require a court to intervene in a school, a prison, a school system, or a voting district, and to reform and administer the organization over a period of time. Complex enforcement will demand a more intimate and sustained combination of prescriptive argument and causal inquiry than has been characteristic of lawyers' reasoning.⁶⁵

As with the practice of RLA, the basic problem with the theory and practice of complex enforcement is the difficulty of making sense of the limits of the practice. Rather than the practice of complex enforcement having natural limits then, Unger argues that the practical limits are imposed by the political interests of the educated and propertied classes that 'will not allow their fate to be determined by a closed cadre of priestly reformers lacking in self-restraint'.⁶⁶ So the practical restrictions on the procedural task of complex enforcement is ultimately a result of the perceived unsuitability of the courts to carry out this important work to execute the mandate of substantive law. Unger thus presents this strange situation in contemporary law whereby although complex enforcement would appear to be 'a necessary

⁶² Ibid.

⁶³ For an account of Unger's realistic, deflationary approach to adjudication see Chapter IV, 'The Lesser and Greater Vocations of Legal Thought' below.

⁶⁴ Lewis Sargentich, 'Complex Enforcement' 1978 (unpublished) cited in Roberto Unger, 'Legal analysis as institutional imagination' (1996) 59 *The Modern Law Review* 1.

⁶⁵ Unger, above n 2, 31-32.

⁶⁶ Ibid.

procedural complement, not a casual afterthought’, to contemporary law, ‘no branch of present-day presidential or parliamentary regimes seems well equipped, by reason of political legitimacy or practical capability, to do it.’⁶⁷ Unger believes that complex enforcement shows how ‘fidelity to law and to its imputed ideals may drive, unwittingly and on a small scale, into the institutional experiments that we have refused straightforwardly to imagine and to achieve. It also demonstrates how our failure to take the second step disorients and inhibits our small-time reconstructive work.’⁶⁸ For Unger, the problem of complex enforcement clearly illustrates the discrepancy between the rationalisation of the substantive law through RLA and the derationalisation of the institutions and practices that are responsible for implementing the ideals of substantive law. So that when the judiciary has attempted to realise the ideals of substantive law in detail through complex enforcement, it is clear that there is nothing determinative within the content of substantive law that defines the limits of such an attempt. It provides an excellent practical example of the defeasibility of legal rights, that is, even if it is possible to clearly define a legal right, there are many different ways that these rights can be effectively enjoyed, or carried out, but this is not a problem that proponents of reasoned elaboration are concerned with.

A final disconcerting practical effect of reasoned elaboration is that it does not appear to provide a basis for effective political action. This effect of reasoned elaboration and other formal styles of legal analysis might explain the dilemma facing the socially progressive lawyer who, on the one hand would like to be able to use her skills qua lawyer to effect real social change, but having internalised RLA feels constrained by the limits of the practice. Indeed, for Unger the ‘central defect of rationalizing legal analysis as political action lies in its failure to reach the deeper sources of disadvantage and exclusion in the institutions and practices of society.’⁶⁹ This is manifest in several characteristic deficiencies of RLA described by Unger. First the ‘shamefaced Bonapartism of the jurists, who hand down legal benefits from on high to people in their capacities as isolated victims rather than channelling them through the forward-looking devices of group organization’. Second, the attempt to counter the experience of subjugation through discrimination law, rather than by changing the institutional structure

⁶⁷ Ibid. Note that there is no similar judicial mechanism in the UK and Australia.

⁶⁸ Ibid.

⁶⁹ Ibid.

of society. And third, ‘the selective blindness to connections among the different sources of disadvantage and among the disadvantages of different groups’.⁷⁰

The effect of these practical deficiencies is to limit the political imagination and therefore limit the practical possibilities for social transformation:

As political imagination, rationalizing legal analysis suffers from the impulse to suppress and to freeze the internal relation between institutions or practices and interests or ideals. It works by bestowing an idealizing image upon the practices and the institutions defined in law, and finds in the retrospective improvement of law the excuse for this uplift. The consequence is to leave unexpressed, unexplored, and unresolved the internal instability characteristic of programmatic positions in modern law and politics: the tension between recognized interests or professed ideals and their established institutional vehicles.⁷¹

While the conventional view of legal analysis may be that it is necessarily distinct to, and much more limited in scope than openly political action, for Unger and many critical legal theorists there is nothing about the nature of law or legal analysis (other than perhaps self interest) that requires limiting legal thought according to the assumptions of reasoned elaboration and thereby restricting the possibilities for practical transformation of society.⁷²

In the author’s view, Unger has provided a clear, insightful and persuasive critique of the method of the reasoned elaboration of law (RLA) as outlined above, both in terms of various conceptual problems and disconcerting practical effects. Indeed many critical legal theorists and mainstream legal scholars would accept that such a critique of the reasoned elaboration of law is largely convincing.⁷³ One could argue therefore that Unger is really only providing a description of a well known and well worn critique of a once dominant style of legal analysis. However, in considering the contemporary significance of Unger’s legal thought, this criticism ignores both the clarity and persuasiveness of Unger’s critique in the face of the continuing influence that the reasoned elaboration of law maintains on legal thought. For this reason alone the critique of the reasoned elaboration of law that Unger provides in his work remains

⁷⁰ Ibid 105.

⁷¹ Ibid 106.

⁷² Some of the implications of this idea are discussed in Chapter IV, ‘The Lesser and Greater Vocations of Legal Thought’ below.

⁷³ See Waldron, above n 9; Richard Rorty, ‘The Banality of Pragmatism and the Poetry of Justice’ (1989) 63 *Southern California Law Review* 1811.

significant. But additionally, Unger has identified two styles of legal analysis that have supplemented and to an extent replaced reasoned elaboration as influential styles of legal analysis in the 21st century. These two relatively new approaches to legal analysis that Unger terms ‘retro-doctrinalism’ and ‘shrunken Benthamism’, together with reasoned elaboration and analogical reasoning complete Unger’s schematic representation of the ‘messy and confused’ analytic practice of law today.

C Contemporary Legal Analytic Approaches

Although the reasoned elaboration of law may have gained acceptance as the canonical style of legal analysis in western legal cultures in the later part of the 20th century, any methodological consensus that formed around reasoned elaboration has since been dispelled due in no small part to the work of the critical legal studies movement of which Unger was a founding and influential member.⁷⁴

So while reasoned elaboration appears to maintain a significant influence on contemporary legal thought, there are at least three other distinctive styles of legal analysis identified by Unger which, when taken together with reasoned elaboration, provide a useful representation of the current analytical practice of law. One approach Unger calls ‘retro-doctrinalism’ the second, ‘analogical reasoning’ in the common law and the third, ‘shrunken Benthamism’. Each of these approaches is addressed in turn below.

Retro-doctrinalism sought to ‘recover and develop’ legal doctrine as it was understood before it suffered the attacks of anti-doctrinal scepticism in the 20th century, including the attacks of the critical legal studies movement and Unger himself. Retro-doctrinalism ‘had an undisguised affinity to the typological conception informing 19th century legal science’. Its home was private law although it could also be extended to public law by merging into the transcendental formalist approach to basic rights. Despite the dubious assumptions of retro-doctrinalism discussed below, Unger argues that it managed to become an influential legal analytic practice in the 21st century due to at least three historical circumstances. One circumstance was the

⁷⁴ Unger’s relation to the critical legal studies movement is discussed in Chapter III, ‘Unger and Critical Legal Studies: Common Ground and Wrong Turns’ below.

relative stability of private law in the 20th century which emboldened many to view private law as ‘the expression of a rational order of economic and social relations’.⁷⁵ A second circumstance was the combined loss of faith in the method of reasoned elaboration, with a common misunderstanding of 19th century legal science. Retro-doctrinalism was able to embrace the typological approach; without the attempt to uncover ‘the inherent content of each type of economic, political and social organisations’ it was able to work on a smaller and more fragmentary scale in broadly the same direction, for example, the law of property was represented by retro-doctrinalists as a law about things in a (rational) market economy. A third condition favouring retro-doctrinalism according to Unger was the broader intellectual setting which was essentially bereft of structural thought and structural ambition. In such a climate, retro-doctrinalism was a way of retreating from the more ‘extravagant ambitions’ of reasoned elaboration, while continuing to do the doctrinal work of the jurist.

Unger provides a plausible explanation of how retro-doctrinalism came to be seen as a viable legal analytic practice. However, the methodological problems discussed above in relation to reasoned elaboration apply even more straightforwardly to retro-doctrinalism. Although this new doctrinal practice rejected the ‘logic of social types’ assumed by 19th century legal science at a theoretical level, by assuming that the rational market is synonymous with existing legal institutions and practices, the effect of this new legal analytic practice was the same as that of 19th century legal science: to naturalise or objectivise the existing institutional arrangements. Unger’s critique of formalism and objectivism therefore applies as much to retro-doctrinalism just as it does to 19th century doctrinal formalism, and to 20th century reasoned elaboration. In addition to the methodological problems with these doctrinal practices, for Unger the ‘rationalising spell’ cast by these doctrinal practices inhibits the possibility of social change through law. It is for this reason that Unger believes it crucial to critique and then reject such traditional approaches to legal doctrine, including the new version.

Within the adjudicative setting there remains however, a much older and, in Unger’s view, a much more robust juristic method than either reasoned elaboration or retro-doctrinalism. That approach is analogical reasoning in the common law tradition. Analogical reasoning is the contextual and purposive mode of analysis familiar to common lawyers in particular, which differs from reasoned elaboration and doctrinal formalism in that it refuses ‘to climb up the

⁷⁵ Unger, above n 3, 37 – 41.

ladder of abstraction, generalization and system'.⁷⁶ As discussed above, the practice of rationalising legal analysis according to Unger is marked by four major characteristics: it is contextual, purposive, generalising and idealising. Analogical reasoning on the other hand eschews the idea that legal analysis should generalise and idealise the law, it therefore rejects the idea of legal analysis as the retrospective rationalisation of law in the language of impersonal policy and principle.

Unger describes the practice of analogical reasoning in detail and thereby distinguishes the practice from both reasoned elaboration and doctrinal formalism. The practice of analogy has three attributes. First, it involves a 'recurrent dialectic between the ascription of purpose and the classification of circumstance'. As such 'there is no sensible way of comparing or distinguishing situations to the end of rule governance apart from purposive judgments. An analogical comparison is not inherently in the facts, it is a way of advancing certain interests.' Second, the guiding interests or purposes drawn upon by the analogist are open ended. The guiding interests or purposes do not form a closed list, nor do they form a hierarchy of higher and lower order propositions by which one necessarily trumps another. Rather, the guiding interests or purposes 'reflect the variety, renewal and disorder of real human concerns.' For Unger the impossibility of hierarchically ordering of the interests and purposes relevant to analogical reasoning is a consequence of 'the refusal to subordinate social experience to schematic containment.' We can see then that like the interest group pluralism model of legal analysis, analogical reasoning differs in important ways from the other doctrinal practices, particularly in its assumptions about agency and institutional change.⁷⁷

The third attribute of analogical reasoning, an extension of the second attribute, is that it is non-cumulative:

its repeated practice over time does not turn it, little by little, into a system of hierarchically ordered, more abstract and more concrete propositions, because the guiding interests or purposes themselves do not move toward a system of axioms and inferences. As convergence and simplification take hold in some fields, divergence and complexity increase in others.⁷⁸

⁷⁶ Unger, above n 2, 60 -61. See also, Cass Sunstein, 'On Analogical Reasoning' (1993) 106 *Harvard Law Review* 741.

⁷⁷ Ibid.

⁷⁸ Ibid.

So unlike the doctrinal approaches discussed above, the practice of analogical reasoning within say, an adjudicative setting is a practice that is not distinct from, but continuous with ordinary methods of moral and political reasoning, although it is bounded by a starting point in legal materials and ‘made self-conscious by the determination to articulate the aims of an endeavour that is both collective and coercive’.⁷⁹ Given these attributes of analogical reasoning, Unger queries the presumption made by proponents of reasoned elaboration or retro-doctrinalism that such formal modes of analysis carry more rational authority than analogical reasoning since:

The family of prudential and analogical practices is more widespread in historical experience and more entrenched in human concerns than is any more abstract or deductive mode of moral, political, and legal reasoning. Even in the world history of legal doctrine, analogical and glossatorial forms of reasoning have exercised far more influence, over more sustained periods, than the principle-seeking abstractions of systematic or rationalistic jurists.⁸⁰

The remaining contemporary legal analytic approach identified by Unger which he argues also maintains an influence on legal thought and culture in the 21st century is what he calls ‘shrunk Benthamitism’. This approach views law instrumentally as a ‘set of tools for the marginal adjustment of incentives and constraints on human behaviour’ encompassing the law and economics school in the United States and other approaches that purport to apply scientific studies ‘of mind, brain and behaviour’ to support their analyses of law and policy.⁸¹

Unger points out that similar to Bentham, these behaviourist approaches, rely on normative assumptions about appropriate, or ‘benign’ social ends such that incentives or disincentives can be designed accordingly. These approaches to law also resemble Bentham in their ‘consequentialism’ and their impatience with the jurist’s doctrinal understanding of law along the lines of either reasoned elaboration or retro-doctrinalism discussed above. As such, shrunk Benthamism is at least consistent with the prospective genealogy of law discussed above; a view of law that Unger has described elsewhere as ‘interest group pluralism’, that is,

⁷⁹ Ibid. Analogical reasoning can therefore be seen as ‘realistic’ or ‘pragmatic’ and can be distinguished from a formalist approach to justification which assumes that the list of human interests and purposes is theoretically closed. See Chapter III below for further discussion of analogical reasoning in the judicial setting.

⁸⁰ Ibid. Unger goes on to argue that the subordination of analogy to RLA is even more puzzling given ‘that an analogical style of thinking has served as the vehicle for the single most influential conception in the history of ideas about spirit and personality in the West: the understanding, in the monotheistic Semitic religions of Judaism, Christianity, and Islam, of the relation between God and humankind by analogy to the relations among people.’

⁸¹ Ibid 41 - 42.

law expressed in the vocabulary of interests and interest groups. On this view, each piece of law is conceived as the product of conflict and compromise, an armistice amongst opposing factional interests, and the law is then a statement of winners and losers in the particular political struggle. So this fourth legal analytical approach identified by Unger resembles Bentham in several ways, however, in other respects it is ‘nothing like the real thing.’ While Bentham’s censorial jurisprudence was radical in its proposals for legal reform, the contemporary ‘shrunken Benthamism’ that Unger describes ‘contemplated no major change in human experience’ and ‘implied no substantial alteration in the institutional regime.’ Unger writes that, ‘the little Benthams presented themselves as experts deploying methods well established in the economics and psychology of their time to achieve goals that were episodically but never systematically contentious.’⁸²

To understand why, it is useful to examine how the economic analysis of law differs from Bentham’s hedonic utilitarian approach. Bentham’s utilitarianism relied on the moral or normative assumption that ‘utility’ was a moral good and that disutility was a moral harm and so law, for example, could be evaluated on the basis of a quantifiable measure of utility. Bentham’s censorial jurisprudence was then based on the simple idea that law ought to maximize subjective pleasure and minimize subjective pain. Economic analysis on the other hand does not rely on a calculus of subjective pleasure and pain, but rather on a calculus of objective behaviours. As West argues, from the mid 20th century, (post marginalist) economic theory sought ‘objective proxies for human well being so that Bentham’s hedonic utilitarianism came to be replaced by objective cost benefit analysis. A problem with this shift from the hedonic goals of utilitarians to the objective quantification of preferences within a market economy is that human pain and pleasure is ‘relegated to the immeasurable and unquantifiable - that which cannot be reckoned’ since according to the new economic theory, what cannot be quantified or measured does not exist.⁸³

There are also important political implications that result from the shift from utilitarianism to modern economic analyses. One is that the costs and benefits calculus of economic theory applies to corporations just as much as to individuals or groups of individuals. As West argues, ‘if the point of law is to minimize costs and to maximize benefits, then corporations and the importance of their bottom lines are conceptually on a par with human beings.’ As a result

⁸² Ibid 42. Dyzenhaus also argues for a neo Benthamite revival in legal theory, see David Dyzenhaus ‘The Genealogy of Legal Positivism’ (2004) 24 *Oxford Journal of Legal Studies* 39.

⁸³ Robin West, *Normative jurisprudence: An introduction*. (Cambridge University Press, 2011), 101.

economic theory is bound to be more politically regressive than traditional utilitarian calculi. The other important political implication of adopting an economic analysis of law is that it blurs the powerful and distinctively utilitarian argument for equality as a guiding norm for redistributive policy. For the hedonic utilitarian, each dollar has more subjective value for the poor person viz a viz the wealthy person. By rejecting the logic of such a subjective comparison, the modern economist is able to also reject the moral case for wealth redistribution. So for both West and Unger these economic, and purportedly objectivist, scientific analyses of law that Unger labels 'shrunk Benthamism', rather than representing a 21st century censorial jurisprudence that might provide an external, normative basis to critique and reform law, instead compliment conventional doctrinal approaches in casting an institutionally conservative, rationalising spell over legal thought.

Unger's explanation and critique of several influential contemporary styles of legal analysis outlined in this chapter is in the author's view and in the view of others, is largely persuasive.⁸⁴ As Jeremy Waldron argues, the continued acquiescence in reasoned elaboration and conventional doctrinal approaches to law belies a certain 'discomfort with democracy' such that:

we have failed to evolve for ourselves a genuinely democratic philosophy of law; that is, we have failed to develop ways of thinking in jurisprudence that are appropriate to law understood as the creation and property of a free and democratic people. Surely, Unger says, "common law after democracy and within democracy must mean something different, and develop in a different way, from a common law outside and before democracy"- but one would never know this, he says, from reading the jurisprudence that is actually written in this "democratic" society.⁸⁵

This is a serious charge which would seem to require a fundamental reconsideration of the contemporary styles of legal analysis identified by Unger and those aspects of traditional jurisprudence which support them. If the critique of contemporary legal thought discussed in

⁸⁴ See Waldron, above n 9; Collins above n 57. Collins also argues that Unger's critique of legal analysis is largely persuasive, Unger stops short of endorsing Unger's attempt to reconstruct legal doctrine.

⁸⁵ Ibid. The focus of Waldron and Unger's critique is the legal system of the United States, although it can be applied to a greater or lesser extent to other western democracies. While Unger is well known for his radical politics, Waldron's adherence to political liberalism means that his critique of reasoned elaboration carries extra weight.

this chapter is accepted then it is only analogical reasoning within adjudication, and law as conflict and compromise outside adjudication that remain acceptable contemporary legal analytic approaches. And the implications of Unger's critique of contemporary styles of legal analysis are not simply academic. As Unger points out in the new edition of *The Critical Legal Studies Movement*, the problem is real in that retro-doctrinalism and shrunken Benthamism have supplemented reasoned elaboration to some extent as popular modes of legal discourse, so that it seems that formalist and objectivist ideas about law continue to re emerge within the 21st century legal thought and culture.⁸⁶ This fact underscores the contemporary significance of Unger's critical jurisprudence, and the continuing need to examine his critique of legal thought particularly within legal education.

For Unger a major problem with objectivity and formalism is that they evade the structure of society and are another example of what Unger calls 'necessitarian' social theory. In the context of legal and social thought, the continued influence of these ideas severs 'the link between the insight into the actual and the imagination of the possible'. In a world where such ideas are fast becoming less credible, objectivist approaches to law therefore seem to represent a kind of hypocritical instrumentalism supporting the institutional status quo. But unlike many within the critical legal studies movement, Unger is keenly aware that it is not possible to replace something with nothing, no matter how convincing a critique of contemporary legal thought might be. Unger's normative jurisprudential project that includes an alternative conception of legal analysis is therefore crucial to addressing the problems with these contemporary approaches to legal analysis identified by Unger, and the 'antidemocratic superstition' that some of these legal analytical approaches mask.

As discussed in the following chapters, for Unger legal thought should be an idealisation of the current discourse of judges and lawyers, but rather it ought to be about engagement with the existing and adjacent possible institutional and ideological structures of society. It is therefore paramount that contemporary jurisprudence rejects any vestiges of objectivism and formalism and instead re-engages with structural and normative ideas about society, that is, with ideas from social theory. But before Unger's attempt to reunite jurisprudence and social theory to develop a contemporary normative jurisprudence is discussed, in the next chapter another important aspect of Unger's critical jurisprudence is examined: the relation between Unger's approach and the critical legal studies movement.

⁸⁶ See Unger, above n 3.

III UNGER AND CRITICAL LEGAL STUDIES: COMMON GROUND AND WRONG TURNS

In the previous chapter a significant aspect of Unger's jurisprudence was discussed: his explanation and critique of prevailing styles of legal analysis which I claim is the clearest and most persuasive account in the literature and which if broadly accepted may point to a new direction for legal thought discussed in the following chapters. Unger's critique of contemporary styles of legal analysis based on a fundamental critique of legal formalism and objectivism could also be seen, however, to be the expression of a set of ideas common to the first wave critical legal studies movement of which Unger was a founding member and thought leader. In this chapter the major theoretical and moral strands within the critical studies movement are discussed, including those strands that Unger shares with the first wave critical legal studies movement. More importantly, however, this chapter points to the divergences of Unger's jurisprudential approach from the characteristic moral and philosophical strands of critical legal studies to suggest both the shortcomings of critical legal studies and to highlight how Unger's 'institutionalist' approach is unique and therefore of contemporary significance to legal thought. It is argued that that a major reason that Unger's legal thought is of contemporary significance is that, notwithstanding the demise of the moral brief within critical scholarship, he clearly continues to share the broader moral brief of the first wave critical legal studies movement as well as the belief that legal scholarship can and should be a site of radical political practice.

A Critical Legal Studies' Philosophical Brief

Although the first wave critical legal studies movement was a diverse and at times fractious intellectual movement, it has been characterised both by the members themselves, and commentators like, as a homogenous movement in that it shared some common theoretical and moral positions in relation to law and legal thought.¹ The theoretical convergences of critical

¹ See for example Robin West *Normative Jurisprudence: An Introduction* (Cambridge University Press, 2011);

legal studies have been characterised in a number of ways, but one recent insightful analysis suggests that the first wave critical legal studies movement shared at least two important theoretical, or philosophical, claims.

The first theoretical claim of critical legal studies, and a corollary of Unger's critique of contemporary legal thought discussed in the previous chapter, is that conventional styles of legal analysis are unnecessarily truncated or limited, and that there is no reason why legal analysis cannot be used as a tool for potentially radical social transformation. This first theoretical claim of critical legal studies suggests that formalist and objectivist approaches to law and doctrine are false and must be rejected. Thus for Unger the critical legal scholars, doctrinal formalism (including reasoned elaboration) mystifies the law by representing it as an approximation to a prescriptive system, enables jurists to usurp their role in a democracy by influencing large areas of law with reference to a spurious rational authority and inhibits the transformative potential of legal thought by casting over it a rationalising spell. This first theoretical claim about the unnecessary limitations of traditional legal doctrine is vehemently supported by Unger as discussed in the previous chapter.

It is in relation to the second theoretical claim of critical legal studies that Unger's views diverge. The second theoretical claim shared by many of the first wave critical legal studies movement is that law and doctrine are radically indeterminate. The essential claim of the radical indeterminacy thesis is that: no matter the particular piece of law in question, or the accepted interpretative procedures it is always possible to deploy the hermeneutic procedures and substantive arguments 'to produce the result preferred by the interpreter'. Unger provides in *The Critical Legal Studies Movement* a clear illustration of the radical indeterminacy thesis in relation to the analysis of contract law where arguments that emphasise the value of freedom of contract have traditionally been 'balanced' against other equitable principles such as economic duress or good faith. Similarly, in all other areas of law, the radical indeterminist assumes that the 'opposing armies' of arguments based on policy or principle mean that 'any skilfully argued interpretation is as good as any other.' There was, however, an additional proviso that hedged the radical indeterminacy thesis: although legal texts and their various

Roberto Unger, *The Critical Legal Studies Movement: Another Time, a Greater Task* (Verso Books, 2015); Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1987); Alan Hunt, 'The Theory of Critical Legal Studies' (1986) 6 *Oxford Journal of Legal Studies* 1.

interpretations may be radically indeterminate on their surface, there is a shared form of consciousness within society and more specifically within legal culture that constrains interpretation and that then makes ‘the indeterminate determinate’.²

Unger rejects the radical indeterminacy thesis, this second theoretical claim of critical legal studies. For Unger and others, the radicalisation of the indeterminacy thesis adopted by several critics was a clear mistake and a key factor in the demise of the movement.³ A fundamental problem with the radical indeterminacy thesis, as Unger has pointed out, is that the hidden form of consciousness or ideology that implicitly constrain interpretation has never been theorized or made explicit, so that the radical aims of the critics to both critique *but also to change* the existing legal and social order could not be achieved through deconstructionist methods. And worse still, the wild ‘anything can mean anything’ thesis that these critics appeared to espouse enabled proponents of doctrinal formalism, whether in its 19th, 20th or 21st century form, to maintain the influence of its more ‘sensible’ method over legal thought.

The problems with the radical indeterminacy thesis and the deconstructionist methods that accompany it can be illustrated with examples of failed attempts to use the techniques of deconstruction to supply normative political projects. As Nicola Lacey wrote in the mid 1990s:

recent work in critical legal theory has begun to concern itself more explicitly with the values and ideals that emerge from critique of legal practices and institutions. Evidence of this renewed and distinctive Utopian or ethical voice can certainly be found in the work of feminists. Good examples are Drucilla Cornell’s ‘ethical feminism’ which insists on the ethical dimension of Derridean deconstruction. And Lucy Irigaray’s concern for reconstructed rights. It is also evident in Jacques Derrida’s interventions in legal theory.⁴

In a similar way, critical legal scholar, Allan Hutchinson has attempted to recover a utopian, normative or ethical voice inspired by Foucauldian deconstruction. Hutchinson’s attempt to derive a political project from the premises of Foucauldian deconstruction is discussed below, followed by a discussion of Drucilla Cornell’s ‘ethical feminism’ derived from Derridean deconstructive premises and her subsequent suggestion to construct an ‘imaginary domain’ to

² Unger, above n 1, 27.

³ West, above n 1, provides a detailed account of a number of factors in the disappearance of critical legal studies as an intellectual movement.

⁴ Nicola Lacey, ‘Normative Reconstruction in Socio-legal Theory’ (1996) 5 *Social & Legal Studies* 131, 135.

assist in the evaluation of standard liberal rights. I argue that both attempts illustrate the limits of deconstruction in that the method is unable to equip normative, political projects.

When Hutchinson conceives of his situation as ‘dwelling on the threshold’ of modern legal thought, his purpose is to provide a jurisprudential approach which can ‘avoid the twin evils of succumbing to the secure comforts of traditional jurisprudence or straying too far into the wilderness of political irrelevance’. Hutchinson derives his political stance directly from postmodernist theoretical premises. In his view, ‘by abandoning the search for foundational truths, we enhance the possibilities for the powerless to engage in the essential dialogue of world re-making.’ However, Hutchinson does not indicate how the adoption of such an abstract philosophical position of deconstruction helps the powerless. Once it becomes clear that he conceives of politics as ‘conversation’ and espouses ‘dialogic democracy’ it becomes even less clear how this helps the powerless. Hutchinson also explicitly renounces the question of institutional change, instead proposing that: ‘The focus of endeavour must be realigned. Each person must individually and collectively encourage themselves and others to promote and experience new forms of inter-subjectivity.’ And his attitude towards politics through law, or politics ‘at the level of the state’ is that: ‘[W]e must refrain from the familiar attempt to think in total and global terms. The response must be much more local and domestic. By working at ground level, transformative activity becomes a real possibility for disaffected citizens.’⁵

Hutchinson appears to argue that it follows directly from the Foucauldian thesis that ‘power is everywhere’ that ‘politics is also everywhere’. However, as Alan Hunt has pointed out, such an argument is misleading since it fails to take account of the fact that local politics are not autonomous realms, but that ‘states, legal institutions, political parties, *et cetera*, function to intervene in and to hegemonise local struggles and resistances.’ In Hunt’s view the (epistemic) limitations imposed by deconstruction mean that it cannot on its own provide the answer to the most pressing problem for politics and political thought:

Hutchinson's progressive reconstruction of the politics of law proceeds by starting with deconstruction and then supplementing it with a few key additional concepts (ideology, power, *et cetera*). I will argue that the general limitation of his political agenda, namely, the failure to offer any linkage between "local" or micro-politics and the wider structural location of politics

⁵ Allan Hunt, ‘Living Dangerously on the Deconstructive Edge’ (1988) 26 *Osgoode Hall Law Journal* 867, 894

within the state, stems precisely from his adhesion to the self-imposed limitations of the deconstructionist strategy.⁶

For Hunt it is this task of linking micro- and macro-politics which is the ‘most difficult and pressing task of political strategy’, that this is *the* question and that deconstruction is an *evasion* of, rather than a contribution to its solution. One of the ways in which Unger’s jurisprudence is significant is that it shows how we might forge this link between micro and macro politics through the reorientation of legal thought which I discuss in the following chapters.

Another legal theorist ‘dwelling on the threshold’ of legal thought is Drucilla Cornell. She has attempted to recover a ‘utopian moment’ out of Derridean deconstruction whilst adopting an ‘ethical feminism’ grounded firmly in the modernist tradition. As Lacey writes:

Like Derridean deconstruction, Cornell’s critique (of law) is premised on a particular (poststructuralist) view of the openness of language. Language does not operate by simply reflecting objects in the world in a directly representational way. Rather, it has an invariably performative or constructive aspect. Hence language always operates in a sense at a metaphorical level. And because linguistic signs get their meaning not by any simple correspondence with the world, but also by reference to - through a process of difference in relation to - other signs, there is an irreducible reference in all linguistic utterances to what was not but might have been said. Meaning in other words is never closed. It is in discursive openness and gaps...that the possibility of other meanings, of other worlds, may be discerned through a process that Cornell calls ‘recollective imagination’. Implicit in that analysis is the idea that those worlds in some sense exist in the very moment in which they are repressed.⁷

Cornell argues for the right to an ‘imaginary domain’ in which women could conceive themselves as whole persons worthy of respect as a precondition to any meaningful instantiation or evaluation of standard liberal rights. However, in arguing for an ‘imaginary domain’ Cornell explicitly goes on to endorse Kantian constructivism which is then ‘tacked on’ to her deconstructive critique. Like Hutchinson, Cornell appears to also reject the possibility of structural transformation, and therefore the possibility of transforming our social contexts and ourselves, through law and legal thought:

⁶ Ibid 888. For a later attempt at progressive reconstruction see Alan C. Hutchinson, *It’s All in the Game* (Duke University Press, 2000).

⁷ Lacey, above n 4, 139 -40.

I reject that such a (Hegelian) conception of human being is either philosophically justifiable or politically and ethically desirable. My claim for the protection of minimum conditions of individuation as a matter of right is more modest since it is in accord with the dictates of practical reason. In this manner it remains consistent with the privileging of the right over the good.⁸

Cornell's neo Kantian liberalism used to justify her particular constructivist position (her evaluative conception of equality that includes an 'imaginary domain') ultimately relies on the idea of law's neutrality, an idea that is criticised by much feminist jurisprudence and by critical legal scholars.⁹ But the more important criticism to make here with respect to Cornell's use of deconstruction is that there does not appear to be any direct link between her use of the deconstructive technique and her reconstructive strategy. Thus Hunt asks of Hutchinson, and we could similarly ask of Cornell: why look to deconstruction as a source of normative projects?¹⁰

The motivation to avoid the twin evils of traditional jurisprudence on the one hand and political irrelevance on the other shared by Hutchinson and Cornell's jurisprudential projects, is also shared by feminist thought with which Hunt and myself are sympathetic. As Hunt explains:

Not only has feminism opened up the whole arena of the politics of gender and sexuality, but it has wider political significance. Contemporary feminism was born out of the struggle against the reduction of gender to class politics. The resulting stress on the specificity of sexual politics and, by extension, of other forms of politics, and the consequent necessity for autonomy has made feminism the most refreshing and innovative force in contemporary politics...But perhaps of greater importance is that feminism, or more particularly socialist feminism, has begun to move beyond the celebration of specificity and autonomy to ask a whole series of important questions: To what extent can specific politics (including local politics) succeed without at the same time engaging with the multifaceted forms of social oppression?¹¹

Lacey presents a similar picture of feminist thought as it relates to conventional legal theory. She argues that while feminist jurisprudence has been important in exposing the (sexual) politics of law and its claims to rationality, coherence, neutrality and autonomy, at the same

⁸ Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (Routledge, 2016), 240 n 3.

⁹ Cornell's neo Kantian liberalism is also a version of what Unger describes as 'splitting the difference between rationalism and historicism' of which he is critical: see Chapter II, 'Unger on Contemporary Styles of Legal Analysis' above.

¹⁰ West is critical of Foucauldian deconstruction for similar reasons. See West, above n 1, 157 – 76.

¹¹ Hunt, above n 5, 890.

time it poses a series of theoretical and political questions which are salient to feminist jurisprudence but which remain problematic. One set of problems revolves around the autonomy of law and legal theory that is assumed by conventional jurisprudence: she asks what kinds of theoretical enterprise feminism should engage with and how far it should concern itself with law. Indeed, is a feminist theory of law a contradiction in terms given the opposition of many feminists to essentialism and their openness to social and political reconstruction?

Another set of questions identified by feminist jurisprudence revolves around the place in feminist thought of normative reconstruction or 'utopian' thinking, as opposed to negatively critical or deconstructive thinking. And if there is a place for normative reconstruction within feminist thought, then does it require some kind of theoretical grounding or foundation. This leads to the question of what Lacey calls 'philosophical closure'. Whether feminist thought should be located within post enlightenment modernism using a language of rights and equality for example, or whether it needs to be located within post modernism. As Lacey points out, this seems to bring us back to the first set of questions, of what kind of theory feminism can and should be engaged in, that is, what combinations of 'modernist and postmodernist, critical and reconstructive, discourse orientated and materialist, essentialist and social constructionist projects'? Indeed, Lacey asks 'should these dichotomies themselves be regarded as having any validity, and what combinations of project may be theoretically defensible and politically productive?'¹²

Both Lacey and Hunt then, drawing in particular on these feminist insights, criticise attempts to derive normative projects directly from deconstruction. They argue that deconstruction is limited in that it is silent on how any chosen normative project might relate to the broader structures of society. Further, Lacey seems to endorse Unger's project of constructing a broader social theory to inform his jurisprudence:

Utopian rhetorical strategies (suggested by deconstruction)...presuppose an understanding of how particular human societies operate and develop, of how discursive and material practices and changes interact, of how power flows through the social body. In other words the legitimacy as well as the power of rhetoric as politics depends upon the development of *institutionally orientated social theoretic insights*. Without this, the critique and imaginative rhetoric of the first two projects cannot move beyond their current (often limited) audience. Nor can they attain

¹² Nicola Lacey, *Unspeakable subjects: Feminist Essays in Legal and Social Theory* (Bloomsbury Publishing, 1998) 174.

any understanding of what their effects may be. A politics that denies the relevance of its own effects may fairly be accused of some degree of irresponsibility.¹³

Lacey suggests that more is required than ‘the utopian moment’ in deconstruction, that some kind of social theory is required since utopian rhetorical strategies presuppose a ‘real structure’ of society. Hunt’s general contention is similarly that deconstruction proves to be an unsatisfactory vehicle to reunite law and politics. Theoretically, it leads to having to graft on to the deconstructive technique the concepts of politics, power and ideology; and politically it leads to the insubstantial politics of localism in Hutchinson’s case, or ‘bourgeois moralism’ in Cornell’s. Hunt’s suggestion then is to ‘step back from the deconstructive edge and to seek firmer theoretical and political ground from which to conduct the engagement with the post-liberal project of reuniting law and politics’. This seems to suggest it is necessary to develop persuasive social theories, that is to reunite jurisprudence and social theory.¹⁴

Unger clearly agrees with Hunt’s and Lacey’s conclusion about deconstruction being an intellectual and political dead end. The Derridean idea that law is aporetic seems unhelpful other than to point out that legal doctrine on its own is inadequate to sustain either an ethical politics or an ethical adjudicative practice. This is not to detract from the importance of the ‘utopian moment’ in deconstruction but to suggest that the reconstructive project also requires a social theory in order for a society to be transformed in a particular (normative) direction. Unger’s criticism of deconstruction would possibly be that it does not, and cannot according to its own method or techniques, relate the normative to the structure. Cornell’s imaginary domain seems to adopt the normative strategy of a return to liberal political theory, that is what Unger calls the ‘humanisation of the inevitable’, existing social structures; similarly Hutchinson’s application of Foucault’s deconstruction gives up on the possibility of collective structural social change and is confined to local, anti-statist politics. Unger uses the term ‘structure fetishism’ to refer to poststructuralists such as Foucault, Derrida and Lyotard and their devotees in legal thought who do not countenance the possibility of collective social change. As Cui again explains in his Introduction to Unger’s *Politics*:

Structure fetishism denies that we can change the quality of formative contexts. Here the quality of a formative context is characterized by its degree of openness to revision. Structure fetishism

¹³ Lacey, above n 4, 143.

¹⁴ Radin makes a similar point that pragmatism and deconstruction are not irreconcilable and that they can and should dialectically supplement each other. See Margaret Jane Radin, ‘The Pragmatist and the Feminist’ (1989) 63 *Sothorn California Law Review* 1699.

remains committed to the mistaken thesis that ‘a structure is a structure’. A structure fetishist may be a sceptical post modern relativist, who gives up on universal standards of value and insight. Alternatively a structure fetishist may be a nihilist, whose concern is to deconstruct everything. However, both theoretical positions are pseudo radical because they end up subscribing to the view that, because everything is contextual, all we can do is to choose a social context and to play by its rules, rather than change its quality of entrenchment. Unger’s thesis about the relative degree of revisability...of formative contexts provides a solution to this dilemma of postmodernism turn conservatism. The way out is to recognise that when we lose faith in an absolute standard of value, we need not surrender to the existing institutional and imaginative order.¹⁵

Unger regards deconstructionist approaches of Foucault, Derrida, Hutchinson and Cornell as doing just that: surrendering to the existing social order, engaging in a ‘subjective adventurism’ while assuming that the (real) mundane world cannot be radically changed. He is opposed to these deconstructive approaches particularly regarding their implications for law and legal thought since deconstruction does not address the question of social structure, nor does it recognise a role for law in the expression and creation of structure and structural change. Unger does not want to be sceptical about the possibility of broad social explanation and change because it leads all too easily to positive social science and what he calls ‘humanisation of the inevitable’ social order which is contrary to his ‘radicalised pragmatist’ social philosophy discussed in Chapter VI below. For him, ‘We can still struggle to make institutional and discursive contexts that better respect our...nature as context transcending agents.’¹⁶

B Critical Legal Studies’ Moral Brief

So Unger is opposed to the second theoretical strand of critical legal studies since the radical indeterminacy thesis coupled with the methods of deconstruction are ill equipped to address the other half of the jurisprudential equation; the moral, or normative reconstructive project. But although, as many commentators have pointed out, the emphasis on deconstruction within

¹⁵ Zhiyuan Cui, *Introduction to Politics: The Central Texts* (1997, Zhiyuan), vii.

¹⁶ Roberto Unger, *Politics: The Central Texts, Theory against Fate* (1997, Verso) cited in Cui *ibid*, ix. Moyn also criticizes the post structuralist position when he talks about Walter Benjamin and Jacques Derrida’s unnecessarily apocalyptic accounts of structural change. See ‘Legal Thought Now, Lecture 4’ (Spring, 2016), *Roberto Mangabeira Unger: Lectures and Courses* <http://www.robertounger.com/en/2017/01/18/legal-thought-now-spring-2016>.

critical legal studies may have been a significant factor in its decline as a distinctive and influential jurisprudential movement¹⁷, it is important to understand that the movement, at least in its heyday did also include a clear normative, or moral, brief.

The moral brief engaged in by many critical legal scholars recognised the need to make the moral case for legal and social change *in addition* to the theoretical arguments for the possibility of that change through law. It comprised various normative arguments designed to make the moral case for the necessity of legal and social reform. These arguments included attacks on different aspects of what the critics referred to as ‘liberal legalism’. The moral critique of legal liberalism essentially argued that liberalism is regressive in that it legitimates ‘unwarranted and unnecessary human suffering...by valorizing and protecting a private realm of both oppression and alienation.’¹⁸ The critique of liberal legalism can then be made in terms of three sets of arguments that have been referred to respectively as the ‘rights critique’, the ‘legitimation critique’ and the ‘alienation critique’.¹⁹

The rights critique essentially argues that, at least within the US context, the rights that historically associated with liberal legalism have been more politically regressive than progressive, and for three main reasons. First, rights have overwhelmingly served to shore up and legitimate existing property holdings against the redistribution of wealth threatened by democratic change.²⁰ As many critical legal scholars argued, the indivisible property right, both conceptually and historically has been the paradigm example of a legal right within liberal legalism, it is ‘the prototype, so to speak, on which all rights are built’.²¹ These negative, individual rights which provide a protective shield against state interference: rights to property, free speech, anti-discrimination and even, paradoxically, to equality are then equated with justice under a liberal legal regime, and this equation of negative, individual rights with justice has a legitimating effect which further entrenches the identification of a legal right with ‘minoritarian’ property rights.

Second, critical legal scholars have argued that rights discourse under liberalism is regressive in that it legitimates privilege by leaving untouched ‘that which is not covered by the right’s

¹⁷ See for example West, above n 10.

¹⁸ Ibid 120.

¹⁹ See *ibid*, nn51 – 53, for examples of these three sets of arguments.

²⁰ Ibid 120.

²¹ Ibid 122. See Morton Horowitz, ‘Rights’ (1988) 23 *Harvard Civil Rights – Civil Liberties Law Review* 393, 396-7; Unger, above n 1, 38-9.

definition of injustice.²² For example, antidiscrimination law provides that certain groups have a right to be free from certain forms of discrimination carried out by certain actors such as governments and employers, however that right leaves untouched and unquestioned and may serve to legitimate other forms of private, institutional and social discrimination that may be similarly or more harmful.²³ And third, critics have argued that liberal rights are regressive because, at least in the US context, they are almost always negative such that the role of rights under liberal legalism is usually to protect the individual from state interference rather than to enable the state to protect against both public and private harms. These negative rights also ensure that exploitation is protected from state interference as long as the exploitation occurs in private. Thus some critics argued that rights are often bad and harmful.²⁴

A second set of arguments comprising critical legal studies' moral critique of liberal legalism is what has been referred to as the 'legitimation' critique borrowing from Antonio Gramsci's idea of hegemonic legitimation. The basic thrust of the legitimation arguments was that even a legal right or innovation that appears to have an obvious practical or moral benefit may nevertheless come with a 'legitimizing cost', and that legitimizing cost may in some cases outweigh the more obvious practical or moral benefit. In addition, often 'the legitimizing cost of a legal right or moral principle is hard to unearth; it becomes a cultural presupposition, rather than a contestable harm that we can readily identify, seek to minimize or otherwise confront.'²⁵ Critical legal scholars argued that liberal legalism has high legitimating costs. First, overlapping with the rights critique, the critics argued that rights that protect the private sphere against state intervention also legitimate harms caused within the private sphere such that, for example, the right to freely contract legitimates exploitative working conditions and consumer contracts, the right to privacy legitimates domestic violence, the right to free speech legitimises pornography, the right to a lawyer legitimises the abuses of the penal system etc.²⁶ But the other part of the legitimation critique argued that not only liberal rights, but also individual acts of *consent* serve a legitimating function within liberal legalism. Just as rights legitimate the behaviour that the rights protect, so consent legitimates that to which consent has been given. So critics argued that under liberal legalism whatever is consented to is most likely legal, and because it was consented to it is therefore good. This is obviously false because consent takes

²² Ibid 123.

²³ As West points out this argument became central to the development of the critical race scholarship movement: see *ibid* n 56.

²⁴ See Mark Tushnet, 'An Essay on Rights' (1983) 62*Texas Law Review* 1363.

²⁵ West, above n 1, 135.

²⁶ *Ibid*.

place under certain structural constraints. For example, working for the minimum wage might be consented to to avoid unemployment, however, the minimum wage may not be a living wage, the workplace may be unsafe etc. The fact that the work was consented to does not make the harms caused by that consent disappear.²⁷

A third set of arguments that comprise the moral critique of liberal legalism is what has been called the ‘alienation critique’ associated in particular with the work of Peter Gabel. Gabel argued that legal liberalism:

perpetuates an alienated form of life that limits our moral and social lives to paranoically distanced interactions, drenches us in an unwarranted suspicion that the other is by nature egotistically and relentlessly seeking our exploitation, and presents all of these as necessary truths about our nature, rather than a function of the way we have constructed liberal social organisation.²⁸

This alienation critique of liberal legalism rests on an alternative normative vision of self and society that is more communitarian as opposed to the isolating, atomistic, and alienating vision of self and society supposed by liberal legalism. Gabel argues that legal liberalism presupposes a stunted conception of what it is to be human, that liberal legalism constitutes a ‘pact of the withdrawn selves’ which is a denial of our nature.²⁹

Although sympathetic with the broader motivations of the critics’ moral brief, Unger ultimately rejects the moral critique of liberal legalism whether in the form of the rights, legitimization or alienation critiques outlined above, because in his view the moral critique rests implicitly on Marxist social theoretical assumptions. For Unger, the ‘neo Marxist’ approach to critical legal studies ‘combined functionalist methods with radical aims in the study of law.’³⁰ Its central claim is that ‘law and legal thought reflect, confirm and reshape the divisions and hierarchies inherent in a supposedly universal and indivisible type or stage of social organisation’³¹ such as capitalism, socialism or liberalism. The genesis of these ideas was the classical European social theory of Marx and Weber and the approaches to history influenced by their ideas, hence the term ‘neo Marxism’. Unger argues that although necessitarian Marxist social theory has

²⁷ Ibid 138. West calls for critical scholarship to challenge the legitimating function of rights and consent discourse within liberal legalism.

²⁸ Ibid 151.

²⁹ See Peter Gabel, ‘Building Power and Breaking Images: Critical Legal Theory and the Practice of Law’ (1982) 11 *NYU Review of Social Change* 369; Gable, ‘Critical Legal Studies as a Spiritual Practice’ (2008) 36 *Pepperdine Law Review* 515.

³⁰ Unger, above n 1, 28.

³¹ Ibid.

been diluted, and its assumptions ‘loosened’ by the crits to allow for ‘the accidents of history’, the fundamental idea of an ‘indivisible social and economic system with fixed legal requirements and expressions’ has not been replaced in social theory, and it certainly has not been replaced within critical legal studies.³² As Hunt has argued, critical legal studies has not been able to develop a theory ‘with the capacity to provide a causal analysis of legal doctrine in its connections with social economic relations, without laying itself open to charges of determinism or instrumentalism’.³³

And so for Unger, a neo Marxist approach remains implicit in the critical legal scholars’ arguments comprising the moral critique of liberal legalism. The moral critique presents liberal legalism as a more or less indivisible social and economic system with a given legal content such that neither of the moral critiques of this ‘system’, no matter how persuasive one might find them, is able to generate an alternative understanding of structure to inform the crits project of potentially radical social transformation through law and legal thought. Unger’s criticism of the moral critique of liberal legalism is therefore that it does not ‘support the movement from explanation and criticism to proposal – from the is to the ought, from the actual to the adjacent possible – without which legal thought ceases to be the practical discipline it always has been and loses its transformative potency’³⁴ and as a result the moral critique has been unable to maintain political relevance.

Unger argues that its neo Marxist assumptions rendered the moral critique not only theoretically incapable of supporting the crits radical aims but, more importantly, these assumptions also rendered the moral critique practically and politically redundant. As Bauman explains, the deconstructionist and neo Marxist methods of the crits allowed for two kinds of political strategy to help to bring about a new form of society, both of which were mostly ineffective. The first strategy referred to as ‘consciousness raising’ maintained that ‘if society is in some sense constituted by the world views that give meaning to social interaction, then to change consciousness is to change society itself.’³⁵ So on the crits’ account, scholarship is politics, ‘the activity of theorizing in which fundamental liberal legal assumptions are

³² Ibid. Alan Hunt further points out that even the looser Marxist notions of the ‘relative autonomy’ of law also remain open to questions of ‘how relative?’ and ‘how autonomous?’, questions that no Marxist has satisfactorily answered. See Hunt, above n 1, 43 cited in Martin Krygier, ‘Critical Legal Studies and Social Theory -A Response to Alan Hunt’ (1987) 7 *Oxford Journal of Legal Studies* 26.

³³ Hunt, above n 1, 43.

³⁴ Unger, above n 1, 29.

³⁵ David Trubek, ‘Where the Action Is: Critical Legal Studies and Empiricism’ *Stanford Law Review* (1984): 575, 592 cited in Bauman, ‘The Communitarian Vision of Critical Legal Studies’ (1987) 33 *McGill Law Journal* 295.

challenged is putting into practice the ideals that are identified with the successor society. This allowed the crits to see their theoretical work as providing an important political contribution.³⁶

Bauman then suggests why the strategy of ‘consciousness raising’ was ineffective in creating an alternative politics to liberalism. The strategy appeared to assume that any (post liberal) vision presented would not only convince all concerned ‘to abandon their liberal presuppositions and change their form of life’ but it further assumed that ‘the enlightened community, having absorbed the moral critique of liberal legalism would be able to resolve all practical and political challenges in the transition to the new form of life. The historical failure (at least to this point) of the post liberal moral and political project common to critical legal studies would seem unsurprising given these dubious assumptions shared by many crits. Thankfully the alternative strategy of intervening in politics through violence was not seriously entertained by the crits. They were therefore it seems sufficiently thoughtful to recognise with Arendt that ‘violence itself is incapable of speech’ and therefore such violence ought to be a marginalised phenomenon in the political realm.³⁷

Unger’s jurisprudence therefore diverges from most approaches to critical legal studies in its rejection of the radical indeterminacy thesis and the deconstructionist methods associated with that thesis, but also in its rejection of the moral critique of liberal legalism and the neo Marxist functionalism that the critique assumes. Curiously then, although a founding member and inspirational leader of the critical legal studies movement, Unger’s position on critical legal studies in many ways reflect the popular contemporary view about the movement: that it is lacked theoretical rigour or sound arguments for many of its claims, that its critiques were too ethno and tempo centric (in relation to the United States) and that its political views and strategies were akin to left wing student politics and thus lacking sufficient nuance to be politically effective, and therefore its demise was unsurprising.³⁸ However, Unger’s opposition to much of the crits’ philosophical brief and to the moral critique of liberal legalism is not intended to diminish the importance of the broader moral brief that initially galvanised the first wave critical legal studies movement as a homogenous political movement. This broader moral

³⁶ Bauman, above n 35, 349.

³⁷ See Hanna Arendt, *On Revolution* (Penguin Books, 1990) 18 – 19.

³⁸ Commentators on Unger’s work have distinguished Unger’s project from that of other crits. See e.g. Bauman, above n 35, Martin Krygier, ‘Humdrum, Hero and Legal Doctrine’ (1987) 11 *Bulletin of the Australian Society of Legal Philosophy* 220.

brief was based on a belief in the coherence of concepts of harm, injury, suffering and human need, that is, the crits understood that:

Sympathy for the suffering, harms and injuries of others is a likely prerequisite not only for moral life, but for political alliances across groups...Recognition of the human suffering of others and of the urgency of the call for us to respond to that suffering is at the heart of progressive activism and must be at the heart of progressive legal scholarship if the latter has anything at all to contribute to the former.³⁹

However, unfortunately the crits moral brief was jettisoned due to a number of factors, some internal and some external to critical legal studies. West suggests that it was partly a response to:

countertraditions and trends in critical theory itself: primarily the incoherence of that brief in light of the indeterminacy thesis, but also, the rise of Foucauldian and Nietzschean thinking, an ‘anti-normativity’ and ‘anti-politics’ ideology that came to swamp moral and normative vision within critical theory more broadly construed, and tensions within and between critical legal studies on the one hand and critical race and feminist scholarship on the other.⁴⁰

She further suggests that the demise of the crits’ moral brief was part of a much broader phenomenon in legal scholarship and perhaps in legal education which was ‘a retreat...from the idea that legal scholarship should have any moral point or that the scholar should have a moral point of view.’⁴¹

It is in this context that I argue that a major reason that Unger’s legal thought is of contemporary significance is that, notwithstanding the demise of the moral brief within critical scholarship, he clearly continues to share the broader moral brief of the first wave critical legal studies movement as well as the belief that legal scholarship can and should be a site of radical political practice. For Unger the problems of the contemporary societies cannot be solved within existing approaches to law and politics⁴², but nor can the predicament of contemporary societies be aided by deconstructing texts, or by moralising about existing institutions and practices whilst invoking implausible neo Marxist social theoretical assumptions. For Unger,

³⁹ West, above n1, 174.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² See ‘Boulewood Lectures’ (18 January 2017), *Roberto Mangabeira Unger: Social and Political Theory* <http://www.robertounger.com/en/2017/01/18/the-boutwood-lectures-the-second-way>.

to be effective in its pursuit of the moral brief, it is necessary for critical legal scholars to adopt an alternative theoretical approach; to engage in what Unger calls an ‘institutionalist’ approach to legal thought.

So what is this ‘institutionalist’ approach to legal thought that Unger recommends? Unger describes the institutionalist approach to legal thought in the most recent edition of his seminal work, *The Critical Legal Studies Movement*.⁴³ Its ‘central idea’ is that legal thought ‘can become a practice of institutional imagination.’ Unger explains that ‘the comparative advantage’ of this approach lies in its ability to ‘use the small scale variations in established law and the deviant or subordinate solutions in current doctrine, as instruments with which to imagine and develop alternatives for society.’ The goal or purpose of the institutionalist approach is to ‘enlarge in law and in politics the penumbra of the possible that we can make happen from where we are now’ in order to develop an institutional program that can assist in the crits’ moral brief. Unger recognizes however, that in order for the institutionalist approach to be effective it would need to address two major problems in contemporary legal thought.

First, is what Unger calls the ‘idealizing spell’ that reasoned elaboration and the other doctrinal formalist approaches identified by Unger have cast over legal thought. For reasons already discussed in this chapter, formalist and objectivist approaches to law cannot be replaced by the idea that law is a system, as the neo Marxist approach assumes, or that law is a ‘kit of rhetorical devises’ that can be endlessly manipulated as the radical indeterminacy thesis implies. Instead Unger argues that the rationalizing spell cast over contemporary legal thought ought to ‘give way to recognition of the distinctive coexistence of dominant and deviant solutions in each branch of law’ which would represent a new understanding of legal doctrine. The second major problem in contemporary legal thought to be overcome is what Unger describes as ‘the to ways of thinking that enlarge their power to influence the evolution of law.’ This self interested commitment of legal professionals’ commitment is manifest in the conventional view that the defining protagonist of legal thought is the literal or figurative judge, and that the central question for jurisprudence ought to be ‘How should judges decide cases?’ Under an institutionalist approach, however, the citizen rather than the judge would be the primary

⁴³ Unger, above n 1, 29-32.

addressee of legal thought. It is in this sense that Unger could be said to aspire to developing a more ‘democratic jurisprudence’.⁴⁴

In this chapter Unger’s legal thought has been compared with some of the characteristic philosophical and moral strands of critical legal studies both to illustrate some of the shortcomings of critical legal studies, and to highlight how Unger’s preferred institutionalist approach continues to hold significance for contemporary jurisprudence. In terms of the shortcomings of critical legal studies, for Unger, two elements of critical legal studies’ philosophical brief: both the radical indeterminacy thesis replete with deconstructive methods, and neo Marxist assumptions implicit in the moral critique of liberal legalism, must be rejected for reasons discussed in this chapter, in favour of what Unger describes as an institutionalist approach. Unger also views unfavourably the trajectory that critical legal studies took after the first wave in aligning itself with the ‘predominant forms of American progressivism’:

With their characteristic emphasis on group identities, their failure to contribute to the making of a successor to the New Deal, responsive to the needs and aspirations of the broad working class majority of their own country, their lack of institutional proposals for the reconstruction of the state and the economy, and their antipathy to theoretical ambition and structural imagination.⁴⁵

Notwithstanding these divergences, Unger’s jurisprudence shares part of critical legal studies’ philosophical brief; the idea that conventional styles of legal analysis are unnecessarily truncated or limited, and that therefore legal analysis can potentially be used as a tool for potentially radical social transformation. Unger also shares with the crits the broader moral brief, which is also the brief of the jurist;⁴⁶ the pragmatic view that our contemporary societies are far from perfect, that law and legal thought are in part responsible many real harms, as well as many real benefits to real people in those contemporary societies, and that because of this fact we not only can, but must do better both in terms of the laws that we create, and in terms of how we critique, reform and reformulate law. So Unger continues to share the first wave critical legal studies movement a sense that, ‘legal scholarship can be a focus for radical

⁴⁴ Waldron characterises Unger’s approach in this way, see Jeremy Waldron, ‘Dirty Little Secret’ (1998) 98 *Columbia Law Review* 510, 529.

⁴⁵ Unger, above n 1, 43.

⁴⁶ Ibid 5. Unger defines a ‘jurist’ as ‘a lawyer with higher pretensions and ambitions: he claims to deploy a method that authoritatively interprets the law or develops it in the service of ideals as well as of interests. He defends his initiatives in a discourse of public reason before his fellow jurists and his fellow citizens. He may be an academic lawyer, a judge, a critic of established law, or what in the tradition of Roman law was called a *jurisconsult*.’

political practice'⁴⁷. As Collins has argued, 'Perhaps Unger's most significant contribution to legal theory will turn out to be his rationale for believing in the potential for radical politics through law, for his programme of internal development makes sense of this ambition.'⁴⁸

Collins seems here to be pointing to Unger's rationale for a normative reconstructive program based partly on an institutionalist approach to legal thought. But to succeed in the crits' moral brief of achieving real (structural), progressive social change partly through the wise use of law, Unger understands that beyond adopting an institutionalist approach, it is also necessary to relate such an approach to legal thought to a (visionary) normative practice which for Unger can be informed by contemporary ideas in social theory. As Unger has recently written, 'a practical alternative to institutionally conservative social democracy and to identity politics need(s) help from a theoretical alternative to Marxist social theory and to liberal political philosophy,'⁴⁹ I contend that it is his unique attempt to reunite jurisprudence and social theory to inform a contemporary, normative jurisprudence that is the most significant and potentially enduring aspect of Unger's legal thought. It is this normative, reconstructive aspect of Unger's jurisprudence that is examined in the following chapters.

⁴⁷ Hugh Collins, 'Roberto Unger and the Critical Legal Studies Movement' (1987) 14(4) *Journal of Law and Society* 387, 402.

⁴⁸ Ibid.

⁴⁹ Unger, above n 1, 44.

IV THE LESSER AND GREATER VOCATIONS OF LEGAL THOUGHT

Having examined Unger's critical jurisprudence in the two previous chapters, that is, his critique of contemporary styles of legal analysis and certain aspects of critical legal studies, the focus now turns to the normative, reconstructive part of Unger's jurisprudence and in particular to the question: What should legal analysis become? In this chapter this question is examined within two different contexts: First, within the adjudicative setting and second, beyond adjudication, within the setting of democratic politics. As Unger points out, the adjudicative setting has traditionally been viewed as the natural or proper setting for legal analysis, however, the continued identification of legal analysis with adjudication, and in particular the work of the higher courts appears suspect. He argues on democratic grounds that we should reject the view that adjudication is the proper or natural setting for legal analysis; that we can instead view adjudication as important, but not necessarily the natural setting for legal thought. Indeed, Unger proposes that we should view the question, 'How should judges decide cases?' as a special question within legal theory, and therefore reject the view that adjudication is synonymous with legal analysis. This reoriented view of adjudication suggested by Unger would be to reject Ronald Dworkin's aphorism that jurisprudence is the general part of adjudication, silent prologue to any decision at law, since it overstates the centrality of adjudication to the jurisprudential project.

By reframing the question of adjudication as a special question rather than viewing it as the central question for jurisprudence, legal theorists would then be able focus more on what Unger believes to be the more important jurisprudential question: What is the relationship between our institutions and practices on the one hand, and our ideals and interests on the other? Responding to this question would then require the development of real institutional alternatives through what Unger has referred to as 'internal development', 'deviationist doctrine' or 'mapping and criticism', as well as the development of broader visions of self and society. Below Unger's proposal to reorientate legal analysis to help provide such alternatives is discussed. In the following section, however, the implications of Unger's proposed reorientation of legal analysis for adjudication are examined.

A Realistic, Deflationary Approach to Adjudication

1 Deflating the Role of the Judge

We need not and should not, according to Unger, view the adjudicative setting as synonymous with the practice of legal analysis. As discussed in the following section, the practice of legal analysis as enlarged doctrine, or its updated version, ‘institutional imagination’, may draw upon legal materials such as judicial opinions at the ‘mapping moment’. Although the commonly held view is that the proper space for the practice of legal analysis is within the adjudicative setting, for Unger, the proper space for the practice of legal analysis, for Unger, is *beyond* the adjudicative setting, allowing the broader citizenry to engage in the practice of ‘institutional imagination’. Unger argues that legal doctrinal formalism:

draws much of its force and meaning from the largely untested belief in a natural correspondence between the method of legal reasoning and the responsibilities of judicial decision. The institutional and ideological constraints upon the judicial role in a democracy and the effort to expound law as connected principle and policy seem to reinforce and to justify each other.¹

Unger queries this continued ‘untested belief’ in a natural correspondence between the proper method of legal reasoning and the responsibilities of judicial decision, asking why it is that contemporary jurists continue to equate the adjudicative role with the practice of legal analysis. He provides three possible explanations for this continued identification of legal analysis with the role of the judge; one political, one psychological and one historical. The first explanation is that there is often, at least on the political left, disillusion with the possibility of significant social reform through politics so that those on the left have been ‘especially tempted to see in politics through judges the providential surrogate for politics through politics.’² At the same time on the right, in order to preserve the legitimacy of courts and out of a fear of popular social movements being given a free political reign, the practice of legal doctrine is identified with the role of the judge in order to keep any radical political change on a short leash. The result

¹ Roberto Unger, *What Should Legal Analysis Become?* (Verso, 1996) 106 – 7.

² *Ibid* 83. This appears less so in Australia and Canada where the legislature has been more successful than the US in implementing government health and social reform agendas

of this situation is that no matter the political orientation of the jurist, doctrinal formalism, whether in its 19th, 20th or 21st century forms, is reaffirmed as the canonical style of legal analysis.

A second psychological explanation is that the practice of doctrine enables ‘the legal scholar (progressive or otherwise) to be taken seriously. He wants to be thought of as doing important work, as one of the few dozen ‘Madisonian notables’ involved in the powerful process of ‘black-robed providence’ which ‘bypasses the unflatteringly cluttered realities of democratic life’. For Unger, doctrinal formalism allows the jurist to act as the imaginary judge, to ‘whisper literally or figuratively into the ears’ of the actor at the very centre of the imaginary space of legal thought.’³

A third explanation draws on an examination of the historical context of what Unger describes as an ‘obsession’ with the judiciary. Unger argues that traditionally in England and Europe, it was common for jurists to identify the role of the judge with the exposition and refinement of customary law. This identification was largely justified since customary law takes shape around a series of interlocking continuities: ‘of law with the actual expectations and claims that people make upon one another according to the social roles they occupy; of normative standards with routinized behaviour and belief; and of the acts by which people define what the law is with the acts by which they apply it in particular cases.’ For Unger, the result of these continuities is to ‘naturalize society: by placing most social arrangements beyond the reach of effective challenge and revision, they become in practice the natural order of things.’⁴ As societies began to assert greater power to remake themselves through the artifice of their laws, the interlocking continuities described above began to dissolve, however Unger argues that the natural correspondence between legal analysis and the judicial role has remained a feature of modern legal thought seemingly as a residue of past systems of customary law.

Whatever the political, psychological and historical explanation for the continuing identification by contemporary jurists of legal analysis with the work of (higher) courts, for Unger this conflation is a mistake:

³ Ibid 117.

⁴ Ibid 108.

As the divisions and the alternatives presented in democratic politics sharpen, the expedient of treating the law as a series of incomplete agreements, with an inner logic capable of being made patent retrospectively loses its purchase on reality. There is no developing rational scheme that different fragments of law may be seen to exemplify. Rather than being a problem for democracy, the absence of such a latent scheme is, in a sense, a precondition of democratic vigour, for democracy expands by opening social life up to conscious experimentation. For the same reason, the devolution of law-completing and law-reconstructive responsibility to an insulated band of experts in rational deliberation makes no sense. Such an expertise properly belongs to citizens.⁵

The most unfortunate consequence of this conflation of the judicial role with legal analysis is to ‘usurp the imaginative field in which more constructive and reconstructive practices of legal analysis might develop... any more ambitious and transformative style of analysis will seem merely to increase the already excessive powers of judges.’⁶ In the following passage Unger provides a compelling argument to reject the identification of the judicial role with legal analysis, to democratize the practice of legal analysis, to open up the space of legal analysis beyond the judicial setting:

Leave analysis to the judges, the answer may go, and deal with the internal relation of interests and ideals to institutions and practices by all the other readily available varieties of political argument, outside legal discourse. The trouble is that this internal relation is played out most importantly when it is played out in detail. At the indispensable level of detail, it lives in the law. The law does not describe behavioural regularities and social arrangements; it selects those arrangements from which claims, backed by state power, will flow. Legal doctrine, in turn, relates these power-giving and power-denying arrangements to conceptions of human connection: pictures of the possible and desirable forms of association in the different domains of social experience. If the large-scale institutional and imaginative alternatives expressed as comprehensive ideologies have lost their seductions, and the great transformative projects they put forward have collapsed in failure and disappointment, the alternatives continue to live in the small. Nowhere does institutional detail meet imaginative conceptions more fully, and nowhere does their meeting have greater importance for people’s powers and incapacities, than in law and legal thought. The lawyers have control, intellectual as well as practical, over this vital stuff. We dare not abandon it to them lest they represent it in a way motivated by the self-

⁵ Ibid 109.

⁶ Ibid 112.

regarding reconciliation of the desire to do important work with the need to avoid embarrassment in the eyes of democracy.⁷

If we are to take Unger's concerns seriously as I believe we should, it appears that a reorientated practice of legal analysis must be conceived in a way that is unconstrained by the significant practical and political limitations of the adjudicative setting. Characterising adjudication as the 'lesser vocation' of legal thought, however, is not to say that the question of legal analysis within the adjudicative setting is unimportant, indeed Unger has a particular response to this question: 'How should judges decide cases?' which is consistent with the 'greater' vocation of legal thought discussed below.

2 Rejecting Doctrinal Formalism and Radical Indeterminacy and Embracing Realism

As discussed in Chapter III, although a leading proponent of critical legal studies, many of Unger's views diverged significantly from other critics, including on the question of adjudication. A common approach of the critics to adjudication is represented by the radical indeterminacy thesis. Unger describes the essence of the radical indeterminacy thesis as follows:

From the starting point of the given legal materials and with the help of the available methods of legal argument and the established canons of interpretation, we can characteristically infer, with similar plausibility, opposite solutions to particular problems. Thus, we choose what we claim to discover.⁸

Rather than presenting a strong practical and theoretical challenge to legal formalism, for Unger, the radical indeterminacy thesis represented a tactical and theoretical mistake. It is a tactical mistake because it allows defenders of the canonical style of legal analysis to paint themselves as 'the defenders of reasonable moderation and moderate reasonableness against

⁷ Ibid.

⁸ Ibid 120. Various accounts of the radical indeterminacy thesis are provided by CLS scholars which are consistent with Unger's 'essence', see e.g. James Boyle, *Critical Legal Studies* (Boyle (ed), New York University Press, 1994), xx; Duncan Kennedy, *A Critique of Adjudication (fin de siècle)*, (Harvard University Press, 1997); Lawrence B. Solum, 'On the Indeterminacy Crisis: Critiquing Critical Dogma' (1987) 54 *University of Chicago Law Review* 462.

the excesses of rationalism and the extravagance of scepticism.’⁹ And it is a theoretical mistake not only because it misrepresents the way we use and understand language within a particular social context, but also because the radical indeterminacy thesis assumes a sceptical epistemology. As Hutchinson explains, ‘these “nihilists” have not been content with the commonplace claim that language and logic alone do not yield uniquely correct answers to legal disputes...From a nihilistic perspective, legal reasoning is infinitely manipulable and hopelessly incoherent.’¹⁰ So for many critical legal scholars, ‘legal discourse is simply judges and other adjudicators doing what their political and ethical views command.’¹¹ But as Hutchinson points out, the methodology employed by these critics is suspect, ‘the demonstration of particular indeterminacies is used to prove a general indeterminacy throughout legal doctrine.’ However, such generalized claims about indeterminacy can only be sustained through some background theory of sceptical epistemology. Such theories Hutchinson regards as ‘polemical and visceral’ and they run counter both to Unger’s philosophical pragmatism and his transformative political project.

If we agree that radical indeterminacy is an intellectual and political dead end, and also reject the doctrinal formalist approaches discussed in Chapter II, ‘Unger on Contemporary Styles of Legal Analysis’ above, is there a third approach for adjudication? Unger’s preferred approach to conceiving of adjudication is consistent with many assumptions about adjudication attributable to the legal realist movement.¹² Like Unger, the realists accepted that there is an eradicable element of discretion, or indeterminacy in legal decision making and that legal doctrine cannot generate determinate results. Indeed many realist scholars set out to demonstrate (as has Unger) that abstract legal concepts like property or contract have no determinate legal content.¹³ In a similar vein, realist judges such as Cardozo and Holmes spoke of the spectre of judicial choice and the difficulties of providing acceptable legal justifications for a decision.¹⁴ But while the realistic view rejects legal formalism as providing an adequate description of the judicial function (the realists are often described as empirical rule sceptics), neither were the legal realists willing to adopt the radical indeterminist view attributable to

⁹ Ibid.

¹⁰ Allan Hutchinson and Patrick Monahan, ‘The “Rights” Stuff: Roberto Unger and Beyond’ (1984) 62 *Texas Law Review* 1477, 1508.

¹¹ Stan Levinson, ‘Escaping Liberalism: Easier said than Done’ (1983) 96 *Harvard Law Review* 1466, 1471.

¹² See Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Quid Pro Books, 2016).

¹³ See Jerome Frank, *Law and the Modern Mind* (Routledge, 2017); Felix Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 *Columbia Law Review* 809.

¹⁴ See generally Brendon Cardozo, *The Nature of the Judicial Process* (Standard Publications, 2009); Oliver Wendell Holmes Jr *The Path of the Law* (The Floating Press, 2009).

many of Unger's critical legal studies colleagues. Therefore the realists rejected the view that there are few real constraints on the judicial process and that the indeterminacy of legal doctrine leaves the judge effectively free to decide according to his own personal or political tastes. But if the realist position is that there are at least moderate constraints on judicial decision making, but that such constraints cannot be provided for by the nature of the judicial role itself, nor by background theories of economic welfare or political right, then how does the legal realist claim that constraints on the judicial decision arise?

While the legal realists recognised the existence of the 'sovereign prerogative of choice' available to judges, that is, an eradicable element of uncertainty in legal doctrine, many also believed that it is possible to identify a coherent public interest and to implement it through a scientific and rational approach to law. Whilst Unger would eschew such rationalising legal discourse, he would agree that certain purposes can be legitimately ascribed to legal materials within a particular social context, and it is this emphasis on the importance of context, that distinguishes a 'realistic' approach to adjudication from both traditional doctrinal formalism and the radical indeterminacy thesis. Like Unger, the realists rejected the formalist view that legal doctrine represents a fixed, identifiable, coherent and justified scheme of human association waiting to be discovered by judges. Justice Frank, for example, thought that the notion that law either is or can be made approximately stationary or certain is irrational and should be classed as an illusion or a myth. His view was that fear of legal uncertainty leads to its concealment and that the arbitral function is the central fact in the administration of justice.¹⁵ Justice Holmes made a similar point:

Certainty generally is an illusion, and a repose is not the destiny of men. Behind the logical form lies a judgement as to the relative worth and importance of competing legislative grounds, often an articulate and unconscious judgement it is true, and yet the very root and nerve of the whole proceeding.¹⁶

Justice Cardozo recognised the necessary inexactness and uncertainty in the law and the element of creativity required by the judge, however he did not think this fatal to the functionality and efficacy of the law. He rejected the radical indeterminacy thesis claiming that: 'exactness may be impossible but this is not enough to cause the mind to acquiesce in a

¹⁵ Frank, above n 13, 169.

¹⁶ Oliver Wendell Holmes Jr *The Collected Legal Papers* (Courier Corporation, 2007), 181.

predestined incoherence.’¹⁷ Karl Llewellyn also believed that there is a role for uncertainty in the law, that the function of law is guidance, not control of decision, otherwise there would be no decision to make. He thought that the law does contain much certainty, that there is a sense in which a decision is ‘according to law’ but he also recognised the role of leeway or uncertainty in order to do justice in the individual case. He was not a formalist (he attacked the formal style of opinion in vogue in the United States at the time), nor was he a believer in the ‘free decision’ doctrine which was adopted by some thinkers in the US and Europe at the time. Llewellyn believed that the creative choice involved in appellate decisions in particular is modified by ‘steadying factors’ which provide a ‘reckonability’ of results in appeals cases. Indeed he estimated that a skilled person could predict the result of an appellate case eight times out of ten.¹⁸ Llewellyn was representative of the realists in that although they were critical of traditional legal theory and the formal style of legal reasoning, at no stage did they abandon traditional rules and principle in favour of total discretion. Thus whilst the realists recognised that there were problems with the formalist approach, they also realised that there must be some sense, when viewed in a particular socio historical context, in which the legal decision can be ‘according to law’.

In further emphasising the importance of context to the judicial decision, the realists argued that what generally causes judges to decide as they do are not legal rules but a sense of what would be fair on the facts of the case, that in deciding cases, judges react primarily to the underlying facts of the case, rather than to applicable rules and reasons, the latter figuring as ways of providing *post hoc* rationales for decisions reached on other grounds. One realist judge, for example, admitted that:

the vital motivating impulse for the decision is an intuitive sense of what is right or wrong for that case...The Judge really decides by feeling and not by judgement, by hunching and not by rationization, such rationization only appearing in the opinion. Accordingly he passes in review of all the rules, principles, legal categories and concepts which he may find useful, directly or by analogy, so as to select those which in his opinion will justify his desired result.¹⁹

¹⁷ Frank, above n 13, 254.

¹⁸ See Llewellyn, above n 12, 19 – 51.

¹⁹ Joseph Hutcheson, ‘The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision’ (1929) 14 *Cornell Law Quarterly* 274, 285.

Llewellyn realised that in order to understand what appellate courts do when deciding cases, one must appreciate ‘how far the proposition which seems so abstract has roots in what seems to be the due thing on the facts.’²⁰ Justices Holmes and Cardozo were also of the opinion that legal rules and principles were used in order to give formal justifications to conclusions at which judges otherwise arrive.²¹ The realist conception of the judicial decision therefore considered moral principle and social policy (both requiring a close examination of the socio historical context) as central to the decision. Llewellyn spoke of the importance of looking forwards at the social effects, as well as looking backwards at precedent in providing a just decision. He pointed out that a court’s duty to justice and its duty to pre-existing authority is often at odds, and that precedent is not as important as public confidence in the legal system and its officers and, like Holmes, Llewellyn advocated for a ‘sound and legitimate practice of open growth and change by way of precedent plus reason.’ For Llewellyn ‘Accounting to the law yesterday, guidance in the law as now laid down for tomorrow, these are the demands of and in a case law system always. So also is the demand for moderate consistency, for reasonable regularity, for ongoing conscientious effort at integration’.²²

This attitude was typical of the ‘grand style’ of appellate judging that was a characteristic of state appeals courts before the American Civil War in many jurisdictions in the United States including New York and Ohio.²³ Under the grand style, a judge cannot decide a case without either a rule or an effort to work towards one. The grand style is realistic in the sense that it recognises the changing social and political conditions that the law must deal with. Whilst it seeks to maintain the rule of law, it also realises the need for some flexibility and change in legal decision-making.

Of all the legal realists, it was perhaps Felix Cohen who most strongly emphasised the ethical and political nature of adjudication, predicting that in the future ‘[s]ocial policy will be comprehended, not as an emergency factor in legal argument but rather as the gravitational field that gives weight to any rule or precedent’.²⁴ He insisted that courts must recognise and make explicit the psychological, sociological and economic assumptions embedded in accepted

²⁰ Karl Llewellyn, *The Bramble Bush* (Quid Pro, 2012), 29.

²¹ See generally Brendon Cardozo, above n, 14; Holmes, above n 14. Holmes believed many factors were likely to influence judicial decisions including judges’ education, general and legal; their family and personal associations; wealth and social position; their legal and political experience; their political affiliations and opinions; and their intellectual and temperamental traits.

²² Holmes, above n 16, 223; Llewellyn, above n 12, 134.

²³ See Llewellyn, above n 12, 156.

²⁴ Cohen, above n 13, 834.

legal doctrine. This, he argued, would enable jurists and scholars to analyse more critically and more accurately how judicial decisions are made with a view to making them more socially responsive. Cohen envisioned the realist judge assessing the conflicting human values that are opposed in every controversy, appraising the social importance of the precedents to which the claim appeals and opening the courtroom to all evidence that will ‘bring to light this delicate task of social adjustment.’²⁵

Cohen’s account of the judicial decision resembles Unger’s approach in that it eschews formalist and objectivist assumptions and understands that the judicial decision can only have meaning and value within a particular socio-historic context. This outright rejection of legal doctrinal formalism, is the basis upon which Unger conceives of his own account of adjudication. He argues, similar to many of the implicit and explicit assumptions of the legal realists, that because legal doctrine is rationally indeterminate, responsible and just legal decisions can only be premised on purposive analogical arguments which address in detail the relevant legal materials and socio historical context but which do not generalise or idealise the existing institutions and practices of a particular society. Thus Unger’s preferred approach to adjudication:

should acknowledge no drive toward systematic closure and abstraction: the conceptual ascent of purposive judgements toward prescriptive theory-like conceptions of whole fields of law and social life. Second, it should attempt to avoid any rigid contrast between the prospective and the retrospective genealogies of law: between law as it looks to those who struggle, in politics and public opinion, over its making and law as it looks after the fact to its professional and judicial interpreters.²⁶

For Unger whatever purposes are ascribed to the law, it is most important that judges recognise ‘the contestable and factional quality of each of the interests, concerns, and assumptions to which it appeals.’ For the realist judge, such purposes count:

not because they are the best and the wisest but because they won, and were settled, earlier down the road of lawmaking. Deference to literal meanings and shared expectations is simply the limiting case of a more general commitment to respect the capacity of parties and movements to win in politics, and to encode and enshrine their victories in law.²⁷

²⁵ Ibid.

²⁶ Unger, above n 1, 114.

²⁷ Ibid.

Unger recognises that there is a problem with introducing this ‘realistic’ style of adjudication to common law jurisdictions which is that, ‘there never was a moment before and beyond the rationalizing and retrospective discourse of specialized lawyers’. Rather than rejecting the common law as a product of the antiquated and undemocratic views of past legal elites, however, Unger believes that we can reinterpret the common law in the context of contemporary democratic values. That is, we can, taking a realistic, deflationary approach to adjudication, view the common law as a penumbra of arrangements and assumptions that the democracy has not yet disturbed and may not always need to displace. Thus Unger suggests that when interpreting the common law in a democracy, ‘[w]e strengthen its continuing vitality and authority by bringing to its case-by-case development the assumptions and analogies active in the political making, and the judicial construction, of statutory law. In this way we make it ours rather than expecting it, through its immanent development, "to work itself pure".’²⁸

Finally, Unger recognises that purposive, analogical reasoning is an incomplete account of the judicial decision. It is incomplete because there are two large ideals that ‘bear upon its work and modify its course.’ The first is an ideal of concern with the litigants as real people, with their vulnerabilities and expectations which gives rise to the deviation of equity. The second is an ideal of commitment to make adjudication serve the larger goal of advancing the power of a free people to govern themselves which gives rise to the deviation of judicial statecraft. Unger describes his approach to adjudication as realistic and deflationary in the sense that it:

deflates the vast intellectual and political hopes of rationalizing legal doctrine. It is less ambitious within adjudication, however, only because it is more ambitious outside it. Moreover, it has the virtue of realism: it describes the mass of actual judicial decisions much better than does the canon of rationalizing legal analysis.²⁹

Not only does Unger’s preferred approach to adjudication have the virtues of being more realistic and more consistent with democratic values than both legal doctrinal formalism and the radical indeterminacy thesis, but more importantly it would enable legal analysis to be

²⁸ Ibid 115. This approach to common law reasoning appears to be the corollary of the legality principle in statutory interpretation: see generally Bruce Chen, ‘The Principle of Legality: Issues of Rationale and Application’ (2015) 41(2) *Monash University Law Review* 329.

²⁹ Unger, above n 1, 113.

reorientated *beyond* the judicial setting as institutional imagination, a practice which, for Unger, is the 'greater vocation' of legal thought.

B The 'Greater' Vocation: Legal Analysis as Institutional Imagination

So what could an alternative account of legal analysis beyond the judicial setting look like? How could the contemporary styles of legal analysis be reorientated so that the conceptual and practical problems discussed in Chapter II, 'Unger on Contemporary Styles of Legal Analysis' are avoided, and so that law, as Jeremy Waldron suggests, can genuinely be regarded as the creation and property of a free and democratic people? In order to address these questions, first Unger's argument to reorientate legal analysis as institutional imagination is discussed and what such a method of legal analysis might entail. Four examples are then provided of how such a reorientated conception of legal analysis might be used to construct institutional and ideological alternatives. Finally I a number of objections made against Unger's preferred conception of legal analysis are addressed.

1 A Proposal to Reorientate Legal Analysis

For Unger, the theoretical and practical problems with conventional approaches to legal doctrine discussed in chapter II can be understood as parts of a riddle which must be solved. Unger suggests that, 'until we solve this riddle, we cannot correctly understand the genius and the self-imposed poverty of contemporary legal thought, nor can we fully appreciate the extent to which the development of law remains bound up with the fate of democratic experimentalism'.³⁰ This 'riddle' of contemporary law is explained by Unger in the following terms:

When we begin to explore ways of ensuring the practical conditions for the effective enjoyment of rights, we discover at every turn that there are alternative plausible ways of defining these conditions, and then of satisfying them once they have been defined. For every right of individual or collective choice, there are different plausible conceptions of its conditions of

³⁰ Ibid 28.

effective realization in society as now organized. For every such conception, there are different plausible strategies to fulfil the specified conditions.³¹

Unger points out that some of the conceptions and strategies for the effective enjoyment of rights will imply maintaining the current institutional arrangements while controlling their consequences, usually through ‘tax-and-transfer or through preferment for disadvantaged groups’. Other conceptions and strategies, however, imply a ‘piecemeal but cumulative structural change’ of these institutional arrangements which may go in alternative directions. Unger therefore argues that:

the reach toward a recognition of the empirical and defeasible character of the rights of choice should be simply the first step in a twostep movement. The second step, following closely upon the first, would be the legal imagination and construction of alternative pluralisms: the exploration, in programmatic argument or in experimental reform, of one or another sequence of institutional change. Each sequence would redefine the rights, and the interests and ideals they serve, in the course of realizing them more effectively...However, contemporary legal theory and doctrine, and substantive law itself, almost never take this second step. There is a striking instance of arrested development.³²

For Unger, the distinctive genius and achievement of 20th century law has been to combine rights of choice with the practical conditions necessary for the effective enjoyment of those rights. For example, in areas such as labour law, traditional contract law has been counterbalanced by broader systems of government regulation with the explicit purpose of guaranteeing the reality of the assumed neutral conditions of the private law contract relationship. Unger suggests, however, that while this advancement in legal thought clearly rejects the 19th century legal formalist view that free politics and economies have a predetermined legal form constitutive of freedom itself (for Unger the greatest advance in legal theory between the mid 19th and 20th centuries), contemporary legal thought has not moved far enough to construct the contrasting practices and institutions capable of fulfilling the conditions that are able further promote the effective enjoyment of rights. Instead, for Unger, the contingent institutions created in western democracies since WWII have been idealised through the continued practice of legal doctrine so that it:

³¹ Ibid 28-9.

³² Ibid 29.

helps arrest the development of the dialectic between the rights of choice and the arrangements that make individual and collective self-determination effective a dialectic that is the very genius of contemporary law. The most important way in which it does so is by acquiescing in institutional fetishism. It represents the legally defined practices and institutions of society as an approximation to an intelligible and justified scheme of social life.³³

In the absence of alternative theoretical approaches to legal thought, the current alternatives in legal theory appear either to be an impossible return to 19th century doctrinal formalism or to adopt a sceptical approach to law represented, for example, by many critical legal studies and poststructuralist approaches discussed in Chapter III, ‘Unger and Critical Legal Studies: Common Ground and Wrong Turns’. Given these two unattractive alternatives for legal thought, Unger argues that legal and political elites tend to lend support to some version of legal doctrinal formalism even though they only ‘half believe’ in it, because it at least appears to provide a narrative of authority and justification. However, such an equivocal, non-committal toleration is bought at a huge price in its uncritical idealisation of existing social institutions and practices, and its denial of the wealth of anomaly and contradiction inherent in conventional legal materials. For Unger, in this way legal doctrinal formalism severs the link between our insight into the actual social institutions and practices and our imagination of the adjacent possible.³⁴

If we accept the criticisms of contemporary legal analysis discussed in Chapter II, ‘Unger on Contemporary Styles of Legal Analysis’ and are open to Unger’s view that legal thought ought to be transformed in some way in order to help create rather than restrict the possibilities for effective social change, then the critical question is, as Unger titled his 1996 book, *What Should Legal Analysis Become?* How are we to reorient legal analysis so that it can take the next steps of suggesting alternative institutions and practices which might provide the practical conditions for more effective enjoyment of rights of choice? The answer, for Unger, is that legal analysis should be reorientated as a practice of institutional imagination, utilising the method of internal development of law and doctrine.

2 Internal Development of Law and Doctrine

³³ Ibid 39.

³⁴ Unger Roberto Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso Books, 2015), 40.

In order to understand what Unger means by legal analysis as institutional imagination, it is useful to first contrast several aspects of his proposed alternative conception of legal analysis with legal doctrinal formalism. First, a revised practice of legal analysis as institutional imagination rejects what Unger describes as ‘institutional fetishism’ and ‘structure fetishism’. By ‘institutional fetishism’ Unger is referring to the practice of identifying institutional ideas such as the market economy or representative democracy with a ‘particular repertoire of contingent arrangements’. Structure fetishism, the higher order counterpart of institutional fetishism, is then the failure to acknowledge that the institutional and imaginative orders of society differ both ‘in their entrenchment as well as in their content’. So the method that Unger proposes seeks to identify and resolve ‘the conflict between the commitment to defining ideals and acquiescence in arrangements that frustrate the realisation of those ideas and impoverish their meaning.’³⁵ The practice of legal analysis as institutional imagination assumes an *internal relationship* between our ideals and interests on the one hand, and our institutions and practices on the other. That is, Unger’s alternative conception of legal analysis does not assume (as does much of neo Kantian political philosophy) that we can think about our ideals and interests in the abstract without an understanding our institutions and practices, but similarly it does not assume, (as does the instrumentalist) that we can gain insight into the value of our institutions and practices without thinking about our broader ideals and interests. In this way, Unger believes that legal thought can connect the ‘realities of power to the discourse of aspiration.’³⁶

A reorientated practice of legal analysis as institutional imagination also rejects other assumptions implicit in conventional approaches to law and doctrine such as anti-analogical prejudices and the ‘obsession’ with judges and the way they decide cases. For reasons discussed in Chapter III, Unger’s revised practice of legal analysis elects, not the higher judiciary, but the citizen as its ‘primary and ultimate interlocutor’. It imagines its work to be that of ‘informing the conversation in a democracy about its present and alternative futures.’ Unlike many poststructuralist approaches to law, legal analysis as institutional imagination assumes that law, particularly enacted law, ‘can be something, and that it matters what it is’. Unger believes that to show how and why it matters is to start the construction of a jurisprudence appropriate to ‘the aspiration of a free people to govern themselves under laws

³⁵ Unger, above n 1, 129.

³⁶ Ibid.

that they themselves have made'³⁷, that is, legal analysis as institutional imagination can be the working method of a democratic jurisprudence. This working method Unger describes as a practice of 'mapping and criticism'. The practice of legal analysis as institutional imagination shares with conventional legal doctrine the attempt to ascertain the ideals or purposes of a piece of law, however, mapping and criticism rejects the generalising and idealising tendencies of constructive interpretation associated with the work of Ronald Dworkin for example. Instead, the mapper/critic looks for professed social ideals that are legally articulated in the materials being analysed, and describes in detail 'the legally defined institutional microstructure of society in relation to its legally articulated ideals ...[and] to explore the interplay between the detailed institutional arrangements of society as represented in law, and the professed ideals or programs these arrangements frustrate and make real.'³⁸

Jeremy Waldron, in his review of Unger's proposal to reorientate legal analysis, suggests how the legal analyst might perform this task:

The radical analyst is supposed to take a cluster of legal rules, officially understood to serve some social ideal X, and to try to give a systematic account of the way in which the particular items in the cluster are specifically related to that ideal. (Thus, one might show that rule A promotes ideal X, rule B establishes an exception which indirectly really serves the ideal in some special circumstances, rule C gives some tribunal jurisdiction to determine whether some action serves or diserves X, rule D does not seem to serve X at all but seems rather a qualification established for the sake of some other ideal Y, and so on.) The point of this account is to get a sense of an institution's ideological situation and in particular to show how the professed importance of X may actually mask the influence of other ideals and interests.³⁹

So unlike conventional doctrinal analysis, the method of mapping and criticism does not aim to put the best face on the law, in the Dworkinian sense, instead it aims to show how the law actually fares in relation to its professed ideals, which means focusing on 'the disharmonies of the law and on the way in which the ideal conceptions... get truncated in their fulfilment and impoverished in their meaning by their received institutional forms'.⁴⁰ Unger understands that it would be 'naïve positivism' to assume that the practice of mapping and criticism is a

³⁷ Ibid 115 -30.

³⁸ Ibid 130.

³⁹ Jeremy Waldron, 'Dirty Little Secret' (1998) 98 *Columbia Law Review* 510, 523.

⁴⁰ Unger, above, n 1, 133.

straightforward, uncontroversial task, or that it could be carried out free of broader social or political ideals and interests. Indeed, it is important for Unger that the two moments of mapping and criticism are seen as having an internal relation to each other, that is, as dialectically related. As such, the purpose of mapping/criticism is to analyse a piece of law according to different sets of ideals and interests so that legal analysis can expand the range of political possibilities:

The preconceptions (of legal doctrinal formalism) to be replaced negate the possibility or the significance of criticism. Such preconceptions present the greater part of any extended and received body of law and legal understandings as an expression of a cohesive moral and political vision, or of a set of practical necessities, or of a law like evolutionary sequence.⁴¹

Rather than restricting the construction of social alternatives, for Unger legal analysis should instead be the master-tool of institutional imagination in a democratic society. Under his proposal therefore the theorist and the practical reformer share a stake in putting actual institutions in their place ‘by understanding and judging them from the vantage point of suppressed and unrealized possibilities’. Unger remarks hopefully that, ‘we can keep this freedom-giving and superstition subverting idea alive today only if we recast... legal analysis...as institutional imagination’.⁴²

In order to illustrate the desirability of adopting this proposal for legal analysis Unger invokes a thought experiment, a ‘simple parable’. The parable intends to show both how conventional doctrine works to suppress the institutional imagination within legal thought and how contrasting practices of legal analysis may become self-fulfilling prophecies. We are asked to imagine two societies, one in which the institutional arrangements are perceived to be slightly more open to challenge and revision than in the other. In the marginally more open society the jurists say: ‘Let us emphasize the diversity and the distinctiveness of the present arrangements, their accidental origins and surprising variations, the better to criticize and change them, pillaging arrangements devised for other purposes and recombining them in novel ways.’ In contrast, in the society in which the institutions seem marginally less open to revision, the jurists may say: ‘Let us make the best out of the situation by putting the best plausible face upon these arrangements, emphasizing their proximity to a rational and infinitely renewable plan. In the name of this rational reconstruction we may hope to make things better, especially

⁴¹ Ibid.

⁴² Ibid 2-3, 26.

for those who most need help: the people likely to be the victims of the social forces most directly in control of lawmaking.’⁴³ The obvious implication that Unger wants us to draw is that the second society, subjected to legal doctrinal formalism, is the less desirable alternative.⁴⁴

3 Examples of Institutional Imagination

Having set out Unger’s argument to reorientate legal analysis as institutional imagination, in this section I illustrate what a practice of legal analysis as institutional imagination might entail by discussing four practical examples of how ideas inherent in existing legal materials could be used as devices to develop larger transformative political projects. Again the working assumption, elaborated further in the final two chapters, is that legal analysis necessarily has a normative, visionary element, but the mapping and criticism (imminent critique) must begin with the detailed materials of law since there is an internal relation between institutions and practices on the one hand and ideals and interests on the other. Recognising this internal or dialectical relationship, the work of the legal analyst is to engage in a sustained practice of internal development, that is, of ideological and institutional tinkering. Examples of institutional imagination could begin anywhere, within any field of law, relating to any arena of social life, and when the project of institutional imagination and reconstruction is thought about as a grand reconstructive project⁴⁵, the scale of the task might seem too daunting to begin. Unger assists us however by discussing four substantive ideas in contemporary law - the disaggregated property right, ‘mobilizational’ political democracy, social law (legal regimes existing outside the control of the state) and the idea of social inheritance and how each can be developed through institutional imagination. All of these ideas are represented to some extent within existing institutions and practices but are not developed further.

For Unger the real problems in contemporary western industrial democracies relating to sustaining economic growth and retaining social equality cannot be solved within the limits of the existing policy debates characterised on both sides of party politics by a conservative

⁴³ Ibid 40.

⁴⁴ The theoretical justification for democratic experimentalism is discussed in Chapter VI below.

⁴⁵ For discussion of Unger’s project in these terms, see Allan Freeman, *Lloyd’s Introduction to Jurisprudence* (Sweet & Maxwell, 9th ed, 2014), 1029-32. These examples are borrowed from Unger’s work. For a good example of how Unger’s approach to legal analysis can be applied to contract law and doctrine, see Hugh Collins, ‘Roberto Unger and the Critical Legal Studies Movement’ (1987) 14(4) *Journal of Law and Society* 387.

reformism, that is, by the view that existing institutions should not be radically changed and that any significant inequalities produced by the existing system should be ameliorated through tax and transfer policies. Unger argues instead that the institutions themselves require piecemeal but potentially radical reform. For example continued economic growth may require that the market economy be democratised through a number of institutional innovations which ‘cannot fully develop without, in turn, transgressing and transforming the traditional system of property rights’.⁴⁶ Unger puts the problem of economic growth in the following terms:

The central problem of institutional design for growth is to develop the arrangements most likely to invite and withstand recurrent innovation because they mix cooperation with competition, recognize the interests of all involved in the joint effort, and ensure fundamental individual security in the midst of change. By this most important and most practical standard the conventional property regime is simply too crude. Its historical justification lies in a bygone age when savings over current consumption, what Marxists called surplus extraction, overshadowed cooperation and innovation as a constraint upon growth.⁴⁷

As Unger points out, the disaggregated property idea was once central to legal thought. That is, in pre-industrial society it was more common for rights relating to property to be divided and allocated amongst various owners or agents, than it was for rights in property to be bundled together and vested in a single property owner. In the 19th century, with the advent of the industrial revolution, the disaggregated property right ceased being considered the legal norm and was replaced at the centre of legal culture by the aggregated property right. Various revolutionary changes in modes of production and exchange led to changes to the property regime and the way that property was conceived as a legal ideal culminating in the canonical industrial model of Fordist style mass production whereby property was concentrated in the hands of business owners and shareholders, and labour was increasingly segregated both practically and conceptually from the legal property regime.⁴⁸

⁴⁶ Unger, above n 1, 12.

⁴⁷ Ibid 13.

⁴⁸ See Peter Drucker, *The Unseen Revolution: How Pension Fund Socialism Came to America* (Heinemann, 1976) for an alternate view. He argues that the extensive holdings of shares by pension funds – also seen in the UK and Australia – had led to a form of socialism in that the people now owned the working capital of the country. But Clarke disputes the aptness of the term socialism. He distinguishes the social security benefits of welfare states – such as the UK with its state employment insurance scheme – from that in the US (and Australia) as the funds tied to the fortune of particular companies, are the subject of investment by professional advisers and these compete in a competitive market for that role: RC Clark, ‘The Four Stages of Capitalism: Reflections on Investment Management Treatises’ (1981) 94 *Harvard Law Review* 561, 657-8.

Employing Unger's reorientated approach to legal analysis, the unified property right, vesting concentrated power in the owner or his agent, could gradually give way, through a process of internal development of the existing property regime, 'to a system of fragmentary, conditional, and temporary property rights, granting residual rights of control and claims to returns from productive assets to a range of different types of stakeholders including social funds, local governments, small-time entrepreneurs, and workers.' Such an approach is 'not recognizable as either socialism or capitalism because it fails to conform to the legal logic of a unified property right held by the individual owner or by the state.' The merits of democratic experimentalism in this context would be 'to enable different systems of contract and property that is to say, different sets of legal devices for the decentralized allocation of economic power and access to coexist within the same economy. Their practical consequences might then be experimentally assessed.'⁴⁹ There already exist many sets of legal devices that disrupt the unified property right. – freehold can be subject to leasehold, life interests, profits a prendre, easements, licences, native title, etc. However Unger is calling for a 'quantum increase' in economic flexibility which would consist in more collective ownership by firms, workers, governments and social funds.⁵⁰

Take next the idea of mobilisational democracy. For Unger, this idea can be contrasted with the present conventional form of liberal democracy with its 'preference for styles of constitutional organization making reform depend upon consensus, and a way of organizing politics favoring the political quiescence of the people, interrupted, rarely and unpredictably, by interludes of social crisis and collective enthusiasm'.⁵¹ In addition, a constitutionalism of 'deliberate deadlock', as Unger describes it, is expressed by forms of government that:

concentrate political action in a class of professional politicians championing unevenly organized and powerful interests against a background of popular political demobilization...The mobilization-hostile arrangements continue to shape a style of political history in which bursts of anti-institutional populist reform come and go, leaving the basic

⁴⁹ Unger, above n 1, 13.

⁵⁰ National insurance schemes that include rights to retirement benefits, and industry superannuation funds controlled by unions and employers appear to fit this approach.

⁵¹ Ibid 16.

forms of the state and economy relatively unchanged, or changing them only under pressure of extreme crisis.’⁵²

Unger argues that democratic experimentalism requires that the reconstruction of these received political institutions be a focus of concern in its own right, and that ‘a constitutionalism favourable to the engagement of the universal electorate in the rapid resolution of impasse among branches of government should take the place of a constitutionalism friendly to the slowing down of politics.’⁵³ For Unger, and I agree, there is an alternative constitutionalism that could be developed through mapping and criticism of the current institutional arrangements which may be more amenable to democratic experimentalist ideals:

Among the devices of such an alternative constitutionalism can be the combination of personal plebiscitarian and parliamentary forms of power, the resort to plebiscites and referenda, and the facility to call anticipated elections at the initiative of any branch of government. A legal structure of electoral politics favorable to a persistent heightening of the level of popular political mobilization can take the place of one that turns electoral politics into an occasional and minor interruption of practical affairs. Among its instruments may be rules of mandatory voting, free access for a broad range of political parties and social movements to the means of mass communication, the public financing of political campaigns, and the strengthening of political parties.⁵⁴

This institutional reconstruction of political democracy that Unger advocates can be set in high relief against the ‘conservative reformist’ alternatives represented by both the left and right as the horizon of democratic politics in the United States and other western democracies which have focused in recent times on reinterpreting rights rather than on reforming electoral law and the constitution.⁵⁵

⁵² Ibid.

⁵³ Ibid 17.

⁵⁴ Ibid. Unger’s views on democracy draw on the American pragmatist, in particular Dewey, who saw democracy as an ethical ideal to be extended, not just a political arrangement: see Robert Westbrook, *John Dewey and American Democracy* (Cornell University Press, 1991)

⁵⁵ Recent exceptions include the constitutionalised indigenous voice in Australia, the federal Canadian model introduced that severs the funding nexus between political parties and moneyed interest groups, and constitutional referenda in Ireland on significant social issues.

A third idea that exists to some extent in contemporary law, and the counterpart to the proposed energizing and quickening of politics, is the organization of civil society through the imagination and construction of what Unger calls 'social law'. Such a social law is necessary because:

A disorganized or unevenly organized society cannot reinvent itself. Its discussion of alternative futures would come lifelessly from books rather than vigorously from the localized experiments and debates of real movements and associations. To abandon the organizational requirements of civil society to the traditional instruments of private law is to acquiesce in starkly uneven organization.⁵⁶

Unger argues that to redress this problem 'civil society may acquire elements of a public law structure. Such a structure may be organized on the basis of neighbourhood, job, or shared concern and responsibility. It may create norms and networks of group life outside the state, parallel to the state, and entirely free of governmental tutelage or influence...In such a law the empowering practice of voluntary association would find a congenial home.'⁵⁷ Unger's vision of a social law seems to suggest the construction of a community sector writ large, amplifying both the scope and level of various social, cultural, religious and sporting associations. For Unger it is important to regard all such associations as canonical examples of law, rather than some being regarded as peripheral, less legitimate forms of social organisation, because it is in the interests of democratic experimentalism that we are encouraged to create more diverse institutional forms of social life.⁵⁸

Fourth, Unger asks us to consider the idea of social inheritance. Unger argues that loosening the grid of social division and hierarchy has traditionally been a common goal of both classical liberalism and socialism but that, '[t]he relentless disintegration of Marxism and of other forms of leftist theory tempt some people to forget that we all continue to live in class societies in

⁵⁶ Ibid.

⁵⁷ Ibid 18. The Internet expands the opportunities for citizen participation. Yannis Theocharis, and Jan van Deth, 'The Continuous Expansion of Citizen Participation: A New Taxonomy' (2018) 10 *European Political Science Review* 139-63 make connections between the new and the old including voting, demonstrating, volunteering, boycotting, blogging, and flash mobs.

⁵⁸ Indigenous groups recognised under land rights legislation come with their own concepts of politics and legal structures and interface with the dominant legal systems through structures like trusts or corporations that are constructs of the settler society and its legal system: see Christos Mantziaris and David Martin. *Native Title Corporations: A Legal and Anthropological Analysis* (Federation Press, 2000); Damien Short, 'The Social Construction of Indigenous Native Title Land Rights in Australia' (2007) 55 *Current Sociology* 857-76.

which stark disparities of inherited privilege shape people's life chances. Marxism may be dead, but class is doing as well as ever.'⁵⁹ One of the main ways in which social division and hierarchy is maintained is through legal mechanisms that quarantine inheritance within the field of private law. However Unger argues persuasively in my view that in order to implement a program of radical reform, we could not 'generate adequate funding for investment in people without rearranging law so that a public right of inheritance from society came to supplant a private right of inheritance from the family.'⁶⁰ How reform to the law of private inheritance is phased in would obviously be an issue for public discussion, as would be the particular composition of the social endowment accounts, but Unger suggests one possibility as follows:

Some portion of these accounts would represent unconditional claims upon the state for the satisfaction of minimal and universal needs. Another portion would be suited to individual circumstance. Yet another portion might be granted as reward for demonstrated promise or achievement. Some part might consist in the provision of services by a unified public apparatus on the traditional model of the welfare state. Another part might result in points to be spent by the individual, on his own discretion or with the approval of trustees, among competitive service providers. The chief object of such accounts would be education...⁶¹

Based on the internal development of the four legal ideas discussed above, it might seem feasible as a practical matter to adopt Unger's revised practice of legal analysis as institutional imagination, that is, the imminent critique and internal development of institutions and ideals represented, at least to some extent, in existing legal materials. Of course there are still normative arguments to be had about the desirability of particular measures and whether they ought to be adopted within particular communities at particular historical moments. Indeed, the point of legal analysis as institutional imagination is that we should welcome informed debates over these normative issues regarding the existing structure, and that rather than assuming the

⁵⁹ Unger, above n 1, 14.

⁶⁰ Ibid.

⁶¹ Ibid 15. This approach would be welcome in Australia where disparities in educational advantage seems to have increased under neo liberal policies: See, e.g. Howard Prosser, 'The Economy of Eliteness: Consuming Educational Advantage' in Aaron Koh and Jane Kenway (ed) *Elite Schools: Multiple Geographies of Privilege* (Routledge, 2016) 229-42.

structural status quo, we should encourage and legitimate a discursive space within law in which these alternatives can be clearly presented and openly debated.⁶²

C Why Law? Responding to Critics

An obvious and important question for Unger's proposal to reorientate legal analysis as institutional imagination is: why *legal* analysis in the first place? That is, why does Unger think that specifically *legal* analysis can and should be considered to be a central means of providing institutional alternatives? The major reasons that Unger views legal analysis to be an important tool in affecting social transformation appear to be pragmatic.⁶³ That is, consistent with his social theoretical approach which I discuss further in the following chapters, Unger argues that there is no necessary relationship between legal analysis and structural social change, but that several contingent socio historical factors have led to a situation whereby legal thought and its reorientation has assumed great contemporary importance for advocates of structural social change. Specifically, Unger identifies three areas of contemporary discourse: political, legal and social theoretical, that have the potential to create the conditions for effective social change, but which have instead acquiesced to a large degree in scientism, naturalism and institutional fetishism.⁶⁴ For example, in relation to contemporary political discourse there has been an increasing trend in the conventional party politics in the western industrial democracies to deride structural institutional change as an unrealistic or undesirable alternative:

The practical men and women who run the rich industrial democracies believe that it would be impractical to energize politics through an intensification of popular political action focused upon a choice among well-defined programs of structural change. The paradoxical result of their anti-pragmatic pragmatism is nevertheless to deny collective problems their collective solutions. Politics degenerates into a series of narrow factional deals among unevenly organized

⁶² Scholarship dealing with legal pluralism is familiar with the idea of alternative legal ideals and structures: See Brian Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375.

⁶³ The term 'pragmatic' is used here in the colloquial sense and is not to be confused with the term 'pragmatist' discussed in Chapter VI which refers to a particular social philosophical approach with which Unger identifies.

⁶⁴ This acquiescence is discussed in relation to Unger's 'radicalised' pragmatist approach to social theory in Chapter VI below.

groups. Each group finds itself trapped in its present understanding of its interests and identity. As a result, the derision of structural change becomes a self-fulfilling prophecy.⁶⁵

Unger argues that the unnecessarily narrow limits of the current political discourse in the contemporary West are shaped by a kind of institutional fetishism, that is, ‘the unwarranted identification of abstract institutional conceptions’ such as the market economy, political democracy and free civil society, with a particular, contingent set of institutional arrangements, largely those that resulted from the last political and ideological settlement that followed the Second World War. For Unger, this institutional fetishism is supported by an implicit but nevertheless influential social theoretical assumption that Unger terms the ‘convergence thesis’. The convergence thesis refers to the belief that there is a natural convergence towards a single best set of available practices throughout the world:

According to this idea the institutional evolution of the modern world is best understood as an approach, by trial and error, toward the only political and economic institutions that have proved capable of reconciling economic prosperity with a decent regard to political freedom and social security. Variations in the institutional arrangements of successful contemporary societies are real but secondary; if anything, they tend to become narrower as the relentless lessons of experience leave ever less room for the reconstructive imagination.⁶⁶

For Unger, the convergence thesis represents an absurd, fatalistic, right wing Hegelian view of history and that its influence in political culture is all the more surprising because it is contrary to many of the recognised developments in the history of social theory:

the thesis represents a striking reversal a reactionary interlude in what has been the main direction of social and historical thought since the late nineteenth century: the escape from functionalist and evolutionary determinism in social and historical explanation and the growing appreciation of the ways in which the practical institutions and the enacted beliefs of a people join to shape a distinct form of life.⁶⁷

The implicit but pervasive influence of the convergence thesis which manifests in institutional conservatism on both the right and left of politics in the western liberal democracies has

⁶⁵ Unger, above n 1, 10.

⁶⁶ Ibid 8.

⁶⁷ Ibid 9.

resulted in a situation where by collective problems are denied collective solutions. Instead, as Unger writes for most of today's politicians:

The program of chastened social democracy must be accomplished within the limits of a particular style of property and politics. The property regime makes access to resources depend upon the decisions of managers and financiers overseeing stocks of private wealth, much of it inherited or given as anticipated inheritance. The practical capacity to achieve economies of scale, the legal rights of free accumulation and transmission of personal wealth, and the organizational habits of managerial discipline exercised in the name of property come to seem natural and inseparable companions. The political regime of de-energized politics favours low levels of popular engagement, and surrenders to technical expertise what it robs from active popular self government, dissolving political choice into a series of loosely linked and narrowly focused policy debates.⁶⁸

Since there is little belief in the possibility of radical institutional reform by the major players in practical party politics, structural change instead becomes dependent on crisis.⁶⁹ Reinforcing the institutional conservatism of contemporary political discourse is much political philosophy including the work of Rawls and Habermas which, according to Unger, accepts the existing institutional framework of liberal social democracy and then provides a philosophical defence of the political status quo that Unger calls 'the humanisation of the inevitable'. Unger believes that this one dimensional, hegemonic discourse in social and political philosophy is revolting and his work in both legal and social theory is aimed at ameliorating its effects. The conventional political discourse which derides structural change as unrealistic or undesirable and the conventional social and political philosophical discourse which attempts to put the best face on the existing institutional arrangements, combine with a third discourse, the hegemonic legal discourse discussed and critiqued at length in chapters I and II above, to ensure that we have no discursive space in which to think and talk about the possibility of structural social transformation. Unger therefore sees the contemporary intellectual and political situation as one whereby there is no discursive space in which to collectively discuss and construct alternative social futures. While each of the three social disciplines, law, politics and social theory are all capable in theory of constructing alternatives, the conventional methodological

⁶⁸ Ibid 10. Significant private wealth also resides in superannuation funds in the UK and Australia.

⁶⁹ This concept of 'structural change' is discussed in more detail in Chapter V below. Suffice it to say at this point that he is not referring to the effects of 'tax and transfer' policies which are common place in contemporary western democracies.

approach in each discipline is to naturalise existing institutional and ideological arrangements and insulate them from radical criticism and change.

It is in this context that Unger regards law as the best placed of the social disciplines to be reorientated and placed in the service of democratic experimentalism. For Unger law is the site of the ‘crucifixion’ of our ideals and interests on the cross of our institutions and practices which gives legal discourse an advantage. This is because legal analysis is a discourse that is taken seriously by the majority of people in an era characterised by disillusionment and disengagement with popular politics as well as by a pragmatist world view that is sceptical of appeals to political ideology and metaphysics. A second advantage of law is that legal discourse has no conventional method – the discipline of law is plural. This situation presents an opportunity for legal analysis according to Unger. In the very first sentence of his 1996 work, *What Should Legal Analysis Become?* he writes:

The conflict over the basic terms of social life, having fled from the ancient arenas of politics and philosophy, lives under disguise and under constraint in the narrower and more arcane debates of the specialized professions. There we must find this conflict, and bring it back, transformed, to the larger life of society.⁷⁰

Unger argues that it is the twin discursive disciplines of legal analysis and political economy which together constitute the discursive instruments capable of imagining institutional alternatives. The method, of these ‘twin disciplines’ is the same on Unger’s account in that both practices must recognise the internal relation between thinking about our institutions and practices and thinking about our ideals and interests as a necessary condition of social transformation. This insight about the dialectical relation between institutions and practices on the one hand and ideals and interests on the other may be a threat to the conventional conceptions of both law and economics, but on Unger’s account, this internal relationship should be opened up and through the practice of internal development of both legal analysis and political economy, turned into an intellectual and political opportunity.⁷¹ So it is important to understand that while Unger views legal analysis as an important tool in the pursuit of democratic social change, his claim is not that legal analysis is the exclusive or even primary

⁷⁰ Unger, n 1, 1.

⁷¹ It is this revolutionary insight in social theory beginning with Vico: that society is made by us and therefore can be understood and remade, that Unger’s work in legal and social theory seeks to develop.

discursive tool to achieve it. Further, Unger's reorientated account of legal analysis, characterised by a process of 'internal development', that is of mapping and criticism of conventional legal materials cannot be regarded as a radically separate or distinct method viz a viz other fields of social inquiry. That is, while according to Unger there is no clear, analytic distinction between legal and political discourse, there are real institutional differences that could be better utilised in the case of legal discourse to provide real social change.

Many commentators have been critical, however, of several aspects of Unger's reorientated approach to legal analysis, in particular whether Unger's account is able to extend beyond the judicial setting whilst remaining distinctly *legal* analysis. They therefore question whether Unger's reorientated approach to legal analysis can be considered to be *legal* analysis at all. While some objections to Unger's positive proposal for legal analysis are grounded in assumptions derived from 'systems theory'⁷², other criticisms also appear to adopt social theoretical assumptions that run counter to Unger's approach.⁷³ William Lucy and Jeremy Waldron, for example, have both argued that the least convincing part of Unger's legal thought is his positive proposal to reorientate legal analysis as institutional imagination. Lucy's argument focuses on Unger's account of adjudication discussed above and suggests that Unger proposes an account which promotes democracy as a fundamental value, or at least as a more important value than any particular account of individual rights. Lucy then suggests that Unger's commitment to democracy comes into direct conflict with other values that he promotes within his broader social theory, values such as solidarity and equality.⁷⁴ Lucy argues that there is therefore a problem with Unger's approach to legal analysis (at least in the adjudicative setting) in that it does not purport to resolve these contradictory values implicit in different parts of Unger's work.

The theoretical basis of Lucy's criticism is misconceived in my view, however, in that it seems to make similar assumptions to the legal doctrinal formalism that Unger criticises in his work. This is the view that each type of social arrangement, in this case, political democracy, has an

⁷² See Emiliios Christodoulidis, 'The Inertia of Institutional Imagination: A Reply to Roberto Unger' (1996) 59 *Modern Law Review* 377. Unger, as a pragmatist, eschews the account of law suggested by Christodoulidis because systems theory does not adequately address the relation between normative vision on the one hand and an account of social structure on the other. In addition, Unger's approach to legal analysis does not reduce law to politics as suggested by Christodoulidis' critique: see Kevin Walton, 'A Realistic Vision? Roberto Unger on Law and Politics.' (1999) 5 *Res Publica* 139-59.

⁷³ See generally Waldron, above n 39, 525-29; William Lucy, 'Book Review: What Should Legal Analysis Become?' (1997) 56 *Cambridge Law Journal* 419-23.

⁷⁴ See, e.g. Unger, above n 34, 107-26.

inbuilt predetermined and coherent institutional and ideological content. Lucy in his criticism also appears to assume, similar to Dworkin, a monist account of value. That is, when Lucy asks of Unger's approach to adjudication, 'Under what (ideological) banner are we to march? Democracy and democracy alone and if there are other values in play ... what is the relationship between them and democracy?'⁷⁵ he assumes that there is a pre-existent, coherent, conceptual scheme of values so that it is possible in theory to state the relation between political values in advance. However, as I argue in Chapter VI, 'Radicalised Pragmatism and Law', Unger's reorientated approach to legal analysis does not require the application of a priori principles such as 'empowered democracy' as if it has a fixed, coherent content. Instead he is proposing the imagination of institutional alternatives so that there can be democratic means, that is, so that we can create a discursive space to argue about and experiment with our institutions and practices. Unger is not suggesting a blue print for a particular set of institutions and practices that would constitute the ideal form of empowered democracy for example. Instead, his suggested conception of structure is one that invites change and that can come closer to Unger's normative vision of the human as a structure defying and context transcending agent.

Waldron also provides what are in my view misguided criticisms of Unger's alternative proposal for legal analysis. Waldron is generally supportive of Unger's negative critique of contemporary styles of legal analysis and Unger's impulse to transform legal discourse towards a more critical and normative practice:

Unger is surely right: ideological analysis of this sort is extremely important for social understanding. We need to grasp "the existing institutional situation as the complex and contradictory structure that it really is, as the strange and surprising settlement that you could never guess from abstractions like 'the mixed economy,' 'representative democracy,' or 'industrial society'".⁷⁶

Waldron argues however that Unger's positive proposal to reorientate legal analysis as institutional imagination is problematic both in its method of internal development and in its external normative aspirations. In relation to Unger's proposed method for legal analysis, Waldron argues that this requires a deeper level of inquiry at the micro-institutional level, but that, 'there is little reason to think that *legally* trained analysts have any special insight into institutions once we abandon a preoccupation with their surface normative structure.' Waldron

⁷⁵ Lucy, above n 70, 422.

⁷⁶ Waldron, above n 39, 524.

then suggests that we should look not to lawyers, but ‘to those with social, cultural, political, and historical training for the special insight that radical reform requires.’ He therefore questions ‘whether there is any need to develop a specifically legal education *at all* for these tasks, given that other scholars are already being trained to perform them in other academic disciplines.’⁷⁷

In his concluding remarks about Unger’s legal thought Waldron appears to deny any real value in Unger’s positive proposal for legal analysis:

One is left...with the unfortunate impression that legal analysis will never really become... anything more positively radical, anything more open to the experimental side of the democratic impulse, until it becomes something else - something other than *legal* analysis. And so we are left, in the end, without an answer to the question with which we began: What can a legal scholar contribute to radical reform that is different from what a social scientist, or a theorist of culture, might contribute? All that Unger has ended up showing is that the legal scholar's contribution depends, in effect, on his *becoming* a social scientist or a theorist of culture. And that is a depressing prospect for us in the legal academy.⁷⁸

Waldron’s comments regarding legal method appear curious, however, for at least two reasons. First, Waldron assumes that the distinguishing trait of a lawyer must be the *method* of analysis. However there is nothing novel about Unger’s claim that legal analysis represents a method that is not completely distinct from methods adopted in other social disciplines. Indeed, many critical theorists from the legal realists to the poststructuralists have made this point again and again. It is curious therefore as to why Waldron would regard it a ‘depressing prospect’ that legal method cannot be radically separated or distinguished from other modes of social inquiry. Arguably this insight about the de-limitable nature of law has provided and will continue to provide opportunities for cross pollination of the social disciplines and an increasingly richer account of social life and its possibilities.

Another curiosity attributable to Waldron’s comments relates to why it is that, having rejected doctrinal formalism, the only remaining alternative for the legal analyst is to become a social scientist or theorist of culture. It seems that similar to Lucy, Waldron is making social theoretical assumptions not shared by Unger – the assumptions of positivist social science.

⁷⁷ Ibid 525.

⁷⁸ Ibid 529.

Unger explicitly rejects the idea that his approach suggests that the legal analyst must become a positivist social scientist. As discussed further in Chapter V, 'Reuniting Jurisprudence and Social Theory' below, according to Unger positivist social science is inadequate in that it assumes a fixed social order but at the same time there is no adequate theory of this supposed order. As such the legal analyst can only draw on existing legal materials to suggest alternative social institutions and practices from the bottom up and inside out. Unger's approach to social theory therefore does not imply that the legal analyst should become a social scientist or a theorist of culture, but instead she ought to adopt a critical approach to society accompanied by imaginative alternatives. Perhaps it could further be argued that legal academics already do this style of legal analysis, in particular within policy and social justice research institutes, however Unger's point seems to be that not enough is being said explicitly to change the canon of legal analysis. So for Unger, although traditionally legal analysis and policy work have often been distinct areas of discourse, they cannot and should not be regarded as such. For Unger, projects of social transformation can often begin with an imminent critique of the law and it is legal analysis that can open up the dialectic between ideals and interests on one hand, and institutions and practices on the other.

Waldron then turns to the normative, visionary aspect of Unger's approach to legal analysis. For Unger, legal analysis also requires a self-fulfilling prophecy, a social hope or gamble on what self and society can become. Unger claims that we need the marriage of a normative conception and an understanding of social structure and structural change and to realise it in the institutional detail of law. Unger gives the examples of the revolutionary ideas of democracy and romanticism which have a history in colonialism but which have been subverted and developed through the process of internal development. For Unger, legal analysis similarly has the potential to be subverted and developed towards a sustained practice of institutional imagination. Waldron is sceptical, however, suggesting that:

an ability to spot the weak points is not the same as an ability to design or construct resilient alternatives. The least convincing part of Professor Unger's case is his conviction that legal analysis can become a form of genuine institutional experimentation. He insists that new institutions should not be just revamped versions of old ones, and he warns against the tendency to assume that familiar ideals cannot be housed in unfamiliar structures. He urges courage and creativity - a healthy sense of the contingency of existing arrangements and a willingness to experiment playfully with alternatives. But again, these are little more than admonitions that might be directed to any politician. They are unsupported by any argument to show that this

ability to think constructively beyond the actual is what *legal* analysis might reasonably be expected to become.⁷⁹

Perhaps these differences between Waldron and Unger on the feasibility of constructive projects for law point more to their different political convictions (to their faith in doing politics through law) than to their theoretical differences.

Waldron is also critical of the view that what Unger terms ‘external normative practices’⁸⁰ can form a legitimate part of legal discourse. Unger, however, eschews Waldron’s criticism that external normative vision cannot be subsumed within the practice of legal analysis. For Unger, as for the German historicists such as Hegel, law is the institutional form of the life of a people, and importantly law is dialectically related to our broader ideals and interests so that external normative practices, that is, appeals to visions of human nature, of what we can and should become, based on existing cultural artefacts, including legal materials, cannot be wholly excluded from an imminent critique of law, that is from the practice of *legal* analysis.⁸¹ As such it seems that Waldron’s criticisms of Unger’s reoriented approach point to some divergences in social theoretical understanding. Implicit in both Waldron and Lucy’s criticisms of Unger’s approach is a positivist social scientific approach to law. Unger on the other hand rejects purely analytic accounts of law and legal thought.

As discussed further in the following chapters, Unger’s radicalised pragmatist approach to legal and social theory draws from a different theoretical tradition.⁸² Unger’s approach does not claim to represent a method radically distinct or separable to other social disciplines nor does it claim to be the primary or exclusive instrument of structural social change. Unger’s reorientated approach to legal analysis as institutional imagination can meaningfully be described as *legal* analysis, however, in the sense that the objects of the analysis are social institutions as expressed in the detailed materials of law. As such the distinctive task of the

⁷⁹ Ibid 527.

⁸⁰ Roberto Unger, ‘Legal Thought Now (Spring, 2016), Lecture 3’ (1 January 2017), *Roberto Mangabeira Unger: Lectures and Courses* <http://www.robertounger.com/en/2017/01/18/legal-thought-now-spring-2016>.

⁸¹ There appears to be a separate philosophical debate about the *source* of external normative practices, that is, do they involve access to the extra social? I don’t think that speculation or imagination of alternative social institutions and practices requires access to the extra social so this aspect of Unger’s thought is consistent with as social theoretical traditions such as critical theory and pragmatism. Although some of Unger’s language borrows from religious traditions (which do claim access to the extra social) we need not attach any transcendental or metaphysical significance to this sort of spiritual language, other than perhaps its ability to inspire change.

⁸² Unger’s account of ‘radicalised pragmatism’ and its relation to both critical theory and classical pragmatism is discussed in Chapter VI below.

legal analyst is to map and critique the institutional microstructures of society past and present, locally and cross jurisdictionally as a means to suggest the adjacent ideological and institutional possibilities.⁸³ Unger's reorientated practice of legal analysis as institutional imagination also operates within certain conceptual constraints discussed in the following chapters which aim to connect a particular understanding of normativity with an understanding of social structure and structural change.

⁸³ For an account of legal thought that is compatible with Unger's proposal, see Margaret Davies, *Delimiting the Law: Postmodernism and the Politics of Law* (Pluto Press, 1996). See also Roberto Unger, 'The Task of the Social Innovation Movement' in Nicholls et al (ed) *New Frontiers in Social Innovation Research* (Palgrave Macmillan, 2015) 233-51 where he identifies eight areas of social life requiring vanguard (legal) thought.

V REUNITING JURISPRUDENCE AND SOCIAL THEORY

Having examined Unger's proposal to reorientate legal analysis as institutional imagination in the previous chapter, in this chapter and the next, I turn to Unger's attempt to reunite jurisprudence with its social theoretical roots in order to develop a contemporary normative jurisprudence. First, Unger's account of the major two theoretical approaches in the universal history of legal thought is discussed and why these approaches may be inadequate to provide a contemporary normative jurisprudence. Unger suggests that both of these traditional approaches to law evade what he terms 'the real structure of society', leaving it unexplained, unjustified and largely invisible. This view that traditional jurisprudence has not sufficiently recognised the social nature of law is shared by several contemporary scholars who have an interest in the sociology of law and in exploring ways to reconnect legal and social theory. Unger's approach is discussed in the context of this sociological jurisprudential tradition before some methodological questions are explored in the final section regarding Unger's preferred social theoretical approach.

A Criticism of Traditional Legal Theory

In his most recent work in legal theory, Unger argues that in the universal history of legal thought there have only been two basic approaches to conceiving of law. On the first approach, law is viewed as an immanent moral order. On the second, law is viewed as the will of a sovereign.¹ According to the first view, 'there exists a moral order latent in social life...revealed and refined through the work of legal doctrine'. The immanent order, or moral logic, may be represented in one of two forms: either as 'the institutionalized form of the life of a people', in the German historicist tradition of the 19th century. Or it may be 'defended as the local instance of a 'universally authoritative direction for humanity'. The votaries of this first idea of law are usually the professional experts in law - the jurists. The jurists view themselves not as 'mere servants' of the state (although they claim to exercise the power of the

¹ See Roberto Unger, 'The Universal History of Legal Thought' (18 January 2017), *Roberto Mangabiera Unger: Legal Theory* <http://www.robertounger.com/en/2017/01/18/the-universal-history-of-legal-thought-fixme-year>.

state), nor as wholly independent thinkers, but as ‘sharers in a community of discourse tied to both a particular society and legal tradition’. Therefore, practice and knowhow are central to the jurist conception of the role of the lawyer and theory is regarded as secondary and derivative. The corresponding method of the jurists is such that they:

organize their work around the view of legal doctrine as the expression and the development, in the detailed materials of the laws, of an intelligible and justifiable scheme of social life. In the extant law, the legal experts find, beyond the arbitrary doings of power, a halting and flawed but nevertheless cumulative approach to a comprehensive ordering of social life. This ordering is both discovered and developed, over time, through the reasoned elaboration of law.²

There seem to be two implicit assumptions that the modern jurist makes. First, a view of institutional inertia opposed to institutional discontinuity and second, a view of institutional intricacy. Expression of this first view of law as immanent moral order can be found in classical Roman jurisprudence and the jurisprudence of the English common law including in its most recent canonical form, which Unger terms rationalising legal analysis.³ According to the proponents of rationalising legal analysis, its repeated practice will, over time:

do more than identify the otherwise fragmentary and contradictory elements of an intelligible and defensible plan of social life in the materials of the law. It will slowly help recast those materials until they seem more fully to embody such a plan. Then the idea of an immanent order will retrospectively vindicate the assumptions and claims of doctrinal practice. The two together - the method and the idea - have made legal thought what it has been for much of its history.⁴

As discussed in Chapter II, however, it is illusory to assume with proponents of conventional legal doctrine, that impersonal policies and principles can ‘carry a meaning of their own, independent of the absurdities and accidents of history.’ Legal doctrine can only make sense as a guide therefore in the practical application of the law if the jurists understand and elaborate its categories in a fashion that bends to the real structure of society, that is, the jurists must ‘adjust abstractions to realities’. With the recognition of this fact, however, emerges the central contradiction underlying the practice of legal doctrine. It must both ‘express an intelligible and

² Ibid, 1.

³ Ibid 6-10.

⁴ Ibid 13.

defensible conception of social life whether or not reduced to a system of rules and propositions’, while at the same time adjusting to a real structure of society, ‘forged in the realities of history rather than in the minds of jurists’.⁵ The contradiction then, contained within the juristic method, is presented by Unger as follows:

How can doctrine be both the embodiment of such a conception and an adaptation to such a structure? How can legal reason (if by legal reason the ancient and universal practice of doctrine) make peace with legal history? The doctrinal conception of an intelligible and defensible plan of social life...differs so starkly from the rough conflicts and compromises of historical experience that no such spontaneous convergence between legal reason and legal history could ever be expected to exist...if it is a marriage, it is a forced marriage, at gunpoint.⁶

The second theorized account of law in the universal history of legal thought that Unger identifies is law as the will of the sovereign. According to this second view of law, ‘the sovereign is also the law willed by the state, and imposed by the state on society’. The votaries of this second view are the political and legal theorists who want to distance themselves from what they regard to be the ‘illusions of the practical jurists’. Influential figures in the tradition espousing this second view of law as the will of the sovereign include Thomas Hobbes, Jeremy Bentham, Carl Schmitt, Hans Kelsen and HLA Hart. A key aspect of this second account of law which distinguishes it from the first account is that:

Law as the enactment of the will of the sovereign is not supposed to be simply a selective intervention of the prince, adapting to circumstance and political purpose an otherwise stable body of law, legitimated by custom, tradition, or divine authority. It is, on this account, the whole source of law. Whatever in the extant body of law fails to result from the active and explicit choice of the sovereign, nevertheless depends for its force on his willingness not to disturb it.⁷

Unger describes two prominent versions of the theory of law as will of the sovereign. The first, is a moderate form favoured by the analytical approach to jurisprudence. The second is a more radical version which Unger names the ‘fighting theory of law’. The essential idea of the ‘analytical theory’ of law is to propose:

⁵ Ibid

⁶ Ibid 20.

⁷ Ibid 2.

a way of thinking about law that clearly distinguishes the legal from the moral or political. Law is best represented as a system of norms, the enforcement of which is backed by the power of the state. The legal question is not whether a norm is right or wrong but whether it is extant law. It is extant law if it was made according to the procedures defined by other, higher-level norms in force. Such a system presupposes, as an analytical construct, a fundamental norm or a rule of recognition that closes it, ensuring the existence of a boundary between the legal and the non-legal.⁸

According to the second version of law as the will of the sovereign, that is, the ‘fighting theory’ of law:

Law results from the cessation or containment of fighting over the organization of society and over the terms of our relations to one another. The sovereign is the power that makes the fight stop, although only for a while and up to a point. Society is then recast, momentarily and fitfully, from field of battle, literal and metaphorical, to scheme of life.⁹

While Unger is scathing of the methodological and political programme of legal positivism he is more sympathetic towards the fighting theory of law as the will of the sovereign and seeks to develop it further. For Unger, it is these two theoretical accounts of law: law as immanent moral order, and law as the will of the sovereign that ‘all by themselves account for the vast preponderance of the ideas about law that have been influential, not only in the West but, with modest qualifications, in the world history of law.’ However, Unger points out two curious facts about these two coexisting ideas about law so influential in the universal history of legal thought. The first is that the two ideas about law contradict each other. Whilst the two ideas of law have always existed alongside each other, one in the adjudicative setting and the other in the legislative setting, they ‘contradict each other in their view of what law is and therefore of how it can and should be developed.’ Unger provides a possible explanation for this curious state of affairs; that the idea of law as latent moral order, whilst a conceptual and methodological construction of the jurists, has rarely been articulated as theory.¹⁰ The idea of

⁸ Unger provides a scathing critique of the methodological and political program of legal positivism, he writes ‘At the core of the analytical theory lies the hope of invulnerability to explanatory and normative controversy...[it] can make no contribution to either the understanding or the development of a dialectic between consensus and dissent. It is on such a dialectic that any real public discourse must rely.’: *ibid* 28.

⁹ *Ibid*, 34.

¹⁰ The major 20th century exception is the work of Dworkin, see eg. Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), *Law's Empire* (Harvard University Press, 1986).

law as the will of the sovereign, on the other hand, has been the dominant account of law in much of the history of legal theory. As Unger explains:

The difference in the mode of expression of the two conceptions - one as largely implicit belief, widely shared by practical jurists; the other, as theory, put forward by individual thinkers...helps explain how the most important and universal divergence of view in the world history of legal thought could have been so little understood and discussed.¹¹

The second curious fact about the two views of law which Unger points out is that both views are 'radically incomplete'. That is, both accounts of law rely on an additional element without which both views of law would be rendered practically obsolete. This additional element, however, astonishingly is largely unacknowledged in legal thought.¹² This third element in the universal history of legal thought is 'the implicit reference to the real structure of society, including its institutional organization as well as its hierarchies of advantage and its divisions of experience.'¹³

As Unger argues, even the most powerful sovereign (whether democratic or not) must intervene in a social context, that is, in 'the inherited arrangements and routines of society and culture'. The problem then with the view of law as the will of the sovereign is that 'the pretence that these routines and arrangements, and the whole distribution of advantage and disadvantage resulting from them, subsist only because the sovereign consents to them is little more than a fiction.'¹⁴ Similarly, regarding the view of law as immanent moral order:

You could never guess from the discourse of the jurists what their high-flown words really meant in context, or what practical meaning and effect legal doctrine would have once married to the realities of the established order in society. You would, if you did not belong to that society and culture, need independent information about that order. Legal doctrine may seek to redescribe it and even to alter it at the margin. It is nevertheless powerless to remake it from the ground up.¹⁵

¹¹ Unger, above n 1, 28.

¹² See Brian Tamanaha, 'The Third Pillar of Jurisprudence: Social Legal Theory' (2014) 56 *William. & Mary Law Review* 2235. There are some exceptions, see e.g. Stewart Macaulay, 'Non-contractual Relations in Business: A Preliminary Study' (1963) *American Sociological Review* 55-67.

¹³ Unger, above n 1, 3.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

The problem then for legal theory suggested by Unger is that both approaches to law in the universal history of legal thought rely on a third idea of law, what Unger describes as ‘law as the real structure of society.’ But this idea is not explicitly recognised in legal theory, the real structure of society which the two ideas in the history of law rely on is therefore unexplained, unjustified and largely invisible in legal thought. In Chapter IV, ‘The Lesser and Greater Vocations of Legal Thought’, Unger’s approach to transform legal analysis through the internal development of the current doctrinal practice of reasoned elaboration was discussed. The corollary at a theoretical level is then to transform the two conceptions of law in the universal history of legal thought, that is, law as immanent moral order and law as the will of the sovereign, into a conception of law as the self-construction of society. Unger begins with the first idea of law as expressing an intelligible and defensible plan of social life with an internal dynamic propelling it forward. He argues that this implicit idea the jurists’ understanding of law is represented within philosophy by Hegel’s phenomenology of spirit:

The guiding conceit of that work is the need of man in society to bring his life under a conception, the contradictions of which, within itself as well as with experience, then become the motor of change. They propel spirit forward until at last all contradiction is overcome and spirit comes to be at home in the world. If we put aside the denouement of the final reconciliation, this view contains, raised to the highest level of generality, all the elements of the jurists' understanding of their own activity.¹⁶

Marx was also critical of Hegel's phenomenology of spirit. His criticism was essentially that the real life of society and humanity ‘cannot adequately be accounted for by an internal history of our dominant conceptions and of their imperfect marriage to the practices and institutions of society.’ Unger’s criticism of doctrinal analysis thus reflects Marx’s critique of Hegel:

The (legal) conceptions must reckon with the recalcitrant reality of these facts of society and of history, and be changed as much by their resistance as by any dynamic internal to themselves. We can never discern their meaning and effect, and grasp their possibilities of development at any given moment, simply by examining them on their own as if they were the source of our collective experience.¹⁷

¹⁶ Ibid 24.

¹⁷ Ibid 25.

If we subject the jurists' conception of law to this Marxist critique we then would say that a conception of law must not *assume* a 'real structure' of society (as does the idea of law as immanent moral order) whilst leaving the structure of society unexplained and unjustified. Instead a theory of law should contain within it, or at least be related to an account of the real structure of society; 'a theory of the discontinuous making of the institutional and ideological structures that shape people's dealings with one another in any real society.'¹⁸

In a similar way, Unger suggests that the fighting theory of law as the will of the sovereign is also 'radically incomplete', representing a 'proto-social theory'. Although the fighting theory of law recognizes, at least implicitly, that the institutional and ideological regimes of each society are 'not simply the outcome of conflict; they are, in a sense, frozen conflict', arising from the 'temporary interruption of a strife that cannot end once and for all', the problem is that the fighting theory contains no general account of the strife: 'of its practice, shape, meaning, and future'. Unger argues that not having an adequate social theory meant that the proponents of the fighting theory of law 'laid themselves open to an alternation between two inadequate views of the structure', one a 'remorseless voluntarism', and the other, a 'quasi-Darwinian' view favoured by the historical jurisprudence of Henry Sumner Maine and Savigny. Unger argues that the instrumentalist approaches of Holmes and Jhering moved between these two poles and that such views were 'incapable of informing a programmatic imagination, determined to create new structures through the revision of existing ones'¹⁹.

B Unger and Contemporary Sociological Jurisprudence

How then to reconnect legal theory and social theory so that both might be able to better address the nature of social structure and structural change? One key idea that Unger emphasises in his piece about the universal history of legal thought as well as in his jurisprudence more generally, is that traditional legal thought has not sufficiently seized upon the insights of classical social theory from Vico and Montesquieu to Marx, and in particular the idea of the rejection of the extra social; that society is instead made and imagined. Another idea fundamental to Unger's jurisprudence, also derived from classical social theory, is that law is a social practice embedded in a particular culture and tradition so that:

¹⁸ Ibid.

¹⁹ Ibid 45.

law is best understood as the institutional form of the life of a people, viewed in relation to the interests and ideals that make sense -- to its own participants -- of that form of life. Our interests and ideas always remain nailed to the cross of the practices and institutions that represent them in fact. Law is the site of this crucifixion. Neither the idea of law as immanent moral order, discovered and improved through doctrine, nor the idea of law as the will of the sovereign or of the state, forged in political struggle, do justice to the character or to the potential of law.²⁰

Many contemporary proponents of what Tamanaha labels ‘social legal theory’ agree with Unger that while law is generally regarded as a social practice, traditional jurisprudence has largely neglected insights from classical social theory about the fundamentally social nature of law. In this section I situate Unger within this tradition and refer to some prominent contemporary proponents’ views about the value of developing a sociological jurisprudence. In a recent work Tamanaha argues that the two major views about law in the universal history of legal thought are inadequate in that they do not account for the social nature of law, and that whilst a ‘third pillar’ of jurisprudence has co-existed with the other two ‘pillars’ of jurisprudence for centuries, it has remained largely in their shadow. For Tamanaha then, the recognition of a third branch of jurisprudence:

will create a framework for the incorporation of insights currently at the margins of discussions of the nature of law, including insights about legal institutions, legal functions, legal efficacy, legal change, legal practices, legal development, legal pluralism, legal culture, and more. This jurisprudential tradition, labelled “social legal theory” ...is characterized by a consummately social view of the nature of law.²¹

Both Tamanaha and Unger recognise that this ‘consummately social view’ represents a jurisprudential approach distinct from the two major theorized accounts of law in the universal history of legal thought. Both also recognise that this ‘third pillar’ of social legal theory is indebted to insights provided by classical social theorists, in particular Montesquieu. For Tamanaha, Montesquieu’s perspective counters not only the universalism of natural law theory, but also subtly pushes back against legal positivism. By locating the causes of law in

²⁰ Ibid 48.

²¹ Tamanaha, above n 12, 2238.

social forces he ‘displaces the *will* of the lawgiver as the primary source of law.’²² In an essay on Montesquieu, philosopher Isaiah Berlin made a similar point:

His whole aim is to show that laws are not born in the void, that they are not the result of positive commands either of God or priest or king; that they are, like everything else in society, the expression of the changing moral habits, beliefs, general attitudes of a particular society, at a particular time, on a particular portion of the earth’s surface, played upon by the physical and spiritual influences to which their place and period expose human beings.²³

Tamanaha points out that Montesquieu’s view of law and society has been criticized for being too deterministic and conservative but, as Berlin noted, it also has been used by social reformers and radicals ‘as so many demands that the law shall constantly respond to changing social needs and not be tied to some obsolete principle valid only for some epoch dead and gone.’²⁴ For Tamanaha, the task of a social legal theory would be to revive the core theoretical propositions beginning with Montesquieu and developed by the historical and sociological schools of jurisprudence. For him these theorists are part of the same philosophical tradition and the conventional jurisprudential narrative, which has historical jurisprudence dying and being supplanted by sociological jurisprudence, is incorrect. For Tamanaha they are strains of the same jurisprudential tradition and, rather than expiring, ‘the former seamlessly morphed into the latter.’²⁵

Berlin also noted this continuity, that Montesquieu’s account of law as the product of society is the foundation of the great German School of historical jurisprudence *and* various modern sociological theories of law.²⁶ Tamanaha agrees with Unger that the two major acknowledged traditions in contemporary jurisprudence are not interested in and are incapable of ‘addressing the dynamic engagement of law *in* society’ and that both natural law and legal positivism can and should be re-framed through a social legal theory lens. He concludes that the poverty of jurisprudence today is its marginalisation of theories that conceive of law as a social practice:

²² Ibid 2243.

²³ Isaiah Berlin, *Montesquieu* (Oxford University Press, 2012), 153-54.

²⁴ Ibid 156.

²⁵ Tamanaha, above n 12, 2254.

²⁶ Berlin, above n 23, Prominent philosophers Oakeshott, Berman and Hume were of a similar mind to Montesquieu in this regard, see Tamanaha, above n 12, 2273.

Without an acknowledged name and identity, a social theoretical perspective practically does not exist. Historical jurisprudence is all but forgotten; sociological jurisprudence is sometimes mentioned but rarely engaged; theoretical work on law and society is relegated to a nethermost region at the border of the social sciences, or stuck in the Law and Society Movement, cabined off from jurisprudence.²⁷

Tamanaha refers to a leading contemporary jurisprudence text by Brian Bix that exemplifies this ‘virtual erasure’ of sociological jurisprudence within the canon. He points out that in Bix’s text, ‘no mention is made of Jhering or Ehrlich...Savingy and Maine get a few quick words on the historical jurisprudence page. Weber shows up in a handful of footnotes, Unger in a single reference. There is nothing focused on the social nature of law or holistic views of law within society.’²⁸ Another reference made is to a jurisprudence text by Raymond Wacks²⁹, which does include chapters on historical and sociological jurisprudence, but Tamanaha is emphatic in insisting that the majority of jurisprudence texts do not include sections focused on the social nature of law or holistic views of law in society, that is, on social legal theory. To remedy this state of affairs, in Tamanaha’s view:

The parameters of this jurisprudential branch must be made concrete and filled in through the construction of theories that illuminate the social nature of law, building on predecessors like Ehrlich and Weber, as well as more recent contributors. With a name and identity, theorists with a social legal orientation can locate their work within a shared tradition, perceiving and constructing common links with others, critically engaging in ways that prompt further insights and development within the tradition. Work now excluded from jurisprudence—like theories of law and development or legal pluralism—will be drawn into jurisprudence by the social legal focus.³⁰

As we have seen from his criticism of the two theoretical approaches in the universal history of legal thought, Unger is also of the view that all three traditional jurisprudential approaches to which Tamanaha refers, ‘the analytical, the philosophical and the historical’ neglect to recognise the fundamental insight of Unger’s (left Hegelian) approach, that is, the internal or dialectical relationship between institutions and practices on the one hand and ideals and

²⁷ Ibid 2275.

²⁸ Tamanaha, above n 12.

²⁹ This is the text that I have assigned my Legal Theory classes at Victoria University, Melbourne, for the past 10 years as it seems to me to be one of the clearest and most balanced accounts of the various jurisprudential approaches that maintain an influence on contemporary legal thought.

³⁰ Ibid 2277.

interests on the other. All three therefore evade the importance of a general theorized account of structure and the normative and the relation between the two. Unger summarises the incongruous state of legal thought as it relates to our broader understanding of society in the following terms:

The arrangements of society no longer seem to us to be natural, necessary, or sacrosanct. We recognize their contingency and their flaws although we have no proper account of how structural change takes place in history, and suffer, in part for that reason, from an impoverished imagination of institutional alternatives. The unacknowledged and unargued reliance of the two leading approaches to law on a view of the real structure of society is therefore a major objection to them.³¹

Unger would agree with Tamanaha that an important task for jurisprudence is to revive the core theoretical proposition of law as a social practice, and develop it further. But Unger emphasises that the historical jurisprudence of Maine and Savigny, and the instrumentalism of Jhering and Holmes which he identifies with ‘the fighting theory of law’ remain radically incomplete. Even if we are to recognise then, as Tamanaha proposes, the ‘theoretical core’ of historical and sociological jurisprudence - that law is a social institution that both constitutes and is constituted by ‘the social’ - a problem remains in that we currently lack any reliable way of understanding how the real structure of society gets made and remade in history. For Unger, to have no understanding of how social structures change is to have no theory of law (conceived as the self-construction of society).

So while agreeing with Tamanaha on the importance of their ‘theoretical core’, Unger regards much of historical and sociological jurisprudence as complicit with its intellectual successors, legal realism and critical legal studies, in failing to recognise the value of normative approaches to law and legal theory, or, as Unger puts it, ‘in severing the link between insight into the actual and imagination of the possible.’ Unger is not alone in recognising the importance of developing a normative theory of what he calls the ‘real structure’ of society, how it might be made and remade, and its relationship to legal thought. In the following paragraphs I discuss some contemporary views regarding the importance of what Lacey calls ‘normative reconstruction’ in social legal theory and how it might be achieved.

³¹ Unger, above n 1, 4.

Philip Selznick, a prominent US sociologist who focused much of his sociological inquiry on the institutions and practices of law and who developed a sociological jurisprudence also shares much with Unger in terms of his jurisprudential approach, in particular the view that law is a social practice and as such necessarily affects and is affected by ‘the social’. Both emphasise the social rather than the doctrinal or formal roots or legal orders, an idea common to classical social theorists such as Durkheim, Weber and Ehrlich that, ‘the centre of gravity of legal development lies not in legislation, nor in juristic science, but in society itself.’³² This shared assumption of the fundamentally social nature of law is developed by both Selznick and Unger and both attempt to provide a descriptive and explanatory account of the structure of society as well as a normative account of how the structure might be changed and developed. Such an approach rejects what both regard as the limited disciplinary methods of the positivist social sciences. Indeed both call for an integration of descriptive, normative and explanatory techniques, an approach profoundly influenced by philosophical pragmatism.

Another key assumption shared by Unger and Selznick is that, whilst not synonymous with society, law represents the institutionalised form of a society and is therefore an important, indeed necessary aspect of any social order. Such a conception recognises that institutions are not all or nothing entities, that is, they can exist ‘more or less’ but it also recognises that law is the most detailed expression of these social institutions. Unger’s descriptive account of law does not aim to denigrate the role played by informal practices and non-institutionalised values and ideals in shaping society, but both Unger and Selznick recognise that law is an important focus of sociological and philosophical study because it is entwined with purpose, authority, values and ideals.³³ As Selznick points out, one significant aspect of legal practice is its discourse and ‘the nature of the arguments that figure in its doctrine’.³⁴ Whether we like it or not, these values and ideals represented in law also play a significant role in shaping society. Both Unger and Selznick recognise the importance of institutions in shaping social life and therefore the importance of subjecting them to critical evaluation. But this leads to the equally important question of the role of ideals and values, how they exist within and might extend beyond particular social institutions and practices.

³² Philip Selznick, *Law, Society and Industrial Justice* (Russel Sage Foundation, 1969), 34 quoting Ehrlich, *Fundamental Principles of the Sociology of Law* (Harvard University Press, 1936), xv.

³³ Martin Krygier, *Philip Selznick: Ideals in the World* (Stanford University Press, 2012), 107.

³⁴ *Ibid.* This aspect of legal thought and practice was the subject of Part 1 of this thesis which discusses Unger’s critical account of legal doctrine and its associated argumentative forms.

In order to consider this equally important question of the role played by ideals and values in shaping and changing society, Selznick's strategy was to explore the relationship between sociology and natural law. Whilst Unger and many other contemporary legal theorists reject natural law and in particular its reliance on an 'immanent moral order', or what Moyn calls the 'extra social' as a source of values and ideals, in Selznick's view there are important similarities between social legal theory and a natural law approach. One is that law is to be viewed as a normative social practice. Hence Selznick's endorsement of Lon Fuller's definition of law as –the enterprise of subjecting human conduct to the governance of rules – which implies that there is a presumption that the rule of law is an important value; that law is or at least ought to be understood as a normative enterprise. Another continuity is that both natural lawyers and social legal theorists do not assume that law ought to be necessarily associated with the state, that is, both reject the analytical positivist view of law as the will of the sovereign. Fuller and Ehrlich, for example, both provided a more expansive definition of law beyond the state to encompass 'all institutions that rely for social control on formal authority and rule making', so that for both, law is endemic in private as well as public institutions. Both Selznick and Unger would follow Ehrlich in recognising the important role played by the 'inner order of associations' and other unofficial sources of legal ordering, however whilst both are sympathetic to a more expansive view of law beyond the state, importantly neither Selznick nor Unger are willing to afford *priority* to the unofficial over the official sources of law. As Selznick says, 'the concept of law should be available for study of any setting in which human conduct is subject to explicit rule making.'³⁵ Roger Cotterrell argues that such a 'social' understanding of law beyond the state is taking on greater relevance in the contemporary world:

It seems obvious to most academic and practising lawyers working on questions of law and religion and legal problems of minority groups that these issues are never purely legal in some positivist sense, but thoroughly socio-legal, so that legal matters can be addressed only by seeing them as deeply immersed in cultural understandings and concerns.³⁶

Whilst Selznick and Unger share with natural law the view that law is a normative social practice which cannot be reduced to the statist conception of law, nevertheless traditional

³⁵ Selznick, above n 32, 8.

³⁶ Roger Cotterrell, 'Socio-Legal Studies, Law Schools, and Legal and Social Theory' (Queen Mary University of London Research Paper Series, 2012).

natural law approaches are regarded as inadequate because they assume either that an immanent moral order or the 'extra social' can provide the source of normative guidance. Natural law therefore evades the central questions of social legal theory: what is society, how is it made and imagined, and what is the role to be played by law in a society?

So how do we arrive at a view of the normative which does not appeal to the 'extra social', but which at the same time does not naturalise existing social institutions and practices? How do we explore this 'middle ground' so that we might understand how law and society might be developed or even transformed? These questions concerning the importance of what Lacey calls 'normative reconstruction' are not only relevant to social legal theorists, but also to the field of critical legal theory. Nicola Lacey, like Selznick and Unger, recognises the importance of ethical or normative questions to any theoretical project and she appears to conceive of the normative jurisprudential project in a very similar way to Unger. Lacey delineates three overlapping yet distinctive theoretical tasks for the social legal theorist: the critique of existing legal and social arrangements, the imagination of different ethical values, relationships and institutions, and the design of political strategies that seek to change current legal institutional arrangements, or in shorthand form: critique, utopianism and reformism.³⁷ Beyond the significance of normative reconstruction within legal theory, Lacey also points out the importance of normative theory for socio legal research. For example, she discusses how social legal theory can provide an ethical or normative framework for the more localised and empirical analysis of much socio legal research. She admits that such a framework is important for socio legal researchers who 'whilst sympathetic to the contextual and interdisciplinary orientation of socio legal studies 'nevertheless find themselves 'disorientated in the journey across a landscape whose theoretical underpinnings often seem to slip away in marshy ground, and whose theoretical orientations are sometimes obscured by a fog of quasi scientific or technocratic discourse.'³⁸

In addition to providing a clearer sense of normative direction for socio-legal researchers at an individual level, Cotterrell argues that normative social legal theory can provide a direction and justification for socio-legal research at an institutional level. Cotterrell provides some

³⁷ Lacey also nicely characterises Unger and Selznick's sociological approach and the nexus between legal and social theory that such an approach entails. See Nicola Lacey, 'Normative Reconstruction in Socio-legal Theory' (1996) 5 *Social & Legal Studies* 131, 131-2.

³⁸ *Ibid* 133.

pertinent insights for example about the tenuous position currently held by socio legal research within British legal culture:

What once was a label of pride to denote single-minded, rigorous and precise analysis and systematisation of legal doctrine, now more often gets treated as an admission of myopia, which no one wants to make. But socio-legal research cannot be said to have invaded the law school. In this country, unlike some continental countries, it is surely generally viewed sympathetically by academic lawyers of most persuasions. But socio-legal research has not modified the most basic patterns of legal thinking. It has not much disturbed the jurists. Its value certainly does not depend on whether it has influence in the lawyer's world of doctrinal argument, dispute processing and practical regulatory design, but its long-term security probably does, to some considerable extent.³⁹

This last sentence seems to suggest that arguments such as Unger's argument to reorientate legal doctrine as institutional imagination premised on a broader social theoretical account is an important ideological battle to be fought within and beyond the legal academy. It suggests that doctrinal analysis remains the canonical, hegemonic form of legal analysis but that it ought to be augmented by sociological analyses of practical legal discourse and its effects, which in turn requires theoretical justification. Cotterrell appears hopeful of the effects that sociological approaches to law might have on legal culture, stating that, 'Sociology of law has been called an intellectual stepchild on the edge of established disciplines. But the view from the periphery of orthodoxy is often clearer, sharper and wider than from its centre.'⁴⁰ I would also like to think that such hope could extend to the sociological jurisprudence of Selznick and Unger because of, rather than in spite of, their unorthodox, holistic approaches that straddle the disciplines of legal theory, history, sociology and philosophy.

Contemporary proponents of social legal theory such as Tamanaha, Selznick, Cotterrell and Lacey are of the view that the two dominant ideas of law in the universal history of legal thought: law as immanent order, and law as the will of the sovereign ought to, as Unger says, 'give way to a view of law as the self-construction of society, advanced through the institutional reformation of contemporary societies in every department of social life.'⁴¹ Some examples were provided in the final part of Chapter IV of how this self-construction of society might

³⁹ Cotterrell, above n 36, 3.

⁴⁰ Ibid 6.

⁴¹ Unger, above n 1, 6.

begin to be carried out in practice through the exercise of institutional imagination (mapping and criticism of the extant law). But to place such alternative institutional arrangements within a broader set of social theoretical assumptions that have both empirical and normative grounding, in Unger's view, what is required is a theoretical approach that explicitly recognises the real structure of society and that addresses how it might be developed or transformed, that is to say, a generalised account of the structure and the normative and of the relation between them. Such a generalising, theoretical approach to thinking about the structure of society and how it can be made and imagined Unger describes as 'super theory'. But this approach to legal and social thought has been the subject of some controversy within the field of social theory. I therefore address some issues surrounding Unger's preferred method in the next section.

C Methodological Questions

It is not only sociological jurisprudential approaches that emphasise the fundamentally social nature of law, arguably the whole range of what might be termed 'critical legal theory' similarly assumes that law constitutes and is constituted by 'the social'. Lacey defines critical legal theory to be 'that portion of normative legal theory which is specifically concerned to dig beneath the surface of legal doctrines and practices; to go beyond the project of explication and rationalisation and to interrogate the deeper political, historical and philosophical logics that underpin the power of law.'⁴² According to this definition, critical legal theory incorporates Marxist legal theory, American critical legal studies, feminist legal theory, critical race theory and postmodernist jurisprudence. Whilst much of Unger's legal thought may be argued to be subsumed under Lacey's definition of 'critical legal theory, I argue that his reconstructive approach should instead be categorised as one of 'social legal theory'.⁴³

There is an important distinction between the approaches of critical legal theory on the one hand and social legal theory on the other which is not only, as their names suggest, their relative emphasis on critique as opposed to normative reconstruction. Whilst both critical and social legal theorists agree that 'everything is politics', and that a project of normative reconstruction is necessary within legal theory, they disagree about the methodological implications of this

⁴² Lacey, above n 37, 131.

⁴³ See generally Tamanaha, above n 12.

realisation. As Unger puts it, critical and social legal theory approaches differ in ‘their preference for the practical over the theoretical, the local over the comprehensive, the utopian over the transformative, and the existential over the idealist.’⁴⁴ There are therefore differing views about the value of developing a theory of ‘all things social’, or as Unger says ‘a general account of the strife’ and the complex of formative structures underlying it. whereas social legal theorists seek a general and systematic account of ‘the social’ – a descriptive, explanatory and normative account of the formative institutional and ideological structures of society, and how they might be developed, critical legal theorists appear sceptical of the value in developing a general theory of social structure and structural change. Unger presents this dispute as a fork in the road of social theory, that one road leads to what he calls ‘super theory’ and the other leads to what he describes (ironically) as ‘ultra theory’.⁴⁵

Unger characterises his own social theoretical method as ‘super theory’. As he explains, super theory ‘preserves the first move of deep structure social theoretical analysis – the distinction between formative contexts and formed routines. But it also replaces the second and third moves - ‘the subsumption of each framework under an indivisible and repeatable type of social organisation and the recourse to the law like constraints and tendencies that can generalise a list or sequence of such types.’⁴⁶ Unger’s approach dispenses with the conception of indivisible and repeatable types of social organisation while ‘nevertheless specifying constraints on what can be combined with what within a single framework.’ It thus offers an account of ‘context making, indeed even of the possibility of cumulative change in the character as well as the content of our frameworks.’ On the other hand Unger’s social theory does not rely on right wing Hegelian ideas about a world historical evolutionary logic or of a set of criteria that any possible social world must satisfy. Nor does it imply any ‘qualitative contrast between the social knowledge available to historical agents and the insight of a theorist who describes and explains their actions.’⁴⁷

⁴⁴ Roberto Unger, *False Necessity: Anti-necessitarian Social Theory in the Service of Radical Democracy: from Politics, A Work in Constructive Social Theory*. Vol. 1 (Verso, 2004), 8.

⁴⁵ Ironic because for Unger even anti theorists cannot completely do without a theoretical viewpoint. While they reflect on life, they do not engage in grand theorizing about life. See Alan Freeman (1981) 90 ‘Truth and Mystification in Legal Scholarship’ *Yale Law Journal* 1229.

⁴⁶ Roberto Unger *Politics: Volume 3, Social Theory: Its Situation and Its Task: A Work in Constructive Social Theory* (Cambridge University Press, 1987), 165.

⁴⁷ *Ibid.*

Unger realises that his super theoretical approach is susceptible to ultra theorists' criticisms of foundationalism and suggestions that the appropriate response is to abandon the theoretical project entirely. The ultra theorist maintains that work like Unger's fails, but in the most successful and productive way – 'it demonstrates once and for all that any attempt to provide a systematic, comprehensive, or reconstructive account of social relations and explanations is impossible.' By playing 'fast and loose with foundationalism, Unger claims a privileged position for his own insights at the same time as and under cover of his denunciation of such privilege.'⁴⁸ Unger provides an *et tu* response to these ultra theorists. He regards that the key difference between super theory and ultra theory is that the latter rejects the attempt to develop a theoretical system:

The ultra theorist believes that the quest for comprehensive and systematic explanations betrays the principle that everything is politics (man as maker, society as artefact, conflict as tool) and leads to another version of the problems of deep structure thought...He believes on the basis of his reading of intellectual history that, whatever its proclaimed intentions, a systematic and comprehensive theory will comprise with foundationalism.⁴⁹

For Unger, while the ultra theorist recognises the distinction between formative contexts and formed routines, insisting therefore on the 'discontinuity and originality of particular contexts', ultra theorists make no attempt to 'develop these insights through more defensible counterparts to the second and third moves of deep structure analysis'. So the ultra theorist does not view social thought as requiring a 'comprehensive system of explanations' she therefore rejects the attempt 'to develop a general theory of frameworks, of their making and their internal constitution.' Although the ultra theorist 'claims to acknowledge the influence of institutional and imaginative frameworks, and the distinctiveness of the ways of life they shape, he can affirm this acknowledgement only by implication or through narrowly focused acts of criticism, explanation or utopian vision.' The ultra theorist therefore has no general and discursive way to justify any particular approach to frameworks and their history.⁵⁰ Thus the ultra theorist would deny a social theoretical basis to critique conventional doctrinal analysis and to offer an alternative legal discourse as Unger attempts to do.

⁴⁸ Allan Hutchinson, 'A Poetic Champion Composes: Unger (Not) on Ecology and Women' (1990) 40 *University of Toronto Law Journal* 271, 279.

⁴⁹ Unger, above n 46, 166.

⁵⁰ *Ibid* 168.

Unger warns that the risk of the ultra theory approach to social thought is that there is only a ‘tenuous distinction between not having a theory of formative contexts and not having a way to talk about (and transform) them.’ Ultra theorists have to work hard therefore to prevent a slide either into positivist social science (which assumes the existing framework as natural) or into expressing a commitment to ‘the existentialist idea that true freedom consists in the perpetual defiance of all settled structure, in the endless flight from one context to another.’⁵¹ Here Unger refutes Hutchinson’s criticism that Unger’s social theoretical approach assumes that human nature is characterised by endless ‘context smashing’.⁵² On the contrary, for Unger it is the ultra theorist who risks being guilty of this charge:

Both the rejection of explanatory and prescriptive theories about our formative contexts and the commitment to trash every argument for the necessity or authority of a given context suit a view that in ‘the endless labour of negation’ lies the sole true source of humanity. At the same time the absence of a theory of frameworks suggests by default that, as constraints upon freedom, frameworks will be frameworks.⁵³

Having discussed some of the risks associated with the ultra theory project, Unger concedes that there are ‘no persuasive a priori reasons to prefer either super-theory or ultra-theory as responsive to the contemporary situation of social thought’⁵⁴ that the ultra theorist’s stance is entirely valid and ‘is not inherently better or worse than [his own] theoretically aggressive strategy ... [each] merely presents a different mix of difficulties, dangers, and opportunities’.⁵⁵ Hutchinson regards Unger’s response to the so called ultra theorists, as ‘curiously generous and inconclusive’. In his view:

this stark disagreement over the implications of pursuing the claim that everything is politics deserves a far more serious airing. Its attempted resolution represents the next crucial step forward in the radical project of social emancipation and empowerment. At bottom, I think that neither position can ignore completely the instincts and lessons of the other and that, if there is to be any radical progress, melding of insights must occur. This would be not so much an expedient compromise as a dialectical synthesis.⁵⁶

⁵¹ Ibid.

⁵² Allan Hutchinson and Patrick Monahan, ‘The “Rights” Stuff: Roberto Unger and Beyond’ (1984) 62 *Texas Law Review* 1477, 1534.

⁵³ Unger, above n 46, 169.

⁵⁴ Ibid.

⁵⁵ Unger, above n 44, 8.

⁵⁶ Hutchinson, above n 48, 280.

For Hutchinson that a ‘dialectical synthesis’ of the contrasting approaches of super theory and ultra theory should be an important ideal for social theory. Indeed his comments prefigure the pragmatist nature of Unger’s approach to legal and social thought.⁵⁷ Unger, by not rejecting *a priori* the ultra theorist approach, is adopting the view that arguments, theories, visions— while they should be as coherent and persuasive as possible –do not require universal philosophical foundations. This goes to Unger’s philosophical pragmatism, and the assumption that the ultimate purpose of theory is not to simply describe the world (pragmatism rejects the idea that you can only defeat a theory with another theory) but to help to better understand the world in order to change it. Thus theory is always linked to practice and consequences. Further, we cannot know the value of a social theory or social action in advance of an assessment of the effects that the social theory has had on society and culture. Whilst Unger would agree with Hutchinson that it is important to recognise and foster the dialectic relationship between Unger’s generalising approach and the ultra-theorists’ contextual approach, as a pragmatist, he also understands that a comprehensive and permanent resolution of the different approaches, that is, a total synthesis is not possible.⁵⁸

Unger’s inclusive view of the potential value of both super and ultra theoretical approaches is consistent with other contemporary social legal theorists. For example, whilst Cotterrell recognises the importance of focusing intellectual resources (social science research methods and conceptions) on large scale issues, he remains equivocal about the method to adopt:

We live in an age of necessary specialisation and of precisely defined professionalism; and the age of grand narratives has famously been declared to be over (Lyotard 1984). Yet in fact, remarkably, each of the big issues ...of classic social theory is now quite rapidly and forcefully pushing itself back on to the contemporary agendas of debate...Accounts of the imminent ‘death of the social’ a few years ago (cf. Rose 1996) will surely be seen as much exaggerated, as it becomes clearer that our most prominent public anxieties relate precisely to the nature of the social and the need to rebuild and strengthen many of its foundations – partly through a wise use of law.⁵⁹

⁵⁷ See Chapter VI, ‘The Lesser and Greater Vocations of Legal Thought’ below.

⁵⁸ As a pragmatist it is necessary to tolerate a level of ambiguity: see Krygier, above n 33, 188-96.

⁵⁹ Cotterrell, above n 36, 9.

Lacey similarly recognises the importance of ‘broad understandings of sociology of law and social theory’ but it is not apparent from her comments to what extent these ‘broad understandings’ already exists or how they are to be developed:

As Marxists saw, the deep reconstruction of the legal has to be premised on the reconstruction of economic, social and political relations: on massive changes in the configuration of social power at every level. Only if both the distinctiveness of and the interrelationships between the projects of critique, Utopianism and reformism are recognised will intellectual practices – socio legal or otherwise – move any closer to the ethical ideals which, implicitly or explicitly, they espouse. Only by constructing a more consistent dialogue between the three projects, *and by locating this dialogue within the broad understandings of sociology of law and social theory*, can the curious and intellectually stultifying gap between so called critical legal theory and so called socio legal studies be filled.⁶⁰

Tamanaha, while advocating ‘well formulated theories’ that adequately reflect our understanding of law as a social practice, similarly does not stipulate a preference for either super theory or ultra theory:

The current situation is precisely that law is widely seen in social terms, but with no recognized jurisprudential tradition to match. Background beliefs about law do not require an accompanying theory to thrive, obviously, yet this theoretical vacuum leaves us to carry on without the benefit of advances in understanding that well formulated theories potentially bring.⁶¹

But while at a philosophical level Unger maintains an inclusive position with respect to different theoretical approaches, as we have seen, his preferred approach or method remains staunchly and unequivocally that of super theory. An explanation for Unger’s preferred super theoretical approach may lie with his perception of the prevailing intellectual and political climate. First, there appears to be a broad acceptance on the part of western political elites of what Unger refers to as the ‘convergence thesis’⁶², and second, there appears to be an acceptance of a method within political philosophy and the social sciences of what Unger calls

⁶⁰ Lacey, above n 37, 151.

⁶¹ Tamanaha, above n 12, 2264.

⁶² The idea that contemporary societies are converging to the best set of practices and institutions realised in the detail of law: see Roberto Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso Books, 2015), 17.

‘splitting the difference’ between rationalism and historicism culminating in what Unger characterises as a ‘dictatorship of no alternatives’. That is to say that there exists in the world today a very restricted repertoire of alternative institutional arrangements, and Unger’s political and philosophical motivation is to enlarge the institutional repertoire. Unger’s super theoretical project can therefore be seen as a resistance or rebellion against the current trends in Anglo American intellectual culture, including legal culture and its promotion of conventional legal doctrine as the ‘wave of the future’. On the other hand Unger views law and political economy as important academic disciplines because they remain pluralistic - there is no accepted disciplinary method in either field, so that alternative approaches, such as those offered by critical and social legal theory, can be developed.⁶³

In a similar vein, Selznick sought to defend his integrated sociological jurisprudence against the rationalist methods of positivist social science and increasingly developed a broad social philosophy – that is, a super theory. Selznick regarded what he called ‘humanist science’, to be an antidote to contemporary specialisms and their ‘sharp and narrow, recondite and arid focus’. Selznick regarded this approach as not much practiced, hard to do, easy to get wrong but pregnant with possibility.⁶⁴ One possible use for super theory is provided by Cotterrell who has emphasised that the discipline of law, at least in the way it is taught at law schools, is still mainly conceived of in the juristic sense or the statist sense, rather than in the sense advocated by social legal theorists:

if sociology of law does not find space to address the meaning of law in *something like* a juristic sense – that is, as ideas and doctrine – it has no central concept of law except insofar as it borrows this from lawyers. No one can really believe that a concept such as – to use Donald Black’s term – ‘governmental social control’ captures the full meaning many people attach to the idea of law. So the intellectual situation seems parallel to that in criminology. ‘Crime’ seems to be what law says it is; and ‘law’ seems to be what the state and the lawyers say it is.⁶⁵

Super theoretical approaches such as those of Unger and Selznick can provide legal scholars who identify as pragmatists and democrats with a coherent and persuasive social theoretical

⁶³ Indeed, Moyn argues that there is currently no such thing as legal thought: see Samuel Moyn, ‘Legal Theory among the Ruins’, Justin Desautels-Stein and Christopher Tomlins (ed), *In Search of Contemporary Legal Thought* (Cambridge University Press, Forthcoming).

⁶⁴ Krygier, above n 33, 203.

⁶⁵ Cotterrell above n 36, 4.

viewpoint from which to argue that law perhaps should not be identified solely with the work of courts and legislatures but with something else, and what that something else should and could look like. This situation described within legal thought is prefigured by Kuhn who argued that scientific paradigms remain unchanged until we are presented with a preferable theorized alternative. Unger's view is that super theory might be useful in providing a definite, systematic social theoretical alternative, and therefore help to change the current dominant legal paradigm. Nor are super theoretical approaches unprecedented – far from it. Contributors to the sociological jurisprudence tradition have been, like Unger, unequivocal in their preference for super theory over ultra theory, amongst them Weber, Durkheim, Marx, Jhering, Holmes, Pound and Habermas. It would be trite, surely, to deny the many valuable insights into law and society provided by these systematizing and generalising, that is, super theoretical approaches. Selznick, who as discussed above, shares many similarities with Unger's approach to jurisprudence was convinced, for example, that developing a social legal theory requires that:

Whatever its philosophical auspices, the search for principles of criticism based on social naturalism must go on...The natural order as it concerns man, is compact of potentiality and vulnerability, and it is our long run task to see how these characteristics of man work themselves out in the structure and dynamics of social institutions.⁶⁶

If we ignore the references the 'natural', this passage by Selznick is interesting in that it recognises that principles of criticism must be based on a particular account of social structure, thus Selznick seems to recognise with Unger that normative principles can and must be derived from within the social. He also recognises what Unger calls the 'internal relation' between human characteristics of man (including common ideals and interests) and social institutions. These themes are developed within Unger's preferred social theoretical approach, which is examined in the next chapter.

⁶⁶ Philip Selznick, 'Sociology of Law' (1960) 12 *Journal of Legal Education* 521 quoted in Krygier, above n 33, 111.

VI RADICALISED PRAGMATISM AND LAW

According to the classical American pragmatist William James, pragmatism is a way of understanding our simultaneous commitments to optimism and pluralism, to concrete empiricism and principles, to an incomplete and dynamic universe and to the possibility of perfection that our ideals impel us unceasingly to hope for and work for. A pragmatist is neither optimistic (tender-minded: the world's salvation is inevitable and we need do nothing about it) nor pessimistic (tough-minded: there is no salvation and we cannot do anything about it). Instead, she is melioristic: the world's salvation is possible, and it depends upon what we do about it. One of the deepest commitments of pragmatism then, is to the interconnection, indeed the inseparability, of theory (vision) and action (practice). For the pragmatist, 'our acts, our turning places, where we seem to ourselves to make ourselves and grow, are the parts of the world to which we are closest, the parts of which our knowledge is the most intimate and complete.'¹ Margaret Radin suggests that the optimism of pragmatism is not the static and secure optimism of the world in which everything is already fixed, but rather the dynamic and risky optimism of a 'workshop of being' in which reality is always incomplete and always dependent upon our practice.²

Contrary to Radin's assertion that Unger is a tender minded philosopher, in this chapter it is argued that Unger's preferred social theoretical approach is pragmatist, in the sense described here by James, in that he is intent on abrogating these dichotomies of theory and practice, realism and idealism.³ Although Unger believes, perhaps ambitiously, in 'super theories' of social structure, that is, in explanatory and normative theories of our formative contexts⁴, as a pragmatist, he conceives of such theories as non-ideal, that is, they are provisional, incomplete and always subject to criticism and revision. In the following sections Unger's rationale for rejecting Marxism and embracing a 'radicalized' version of philosophical pragmatism is

¹ William James, *Pragmatism* (Harvard University Press, 1975) 138.

² Margaret Jane Radin 'The Pragmatist and the Feminist' (1989) 63 *Southern Californian Law Review* 1699, 1714.

³ Like Selznick, Unger is a 'realistic idealist': see Martin Krygier, *Philip Selznick: Ideals in the World* (Stanford University Press, 2012), 40-41.

⁴ See Chapter V, 'Reuniting Jurisprudence and Social Theory' above for a discussion of the distinction between what Unger labels 'super theory' and 'ultra theory'.

discussed and an account is provided of that conception. It is then argued, contrary to claims that there is nothing distinctive to denote by the term pragmatism, that there are good reasons to use the term 'pragmatism' to describe the distinctive philosophical approach that informs Unger's jurisprudence. Finally, a discussion is provided of how law is implicated in Unger's pragmatist social theoretical project.

A Rejecting Marxism and Embracing Pragmatism

Perhaps the most fundamental assumption of Unger's social theoretical approach is that the dialectic of enlightenment is not a myth; the fundamental insight of classical social theory from Vico to Marx that we made society, so that we can understand it and remake it. A further assumption consistent with classical social theory is that the project of enlightenment is one toward collective, and not simply individual freedom or emancipation. Unger therefore rejects the methodological individualism of Immanuel Kant. For Unger the project of social theory is the project of realising greater individual *and* collective freedom. So Unger's response to the question 'What is enlightenment?' is that it is to unveil the structural constraints on societies and individuals and to turn them into resources for our collective freedom. For Unger, collective freedom requires being able to think about social structure, constraint and change without the necessitarian illusions of classical social theory, but equally importantly, without what Unger calls the 'evasions' of contemporary legal and social thought. If law matters because of its role in maintaining or creating alternative social orders or structures, then this is a threshold point and the theoretical core is still to be developed. An important project for Unger therefore is to develop an adequate account of social structure and structural change. Another important question for Unger which is a key question for both legal and social thought is: what kind of normative or political projects are available within the assumptions of classical social theory? Some salient features of Unger's legal and social thought are discussed in this chapter, with the intention to illustrate how Unger develops a distinctive response to these questions. The social theory proposed by Unger, in the tradition of others like Mill, Herzen and Marx, is a defence of the radical democratic project. As Cui explains in his introduction to Unger's *Politics*, Unger is:

influenced by Marxism, especially those Marxist theories that emphasise the autonomy of politics. but he is not a Marxist, because he refuses to entangle transformative aspirations in

determinist assumptions...he does not belong to the school of ‘deconstruction’ because his own ‘constructive’ theory recognises that *our freedom to resist, reimagine and reconstruct the social worlds we inhabit is itself a variable up for grabs in history*. He is not an anti liberal. But he calls his theory ‘super liberal’ in the sense of realising the highest aspirations of liberalism by transforming its conventional institutional commitments.⁵

Unger’s work can be described as both post liberal and post Marxist. It is post liberal in the sense that, consistent with the critics’ critique of liberal rights theory, it recognises the philosophical value of individual human agency beyond the community. Importantly, however, Unger rejects the view common to classical liberals that persons as wholly autonomous, unsituated individuals must then choose between ‘negative liberty’ on the one hand, and dangerous totalising ideologies such as socialism on the other.⁶ Unger’s approach can also be distinguished from classical Marxism which identifies the community as ‘the paramount source of value, which promises to end the division between the individual and community, rendering the idea of an individual right irrelevant.’⁷ But then if individuals are more than simply ‘fractions of communities’, it is presumably necessary to conceive of a social structure that organises group life so that individual agency can be nurtured and developed. As Hutchinson points out, this move to place individuals within a social context (situated selves) transforms the question about abstract rights, to one about which community structures are the most amenable to individual and collective freedom, and this is not a metaphysical or philosophical question, but a legal or political question.⁸

1 Rejecting the ‘Necessitarian Illusions’ of Marxism

Unger’s approach can also be described as post Marxist in the sense that he begins with a critique of Marx’s ideas about structure and structural change as a springboard to develop his own social theory. However, and as I will attempt to show, by rejecting so many of what he calls the ‘illusions’ of classical Marxist theory, it would make little sense to describe Unger as

⁵ Roberto Unger, *Politics: The Central Texts, Theory Against Fate* (Verso, 1997), i.

⁶ See, e.g. Isaiah Berlin, *Two Concepts of Liberty* (Clarendon Press, 1958); Judith Shklar, ‘The Liberalism of Fear’ in Nancy Rosenblum (ed) *Liberalism and the Moral Life* (Harvard University Press, 1989).

⁷ Allan Hutchinson and Patrick Monahan, ‘The “Rights” Stuff: Roberto Unger and Beyond’ (1984) 62 *Texas Law Review* 1477, 1488.

⁸ Ibid 1488 -90. Hutchinson, like Unger, sees it necessary to democratise jurisprudence and to put the values of philosophical pragmatism at the forefront of legal theoretical scholarship: see Allan Hutchinson, *The Province of Jurisprudence Democratized* (Oxford University Press, 2009).

a Marxist. In addition, while Unger's social theoretical approach relies on some fundamental insights of classical social theory (namely that enlightenment is not a myth and that we ought to distinguish between formative structures and formed routines) Unger's project can also be viewed as a 'double rebellion' against both positivist social science and classical social theory. As Cui explains:

Caught between the pretence of 'deep structure social theory' to be the 'science of history' on the one hand, and the uncritical approaches of positivist social science on the other...Unger's theoretical work, in a nutshell, is an effort to carry the idea of 'society as artifact' all the way through, to develop a radically antinaturalistic, antinecessitarian' social theory. In this sense, Unger's social theory stages a double rebellion against classical social theory, with its functionalist and determinist heritage, as well as the positivist social sciences.⁹

So Unger seeks to develop a social theory that rejects the 'necessitarian illusions' of classical social theory, in particular Marxism, but that also 'evades the evasions' of structure. In Unger's view we cannot set up a 'kingdom within a kingdom' and rely on extra social ideas such as the invisible hand mechanisms of liberal political theory or Kantian moral philosophy to provide normative guidance whilst ignoring how social contexts determine agency. Unger therefore wants to make explicit in his social thought the Hegelian insight about the dialectic relationship between the structure and normative, between our institutions and practices and our ideals and interests. He also wants to reject the view common to liberal political theory and post structuralism that social theory can provide no account of normative justification.

Unger's attempt to develop a normative social theory, that is, to provide a plausible general account of social structure and structural change, begins with a critique of the Marxist approach to social theory. Unger begins with Marx because, for him, the tradition of social theory beginning with Montesquieu and Vico, found its most radical and ambitious expression in the work of Karl Marx, before being reborn as the comparative historical typologies of Max Weber and Emile Durkheim, who developed ways of thinking about the structure of society. The value of the Marxist approach, for Unger, is that it both 'recognized that these structures are our creations' whilst distinguishing 'in each historical circumstance, between the formative institutional arrangements and ideological assumptions and the practical or discursive routines that these assumptions and arrangements shape.' Marxism therefore 'provided intellectual tools with which to explore the discontinuous character of historical change'. According to Unger

⁹ Unger, above n 5, vii.

however, these revolutionary Marxist insights (revolutionary as modes of understandings and as bases for the reformation of society) were tainted, nowhere more clearly than in Marx's own writings, by what Unger terms 'necessitarian illusions'.¹⁰

One of these necessitarian illusions is that there exists in history a small, closed list of institutional systems (Unger calls this the 'closed-list illusion'). According to this illusion, history is supposedly the record of their discovery and enactment. A second illusion is that each of these systems which represent the institutional options of humanity amount to an indivisible type, all the parts of which stand or fall together (Unger refers to this as the 'typological illusion'). According to the Marxist view then, politics must be concerned either with the management, defence, and improvement of one such indivisible system, or with the replacement of one indivisible system with another by way of revolution. According to a third Marxist illusion (which Unger refers to as the 'historical laws illusion') there are laws of social change, for example, the eventual failure of the relations of production to accommodate the greatest possible development of the forces of production or, in the absence of such laws, there are at least directional and irresistible tendencies, for example, bureaucratization, rationalization, functional specialization and integration, governing the succession of indivisible institutional systems in history. The result of these three Marxist illusions is the false view that history supplies, regardless of our intentions, the program that matters, leaving no room for something that is so important for Unger, the development of what he calls the 'programmatically imagination'. For Unger, while these 'illusions of false necessity' have become 'increasingly hard to share', by rejecting them the positive social sciences that took hold in the course of the twentieth century also discarded the insights with which those illusions had been combined. They produced a view of society and history that tended to vindicate the naturalness, the superiority, or even the necessity of the dominant arrangements. They cut the vital link, as Unger puts it, 'between insight into the actual and imagination of the possible'. As a result, we have been left with no reliable way of thinking about how the structure, in particular the institutional structure of society, changes and consequently we have no developed account of what social structure is. We are driven instead between agnosticism and superstition:

agnosticism as despair of understanding the nature of society and its transformation,
superstition as identification of our professed ideals and our recognized interests with the

¹⁰ Ibid.

habitual forms of their enactment in established institutions and practices. An important example of such superstitions is the belief, graced with a hundred lives in the core of practical economics, that a market economy has a single natural or necessary legal institutional form. A market is a market, a contract is a contract, and property is property.¹¹

The problem then is that the revolutionary insights offered by Marx are tainted by what Unger terms ‘necessitarian’ or deterministic illusions: ‘the view that there is a closed and predetermined list of such structures or institutions in human history, that each of them forms an indivisible system, changing all at once or hardly at all, and that irresistible laws of historical change drive the succession of the systems: in Marx's theory, the modes of production.’¹² These ideas were not even believed by Marx's own followers, however, they have not been replaced in legal or social thought by an alternative view of the structures of society and of their remaking.¹³ The solution to the problems presented by the intellectual history, for Unger, is to rescue and to radicalize the insight of classical social theory into the decisive effects and discontinuous history of formative institutional arrangements and ideological assumptions (the structures), while expunging from this insight the taint of necessitarian illusions

For Unger then, the social theoretical project in a post formalist and post Marxist era is clear: to replace Marxism with a more plausible social theory. That is, we need to provide an adequate, contemporary account of structure and structural change, to provide for intelligibility of real structural change, to return to the large scale descriptive and *explanatory* project of social theory and its relationship to the small scale including our own experience.¹⁴

¹¹ Roberto Unger, ‘The Universal History of Legal Thought’ (18 January, 2017), *Roberto Mangabeira Unger: Legal Theory* <<http://www.robertounger.com/en/2017/01/18/the-universal-history-of-legal-thought-fixme-year>>, 5.

¹² Ibid 25.

¹³ Unger suggests that political philosophy, conventional social science, political discourse and legal discourse all reinforce the institutional status quo: see Roberto Unger, ‘Legal Thought Now (Spring, 2016), Lecture 9’ (18 January 2017), *Roberto Mangabeira Unger: Lectures and Courses* <<http://www.robertounger.com/en/2017/01/18/legal-thought-now-spring-2016>>.

¹⁴ While defenders of institutional inertia such as Shklar and Berlin argue that it is more dangerous to bet on history than to keep institutions the same, such an attitude is anathema to Unger’s radicalised pragmatism.

2 Drawing on Classical Pragmatist Themes

The social theoretical approach that Unger draws upon as an alternative to Marxism, on the one hand, and liberalism on the other, is philosophical pragmatism. Unger argues that classical American pragmatism understood as a set of philosophical theories not only betrayed the central pragmatic theme of human agency, but that it also failed to do justice to the other themes of contingency, futurity and experimentalism that inspired it, and that the classical American pragmatists also sacrificed these themes to naturalism. Unger therefore, in proposing a radicalized pragmatism, attempts to draw on these themes that inspired the classical pragmatist philosophers, but at the same time he attempts to denaturalise their approach. In this section the themes of contingency, futurity and experimentalism that Unger draws upon in order to develop his particular version of philosophical pragmatism are discussed.

According to Unger, the theme of *contingency* takes on a special meaning that is important to an understanding of pragmatism that rejects naturalism.¹⁵ While in the natural sciences a particular conception of contingency ‘is simply a shorthand allusion to a particular theory or family of theories’, in the social sciences and humanities contingency is not merely the subject of theory, but ‘is a weight that bears heavily down upon us’, the result of four distinct elements.¹⁶

The first element of our experience of contingency that Unger identifies is the irreducible sense in which the universe and its history, the broader setting of our lives is ‘simply and unexplainably there’. This description of our sense of contingency is similar to Rorty’s pragmatist view that ‘to say that the world is out there...is to say, with common sense, that most things in space and time are the effects of causes which do not include human mental states.’¹⁷ A second component of our experience of contingency is ‘our inability in the study of any part of nature to determine conclusively and definitively, which theory is the right one. Not only is knowledge limited, but our efforts to establish unchanging premises and methods are tainted by insoluble contradictions.’¹⁸ This view is consistent with Rorty’s claim that ‘you

¹⁵ Contingency is also of central importance for other philosophical pragmatists, see in particular Richard Rorty, *Contingency, Irony and Solidarity* (Cambridge University Press, 1989).

¹⁶ Roberto Unger, *The Self Awakened: Pragmatism Unbound* (Harvard University Press, 2007), 39.

¹⁷ Rorty, above n 15, 4.

¹⁸ Unger, above n 16.

can only defeat a theory with a better theory'¹⁹, Berlin's view that our personal and societal values are not internally coherent, and Hume's original account of the fact/value problem.²⁰

A third part of our experience of contingency for Unger is 'the fateful character of our historical struggle over the shape of society and culture. Even the most intimate and basic aspects of our experience are coloured by the dogmas of culture and the institutions of society.'²¹ And the fourth aspect of contingency is 'the role of luck and grace in human life; having or not having lucky breaks, receiving or not acts of recognition and love from other people.'²² Unger argues that these four facts of the human experience of contingency threaten to overwhelm us and as a result humans have often fought against it.

The next theme that Unger draws upon in order to develop his particular conception of pragmatism is *futurity*. Unger argues that since 'we are not exhausted by the social and cultural worlds that we inhabit and build', that since we can 'see, think, build and connect in more ways than they can' we are required at times to resist the social and cultural worlds we inhabit. As Unger puts it:

Living for the future is a way of living in the present as a being not wholly determined by the present conditions of its existence. We never completely surrender. We go about our business of passive submission, of voiceless despair, as if we knew that the established order were not for keeps, and had no final claim to our allegiance. Orientation to the future – futurity – is a defining condition of personality.²³

So whilst we are beings with some degree of free will, that is, whilst we all share this predicament of futurity, in order to empower ourselves further Unger argues that we need to radicalise our orientation to the future, that is, we need to turn futurity into a program.

Futurity should cease to be a predicament and should become a program: we should radicalize it to empower ourselves. That is the reason to take an interest in ways of organizing thought and society that diminish the influence of what happened before on what can happen next. Such intellectual and institutional innovations make change in thought less dependent on the pressure

¹⁹ Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice* (1990) 63 *Southern Californian Law Review* 1811, 1819.

²⁰ See Berlin, above n 6; David Hume, *A Treatise of Human Nature* (Oxford University Press, 1963).

²¹ Unger, above n 16, 37. See also Rorty's account of the contingency of language: Rorty, above n 15, 3-21.

²² Unger, above n 16, 40.

²³ *Ibid* 41.

of unmastered anomalies and change in society less dependent on the blows of unexpected trauma.²⁴

The final pragmatic theme that Unger draws upon in developing his distinctive philosophical approach is *experimentalism*. For Unger experimentalism is ‘a conception of the new and its creation’, and in politics, the overriding criterion by which to measure success in approaching an experimentalist ideal is success in making change less dependent on crisis. For Unger, even in the ‘partly democratized societies of the contemporary world, those who would reform the established social order will ordinarily need to count on crisis as their ally. To render politics experimental is to dispense with the need for this ally...Change becomes internal.’²⁵

Such political experimentalism that Unger advocates is itself a species of the more general pragmatist idea of never being confined to the present context, of using the smaller variations that are at hand to produce the bigger variations that do not yet exist. Unger describes experimentalism as ‘existential bootstrapping; it is about changing the context of established arrangement and assumed belief, little by little and step by step, as we go about our business’. He therefore sees experimentalism as ‘the solution to a metaphysical problem’. That problem being that ‘we must organize experience and society in order to do anything at all but that no single organization of experience and society does justice to our powers of insight, invention, and connection’. We all have a stake in experimental politics, according to Unger, for three reasons. First, ‘it serves our interests in being masters of the partial, contingent context in which we operate: in not having this context imposed on us as a natural fact and an irresistible fate’. Second, experimentalism advances our interest in ‘the subversion of entrenched social divisions and hierarchies, which always rest on institutions and beliefs that are relatively insulated from constant attack.’ And third, it advances our interest in the acceleration of practical progress.²⁶

3 Radicalised Pragmatism: A Conception

The radicalised conception of pragmatism that Unger advocates draws upon these classical pragmatist themes of agency, contingency, futurity and experimentalism discussed in the previous section. It is essentially a conception of humanity, ‘of human action, thought and

²⁴ Ibid 39.

²⁵ Ibid 42-3.

²⁶ Ibid.

potential.’ which remains faithful to pragmatism’s rejection of the onto-theological tradition whereby:

Impersonal reality was assumed to be both the subject matter of our most reliable knowledge and the source of our strongest values. The divine itself was pictured on this model of impersonal but fundamental reality, and the anthropomorphic representation of God was dismissed as a concession to the vulgar.²⁷

Unger sets out three ideas about the individual and humanity that are central to his ‘radicalised’ conception of pragmatism. The first the anti-essentialist idea is that our selves are formed by the particularity of our experience, and that ‘there is no natural and definitive form of our individual and social being.’ The second idea is that we are uncontained by the particular institutions and practices that surround us, that ‘even though they shape us, they never shape us completely.’ Thus, according to Unger:

The uncontainable character of the individual mind and self is repeated in the experience of humanity as a whole. No possible list of social and cultural orders exhausts the collective powers of the species. The historical succession of such orders never culminates in a full and definitive reconciliation between spirit and circumstance.²⁸

The third central idea that informs Unger’s radicalised pragmatism is the progressive view that we can and must innovate, step by step, to transcend our current social and cultural contexts. It is imperative that we do so for Unger, in order to realise our most powerful interests in material progress, in the liberation of individuals from entrenched social division and hierarchy, and in creating a world that recognises our ability to transcend our current context.

In drawing on the ideas and themes discussed above, a radicalised pragmatism provides a program of permanent revolution where the word ‘revolution’ is ‘robbed of all romantic otherworldliness’. For Unger we can judge the value of a given political reform by how it renders a conception of humanity defined by these three central ideas and by asking whether it enhances or inhibits our powers of agency, transcendence, futurity and experimentalism.

Unger makes clear that this conception of humanity defined by the three ideas set out above is not constant; it has a life and a history but no permanent essence. His conception of humanity is therefore, in the tradition of pragmatism, historicist and anti-universalist, but it also implies

²⁷ Unger, above n 16, 52.

²⁸ Ibid 55.

three 'philosophical attitudes'. The first is a commitment to the marriage of theory and action. For Unger there is no fundamental difference between the views of the agent acting within the course of ordinary life and the views of a philosopher who purports to take a step back. That is, 'the philosopher is master of no secrets forbidden to the agent.' The second philosophical attitude implied by Unger's radicalised pragmatist conception of humanity is what Unger refers to as a 'rejection of the spectral view of possibility'. The spectral view of possibility is the view that before a particular social institution or practice is actualised, it somehow existed previously on a spectrum of possibility. Together with this spectral view of possibility goes the notion that we are able to 'demarcate the outer horizon of possible states of affairs or possible worlds' and that 'whatever happens in fact in our world happens as a subset of this larger reality'. But for the radicalised pragmatist, 'the possible is not the antecedent of the actual but its consequence...it is an afterglow that we now mistake for an antecedent light'. For Unger, 'we need not resort to a fixed horizon of possibility.'²⁹

The third philosophical attitude associated with Unger's radicalised pragmatism is denaturalisation (or derationalisation) of the institutional and ideological structures that constrain and define us. That is, unlike the structures forming the natural world, man-made institutions and practices can exist more or less:

They exist more strongly because we act and think more weakly. The force that is sucked out of us is drawn into them. The shorter the distance between our context preserving and our context transforming activities, the less clearly do these structural facts exist. We are strengthened because they are weakened.³⁰

These three philosophical attitudes associated with radicalised pragmatism combine to suggest the following picture of the social world - a structure of no structure:

The structures of society and culture are fighting turned to stone; they are what comes into existence so long as we interrupt our practical and ideological struggles over the organisation of life in society. When the fighting escalates again the structures dissolve into the collective action and imagination from which they arose. When we fashion structures designed to invite their own reconstruction, we make them into both superior instruments of our power and more faithful reflections of our humanity.³¹

²⁹ Ibid 60-61.

³⁰ Ibid 62. Unger's philosophical attitude is crucial to reorientating legal thought as institutional imagination and placing conflicting doctrine in the service of democratic experimentalism.

³¹ Ibid 63.

B Why Pragmatism?

A persistent criticism of Unger's radicalised pragmatism has been that there is something arbitrary in the choice of 'pragmatism' as the name for his favoured philosophical story, that there is no good reason to describe his approach as distinctively pragmatist. Martin Stone puts the criticism as follows:

The view which emerges here isn't proprietary to, say, James, Dewey or Pierce (as Unger himself acknowledges). You might plausibly say Unger's view is 'Sartrean' (in its emphasis on self-conscious practical agency), or Hegelian (in its presentation of history as the progressive realization of freedom), or Emersonian or Nietzschean (in its portrayal of self-overcoming as the mark of the human). It is quite generally post-Kantian, in its insistence on the distinction between Nature and Freedom, and in its depiction of human will and agency as prior to any formal requirements of natural and political order. So why pragmatism? Why this frame?³²

Stone then goes on to speculate as to why Unger has described his approach as pragmatist and suggests that Unger's description of his approach is at worst misguided and at best irrelevant. He suggests, for example, that Unger chooses the label 'pragmatism' because, of the four philosophical doctrines in dissent against the perennial philosophy,³³ pragmatism is the one most devoid of any obvious metaphysical or political commitments and therefore the most malleable for his own purposes:

As recent discussions from Richard Rorty to Richard Posner and Stanley Fish make clear, 'pragmatism' can be just about anything an American wants it to be. This would naturally make it serviceable for Unger's creative purposes. True, Unger does devote some pages to discussing what James & Co. got right and wrong. But the attempt to root 'radicalized pragmatism' in historical American pragmatism seems half-hearted ... and, anyway, unconvincing.³⁴

It appears, however, that Stone has not read Unger's recent work with sufficient care. Unger in fact foresaw and explicitly addressed Stone's objection. In *The Self Awakened*, for example, Unger writes that:

³² Martin Stone, 'The Self Awakened: Pragmatism Unbound by Roberto Unger' (2007) *Notre Dame Philosophical Reviews* <<http://ndpr.nd.edu/news/the-self-awakened-pragmatism-unbound>>

³³ See Unger, above n 16, 10-25.

³⁴ *Ibid.*

Some will object that the argument presented in this book has no unique relation to the philosophical tradition of pragmatism. It could start out from the agendas, the conceptions and the vocabularies of several other traditions of thought, recent or long past. What matters, they will insist, is the content of the ideas. They will be right.³⁵

That is, Unger does not dispute that the ideas that he advances have no exclusive relation to pragmatism. He says, however, that ‘the point is ... not to rescue and reinvent pragmatism. It is to pull ourselves together’ in a post metaphysical world and for Unger that involves putting forward a conception of the self and humanity. It is a view of the ‘wonderful and the terrible disproportion of that spirit to everything that would contain and diminish it.’ For Unger philosophy must be a humanist prophecy in the service of the infinite human spirit, and the content of this prophecy is ‘a vision of how it is that we may respond right now and with the instruments at hand, to the experience of being lost in a void that is made up of time, into the beginning and end of which we cannot see, and that is indifferent to our concerns.’³⁶

Unger admits that no philosopher or philosophical tradition has a monopoly on this prophecy, but argues that there are pragmatic reasons to use the label ‘pragmatism’ for his particular prophecy ‘and to pillage the pragmatist tradition.’ For Unger, the pragmatist tradition contains many of the conceptions or ideas we most need today, although those ideas may be in a distorted or truncated form. The attraction of these ideas lies in their focus on a picture of the human agent that is both ‘irreducible to any set of causal influences that may weigh upon him’ and ‘incapable of being fully contained and governed by the social and cultural orders he develops and joins. For such a view prophecy speaks louder than memory, and one lives for the future the better to live more freely and fully in the present.’³⁷ Unger recognises, however, that these themes are not exclusive to pragmatism and can be found in other intellectual traditions, in particular the Christian, romantic and historicist traditions.³⁸ This first reason for Unger’s use of the label pragmatism therefore does not suffice to distinguish it from many other philosophical approaches. Unger does provide, however, two additional reasons for using the label pragmatism that highlight pragmatism’s distinctive character. One reason is that pragmatism, ‘though diminished and domesticated, represents the philosophy most alive today,

³⁵ Unger, above n 16, 26.

³⁶ Ibid 27.

³⁷ Unger, above n 16, 28.

³⁸ Rorty’s version of pragmatism also draws explicitly on themes found in these other intellectual traditions: See Ian Ward, ‘Bricolage and Low Cunning’ (2008) 28 *Legal Studies* 281.

at least in the modern West. It lives not among professors but in the world.’ According to Unger:

the world needs the full, intransigent development of...the major alternative to the perennial philosophy. It needs to develop this alternative in aid of its commitments to the radicalization of democracy and the divinization of the person. The teachings of the American pragmatists are a version of this alternative. However, they are an inadequate, truncated version.³⁹

The term ‘pragmatism’ refers to a living philosophy that is of great practical importance because the struggle over the direction of pragmatism ‘becomes a contest over everyone’s future as well as over the content of an alternative to the perennial philosophy’. The second additional reason that Unger provides for using the term pragmatism to describe his philosophy is that, ‘a struggle over the meaning and value of pragmatism today soon becomes a struggle about how we should relate the future of philosophy to the future of society.’ That is, an account of the meaning and value of pragmatism as a philosophical approach matters, because philosophy matters to the future of society. For Unger, philosophy is important for two reasons. First, ‘it matters because it is like politics (and law); it is not about anything in particular; it is about everything’. Second, it matters because ‘it is like us: it does not fit; it is the residue in thought of what cannot be contained in particular disciplines or be brought under the control of particular methods’.⁴⁰ That is, in philosophy we confirm the power to act and to think beyond regulative limits and ‘to reposition these limits, as a defining characteristic of our humanity and our intellects’. Philosophy enables us to transgress our present limits because philosophy is not only a set of doctrines or arguments but, importantly, also contains various themes of orientation or purpose which can be assessed, challenged and revised with the aid of experience.

Perhaps the closest approach to pragmatism within the social philosophical tradition is critical theory made famous by the Frankfurt School and more recently by theorists such as Jurgen Habermas and Axel Honneth. But while pragmatism and critical theory share similar views about social ontology, as Roberto Frega has pointed out, there are also some important differences with respect to the two approaches. In terms of their similarities, both pragmatists and critical theorists ‘reject the assumption of methodological individualism, or atomism, and take the individual to be in his own constitution deeply dependent upon, and situated in, society

³⁹ Unger, above n 16, 29.

⁴⁰ Ibid 27.

and history.’ Second, they share the view that ‘theory and practice are deeply entangled forms of activity, that theory must be seen as an aspect of the socially shaped practical activity of agents.’ Both pragmatists and critical theorists thus reject what Dewey called the ‘spectator theory of knowledge’, that is, ‘a conception of knowledge as the external representation of states of affairs’ or what Rorty called the ‘representationalist’ theory of truth.⁴¹ Related to this view is ‘a shared critique of the foundational conceptions of philosophy and the idea that philosophy should deal with concrete objects related to social experience’, and the view that ‘we should enter in new and collaborative relationships with the social sciences, adopting an empirical and even an experimental attitude toward itself as knowledge’.⁴² Another trait shared by pragmatism and critical theory is a conception of philosophy that is emancipatory, transformative, and reconstructive:

That the task of social philosophy is to support processes of social transformation aimed at bettering the circumstances of social life, at reducing injustices and oppression rather than at increasing our knowledge of the social world or the legitimacy of existing institutions. The study of society is seen by both as a way of changing it, which for both implies the rejection of pure normative or ideal theory and the necessity for social philosophy to focus on the real problems of existing societies.⁴³

There are however three major points on which the pragmatist and the critical theory conceptions of social philosophy diverge and which support Unger’s attempt to label his approach as distinctly pragmatist. The first has to do with pragmatism’s rejection of realist metaphysics, that is, its anti-essentialism. As Frega puts it, ‘Compared to the critical theorist, the pragmatist is more explicit in stating that to engage in non ideal theory requires a thorough rejection of any transcendent normative standard.’ For the pragmatist, the public itself must discover which social problems to solve, and social theorists should limit their role to ‘supporting, fostering and advancing public-based processes of discovery and problem solving.’ Frega invokes the Neurathian metaphor of the ship at sea and takes extremely seriously the image of normativity as a repairing and maintenance activity: ‘We are like sailors who must rebuild their ships on the open sea, never able to dismantle it in dry-dock and to

⁴¹ See generally, Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton University Press, 2009)

⁴² Roberto Frega, ‘Between Pragmatism and Critical Theory: Social Philosophy Today’ (2014) 37 *Human Studies* 57, 78.

⁴³ *Ibid.*

reconstruct it there out of the best materials'⁴⁴ This metaphor is consistent with Unger's metaphor of social reconstruction as occurring bit by bit, step by step with the materials at hand, and suggests why law, as the most detailed expression of the existing structure, is instrumental to the reconstruction of society.⁴⁵ Contrary to pragmatism, 'critical theory needs an independent standpoint, a source of normativity whose objective origin in the pre theoretical life can grant critique a firm and uncontroversial ground'.⁴⁶ Critical theorists point to something 'out there' in society, something that exists before critique. This is the myth of the extra social that Unger emphatically rejects. A criticism with such an approach is that:

The search for a noncontroversial external standpoint, even in its most sophisticated forms... fall(s) under the critique of the myth of the given, as it neglects important aspects by which our individual constitution, desires, expectations and affective structure are socially construed, and are therefore in no way pre-theoretical. Here the romantic myth of a pre-social undistorted state of nature, so important for the enduring success of the program of Critical Theory, reveals its hidden and problematic face.⁴⁷

Pragmatism, on the other hand, 'set metaphysics aside and passed on' and in the tradition of Dewey and Rorty in particular, 'in place of the grander metaphysical aspirations came the altogether more earthly concern with social hope, with simple questions of happiness and health, cruelty and kindness.'⁴⁸ According to prominent pragmatist philosopher Richard Rorty, pragmatists substitute the question, 'Which descriptions of the human situation are most useful for which human purposes?' for the question, 'Which descriptions tell us what that situation really is?':

Pragmatism...is one more suggestion about what to do with our lives. We might for example colonize the planets of other stars. Or we might tweak our genes, in order to give birth to *Übermenschen*. Or we might try to equalise the life chances of rich children and poor children. Or we might try to make our individual lives into works of art. Dewey thought that we should not try to ground our choices among alternatives such as these on knowledge of what human beings 'really' are.⁴⁹

⁴⁴ Ibid.

⁴⁵ See Roberto Unger, *What Should Legal Analysis Become?* (Verso, 1996) 130-34.

⁴⁶ Frega, above n 42.

⁴⁷ Ibid.

⁴⁸ Ward, above n 38, 286.

⁴⁹ Richard Rorty, 'Dewey and Posner on Pragmatism and Moral Progress' (2007) 74 *University of Chicago Law Review* 915, 917.

For pragmatists such as Unger, Rorty and Dewey then, the term ‘reality’ is a term of value or choice and philosophy is not ‘in any sense whatever a form of knowledge’ but is instead, ‘a social hope reduced to a working program of action, a prophecy of the future.’⁵⁰ Whereas for critical theory the task of the intellectual remains connected with the production of a theory of society containing objective normative standards, for the pragmatist the intellectual operates essentially as a ‘liaison officer’, and a theory of society ‘has to be considered as a partial and functional tool for mapping and sustaining processes of public formation rather than as providing them a valid normative ground.’⁵¹

Another distinction between pragmatism and critical theory identified by Frega is that ‘pragmatism denies that social philosophy must be exclusively identified by its critical orientation, although it certainly agrees that it should engage in sustained critiques of all forms of social injustice and oppression.’⁵² Thus, a distinctive trait of the pragmatist conception of social philosophy is that:

it considers criticism as a necessary, invaluable, and yet only partial accomplishment of social philosophy. Justification, reform, adjustment, maintenance, and institutionalization of new normative orders are as legitimate and important as criticism is, so that critique is given neither epistemic nor moral-political priority with respect to other normative practices.⁵³

A final point of distinction between pragmatism and critical theory discussed by Frega concerns the leading heuristic role assigned to large-scale narratives in the diagnosis of social problems or ‘pathologies’:

At least since Horkheimer and Adorno’s *Dialectic of Enlightenment*, but in stunning continuity with Hegel and Marx...Critical theory has based its account of normativity on the assumption of a large scale narrative identifying an ideal or non-distorted account of rationality or society in its entirety. These metacritical narratives constitute the source of normative critique: a general diagnosis of what reason (Horkheimer, Adorno), modernity (Habermas), or human nature (Honneth) is, becomes the general benchmark for any critical endeavor.⁵⁴

⁵⁰ Ibid n 9.

⁵¹ Frega, above n 42.

⁵² Ibid 79.

⁵³ Ibid. Selznick also discussed the importance of this pragmatist method of combining the critical, explanatory and normative: see Krygier, above n 3, 222.

⁵⁴ Frega, above n 42, 79.

Critical theory tends to assume that collective social problems make sense ‘only in the context of a rejection, a critique, a denunciation of society in the name of a totalizing normative benchmark such as human nature, reason, undistorted communication, recognizing society.’ It tends to adopt ‘a language that expresses the persuasion that society is too sick to be reformed and that it needs to be changed from scratch.’ Pragmatists, on the other hand, are wary of such an approach, fearing that it could ‘prevent the fresh and unbiased examination of concrete social conflicts and of their specific determinants.’⁵⁵ However, the pragmatist trait to set aside the concerns of realist metaphysics, and the objectivist, totalizing narratives that promote it, does not obviate the need for the pragmatist to adopt social theoretical approaches that may contribute to the criticism and reconstruction of society. While many theorists want to reject general theorizing about our formative social contexts, Unger sees it as an important task of social theory to develop accounts of our formative contexts which describe and explain, but do not ‘naturalise’ existing social structures and which might better realise the radicalised pragmatist vision of the human agent as capable of understanding, reimagining and transcending our formative contexts. It is in the spirit of this unyielding ‘radicalised’ pragmatist commitment to the context transcending human agent that Unger makes his distinctive proposals for (social) legal thought.

C Radicalised Pragmatism and the Role of Law

If we reject the idea of the extra social as being in any way relevant to how societies are constructed and if we reject the Marxist idea of an evolutionary determinism for societies, the question of the normative remains, that is, the question of how we proceed in the creation of alternative futures for society. So for Unger, key questions for legal and social thought are: how do we justify norms without the extra social, or what makes them legitimate? What normative projects can be pursued or justified within the assumptions of social theory? Indeed, can social theory give us any answers?

In order to develop a plausible, contemporary normative social theory, Unger argues that we ought to hold on to the insight from classical social theory to reject the extra social and to

⁵⁵ Ibid 80.

promote the view that we made the social and that we can therefore understand it and if necessary remake it. At the same time however, we should avoid lurching toward a voluntarism on the one hand or an evolutionary determinism on the other. We would need a normative account of structural constraint and of how such constraint might be transformed into opportunities. To help to replace what he describes as the ‘dictatorship of no alternatives’ in contemporary western politics, Unger seeks to develop an account of social structure and structural change without the ‘necessitarian illusions’ of classical social theory and a view of normativity that excludes reference to the extra social. For Unger such an account could help to provide a discursive space for being able to think programmatically without necessarily providing blueprints for the future.

The account of social structure that Unger wants to develop has three key assumptions. First, the structure of society is path dependent – such path dependency constrains agency and discredits voluntarism; second, the structure of society arises from the interruption of conflict which leads to interests and identities forming within the settled structure and seeming like a second nature; and third, existing identities and interests can either presuppose the existing structural arrangements or transgress them by creating alternatives to the path of least resistance – which then opens a space for programmatic social thought.⁵⁶

In his introduction to Unger’s *Politics*, Cui discusses Unger’s normative vision for structure which is to create structures that are more amenable to ‘negative capability’:

Although we can never escape completely the constraints of a ‘formative context’, we can make it more open to challenge and revision. Unger argues that this degree of openness is itself variable. For example, hereditary castes in ancient India, corporately organised estates in Feudal Europe, social classes today, and ‘parties of opinion’ tomorrow mark the presence of group characteristics of increasingly open or ‘plastic;’ formative contexts. Unger proposes the notion of ‘negative capability’ to signify the relative degree of openness...of a formative context...to increase ‘negative capability’ amounts to creating institutional contexts more open to their own revision – so diminishing the gap between structure and routine, revolution and piecemeal reform, and social movement and institutionalisation. Unger values the strengthening of negative capability as both an end in itself – a dimension of human freedom – and as a means to an achievement of other goals. For he holds there to be a significant causal connection between disentanglement of formative contexts and their success at advancing

⁵⁶ For a more detailed account of structure see Unger, above n 41, 18-22; Unger, above n 5, 227-62.

along the path of possible overlap between the conditions of material progress and individual emancipation.⁵⁷

A conception of structure such as the one sketched by Unger then leads to three sets of consequences for political action. The first is that we can change the structure piecemeal (this is Unger's idea of 'radical reform'), second, we can define and defend group interests so that different groups are potential allies, and third, we can provide ourselves with political projects (presumably there is a role for ultra theory in defining these) and these political projects ought to be in a dialectic relationship with a theoretical (explanatory and normative) conception of structure since, for Unger, we cannot justify or defend mindless, existential causes. Importantly the beginnings of such normative projects can be found in law, the most detailed expression of structure, and its relation to the normative, that we have.

Unger's normative ideal of creating conditions that encourage institutional tinkering to develop more corrigible structures to further realise our structure defying freedom does not imply indiscriminate context smashing for its own sake, that is, Unger's social theory has normative implications for how to resolve the tension between the individual and the community.⁵⁸ Unger's social theory therefore addresses the problem of 'politics' or 'the normative', it recognises the existence of the tension between the interests of the community and individuals, a tension that may not be resolved theoretically but the hope is that, with the help of social theoretical insights, it can be attenuated in practice.

There are two broad traditions in Western philosophy that have attempted to address this inevitable tension between individual freedom and the common good.⁵⁹ The first is liberalism which assumes that a free society is held together by what Adam Smith referred to as 'invisible hand mechanisms' whereby abstract rights of choice are held sacrosanct with relatively little emphasis placed on the socially contextualised (institutional and ideological) causes and effects of those abstract liberal rights. The other is the intellectual tradition described by Charles Taylor as civic humanism. On the civic humanist view, a free society is made possible by common meanings, that is, common customs and traditions and a strongly shared sense of what is good (both for individuals and communities). Thus the civic humanist tradition is

⁵⁷ Unger, above n 5, xiii.

⁵⁸ Contra Allan Hutchinson and Patrick Monahan, 'The "Rights" Stuff: Roberto Unger and Beyond' (1984) 62 *Texas Law Review* 1477, 1534.

⁵⁹ Charles Taylor, 'Hegel's Ambiguous Legacy for Modern Liberalism' in Drucilla Cornell, Michel Rosenfeld and Grey Carlson (ed) *Hegel and Legal Theory* (Routledge, 1991) 64-77.

distinguishable from the liberal tradition since, unlike the former, the latter prioritises the right over the good and considers personal and collective motivation to be unimportant and largely irrelevant to the maintenance and development of law.⁶⁰

Taylor suggests that under a civic humanist conception of a free society there are then two coexistent ways to conceive of the role of law in politics, which reflects different ways of conceiving of the relation between the individual citizen and the structure of the society. On one view, similar to the liberal position, the rule of law is viewed as instrumental to citizen identity and integrity, the rule of law in turn being viewed as synonymous with maintaining a regime of rights. On another view however, citizen dignity is identified with participating in self-rule. Taylor then suggests that Hegel gave us a philosophical basis to provide a response to resolving the tension between the individual and the community which rejects ‘invisible hand mechanisms’ so central to neo - Kantian liberal rights discourse and rationalising legal analysis both of which, in Unger’s view, cast an ‘idealising halo’ over existing institutions and practices. Instead, by showing ‘the tremendous importance of the bonding around a particular history and tradition, Hegel allows us to pose the more finely grained issues which arise in comparing a society which defines citizen dignity in terms of retrieving one’s rights with a society that identifies citizen dignity with participating in rule.’⁶¹

Without rejecting or belittling the former negative conception of the rule of law, Unger seems to aspire to realise this second view of the relationship between the individual and the community; of the agent and its relation to structure. This second view is a normative conception of society that is interested in pursuing the radical democratic project –the project of democratic institutional experimentalism inspired by a radicalised pragmatist philosophy. In pursuing this second, civic humanist approach, Unger adopts a Hegelian view of normativity, already a diversion from neo Kantian liberalism and deconstruction, that our agency is structurally determined to a degree, and that there is an internal, or dialectic, relation between our ideals and interests on the one hand and our institutions and practices on the other.

So Unger wants to provide a view of the normative (of our relation to others and our relation to structure), a vision or prophecy of what we can and should become which is related to an

⁶⁰ Selznick discusses the distinction between liberalism and civic humanism in terms of the relative emphasis placed on ‘civility’ and ‘piety’: see Krygier, above n 3, 258-62.

⁶¹ Taylor, above n 56, 75-76.

account of the existing structures of society. The normative vision proposed by Unger rejects the relevance of the extra social; it is not based on universal reason or an ethic of obligation but rather on the aspiration to become more free through the pursuit of structural imagination and change - what Unger calls 'deep freedom'. For Unger, the Kantian obligations enshrined in law assume an impersonal benevolence, which assumes an ambivalence to others as well as to what Unger refers to as a 'real structure' of society. Instead, for Unger, we should attempt to reconcile our radical need of others and our radical fear of others through democratic experimentalism.⁶² The basic moral (normative) problem for Unger then is not the constraint on selfishness (as per Kant) but it is the problem of our relation to the other; we both radically need them and radically fear them. So Unger thinks we ought to develop forms of connection such as personal love and cooperation in civil life, not only where we are safe, but where we can flourish. Unger's account of the external normative therefore provides an alternative account of who we are and our place in the world.⁶³

For Unger the abstract idea of society (a view of the structure and the normative) must then be translated into prescriptions of human association in various social contexts (the internal normative). These prescriptive ideas of human association have two sides – the existing institutions and practices and the representation of the association as ideals and interests which cannot be exhausted by the existing institutions and practices. Importantly for Unger, although the institutions are always 'parasitic on forms of consciousness', the two sides of the prescription of human association, that is, the institutional side and the ideological side, can always be dissolved. So whilst we are constrained by structure, we always maintain a power of rebellion over the structure. Unger describes this power as a self fulfilling, prophetic power. It treats humanity as spirit as per Hegel with a power of agency more than as natural object or thing as per Kant. The marriage of his account of structure and the normative can inspire the imagination of institutional alternatives. The project is not to define dogmatic blueprints, but to imagine and develop structures that are corrigible to accommodate our structure defying freedom, and that can help to reduce the inevitable tension between accounts of individual freedom and the common good.

⁶² For an exploration of the relation between Dewey's pragmatism and democratic experimentalism, see Charles Sabel, 'Dewey, Democracy and Democratic Experimentalism' (2012) 9 *Contemporary Pragmatism* 35.

⁶³ Moyn criticises Unger's account of the normative for not providing an adequate account of how these visions are themselves not reducible but nevertheless internal to structure: see Unger, above n 13.

The project of radical democracy then becomes about mastering the structure, through the perpetual creation of the new.⁶⁴ For Unger, if institutions and practices render themselves more open to challenge and change, that is, more amenable to ‘negative capability’ then the two kinds of normative practice, the ‘internal’ or contextual and the ‘external’ or prophetic, can come closer together and in law and legal thought we find some of the instruments to achieve this in practice. It is a hopeful social theoretical project and such a project cannot be refuted by argument but like Cornell’s interpretation of Derrida’s ‘just decision’, its full meaning must be deferred until it is linked (or not) with historical events.⁶⁵

The practical import of Unger’s vision of structure when combined with his vision of the normative is that it can help to resist what he describes as the current political minimalism on both the left and right of politics which, by acquiescing in conventional styles of legal analysis and human rights discourse and by adopting various policies of tax and transfer, leave the existing institutional and ideological structure of society largely untouched. Such political minimalism is anathema to Unger’s normative social theory discussed above and its emphasis on relating a vision of the normative to a vision of structure and structural change. While (neo) liberals hold on to the false ideal of neutral rights that assumes a real structure of society, for Unger, the normative ideal should always be corrigibility of structure. So we would need to develop a social, economic and political pluralism by suggesting different forms of each rather than idealising the existing institutions. Unger therefore wants to follow the 19th century rather than the 20th century liberal project in pursuing ‘deep freedom’ through institutional reconstruction rather than what he calls ‘shallow equality’. While modern western politics has been characterised by a contest between ‘shallow equality’ on the left and ‘shallow freedom’ on the right, on the basis of an acceptance of the existing institutional arrangements, for Unger the normative direction of the left ought to be towards ‘deep freedom’.⁶⁶

However, these encouragements to move in a direction from shallow equality to deep, structure defying, freedom presupposes a conception of ourselves as context transcending agents both formed by, and forming the context. These assumptions of Unger’s radicalised pragmatist social theory are not essential characteristics of human nature but constitute a ‘waring vision’

⁶⁴ Ultra theory could presumably play a role here.

⁶⁵ See Richard Rorty, ‘Unger, Castoriadis, and the Romance of a National Future’ (1988) 82 *Northwestern University Law Review*, 45; Jeremy Waldron, ‘Dirty Little Secret’ (1998) 98 *Columbia Law Review* 510, 529.

⁶⁶ See Roberto Unger, *What Should the Left Propose?* (Verso, 2006).

of what we can and should become.⁶⁷ If we accept the left Hegelian normative vision and the insight about the dialectic relationship between the structure and the normative then ‘the law’ as the most detailed expression of structure and the ‘site of the crucifixion’ where our ideals and interests are ‘nailed to the cross’ of our institutions and practices, becomes implicated in the normative political project.

But as Unger makes clear, his left Hegelian approach to social theory and the role that it suggests for law is not currently the dominant conception of law. For example, law schools do not normally conceive of law in this way. As I discussed in Chapter II, the dominant picture of law and legal thought is that it is about cases and judges who promote reasoned elaboration as the canonical style of legal discourse. For Unger this is a false representation of what law is and should be, because the practice inhibits the dialectic and imagination of alternative institutions and practices, ideals and interests. For Unger we should reject the dominant legal and political attitudes which leave the current institutional arrangements largely in tact, and develop a view of structure such as the one sketched above, and a political program informed by legal ideas – the most detailed expression of the existing structure of society. For Unger and other defenders of the radical democratic project, the role of (law in) politics is to resist the path of least resistance. That is, the power of path dependency is something we should fight about in politics. While the ‘evaders’ of structure, as Unger refers to Kantian liberals and poststructuralists, might assume that the outer limits of politics is textual reinterpretation of a constitution or declaration of human rights, for him, new ideas, including ideas from social theory and ideas from law and legal thought, need to inform an alternative politics. This is consistent with the radicalised pragmatist view that there is no ‘closed list’ or fixed horizon of possibility for law and politics.

⁶⁷ This vision of legal thought is supported by ‘left’ Hegelians such as Taylor, Hunt and Hutchinson. Even critics of the normative vision regard Unger’s social theory as the most powerful account of the late 20th century: see Geoffrey Hawthorn, ‘Practical Reason and Social Democracy: Reflections on Unger’s *Passion and Politics*’ in Robin Lovin and Michael Perry (ed) *Critique and Construction* (Cambridge University Press, 1990).

VII CONCLUSION

A Research Findings

In this thesis it has been argued that Unger provides through his work a novel approach to law and legal thought that is of contemporary significance in a number of respects. Unger provides an explanation and critique of contemporary styles of legal analysis that is in the author's opinion the clearest and most persuasive in the literature. As Unger points out in his seminal work the *Critical Legal Studies Movement*, a major problem with contemporary legal analysis is that although most jurists have rejected old modes of legal objectivity such as 19th century doctrinal formalism, both retro-doctrinalism and shrunken Benthamism have supplemented reasoned elaboration to some extent as popular modes of legal discourse, so that formalist and objectivist ideas about law continue to re-emerge within 21st century legal thought and culture. This fact underscores the contemporary significance of Unger's critical jurisprudence, and the continuing need to re-examine his critique of objectivity and formalism, particularly within legal education. A major problem with objectivity and formalism beyond becoming less credible ideas is that they assume a 'real' structure of society and are another example of what Unger calls 'necessitarian' social theory. In the context of legal and social thought, the continued influence of these ideas 'severs the link between the insight into the actual and the imagination of the possible'. Objectivist and formalist approaches to law represent a kind of hypocritical instrumentalism that is inherently conservative in its support of the institutional status quo.¹ If the explanation and critique of the current styles of legal analysis discussed in Chapter II, 'Unger on Contemporary Styles of Legal Analysis' is accepted, then it is only analogical reasoning within adjudication, and law as conflict and compromise outside adjudication that remain acceptable contemporary legal analytic approaches.

For Unger and other sociological jurists discussed in Chapter V, 'Reuniting Jurisprudence and Social Theory', law cannot only be understood as a conventional doctrinal practice carried out within the judicial setting. Instead for the social legal theorist, law is the 'site of the crucifixion', where a society's ideals and interests are nailed to the cross of its

¹ Samuel Moyn provides an account of why current western liberal institutions cannot be the horizon for politics: see 'Legal Thought Now (Spring, 2016), Lecture 12' (18 January, 2017), *Roberto Mangabeira Unger: Lectures and Courses* <http://www.robertounger.com/en/2017/01/18/legal-thought-now-spring-2016>.

institutions and practices, that is, there is a normative element to law and this normative element is related to the structures and routine practices of society. So Unger's jurisprudence departs from several aspects of the first wave critical legal studies movement with which he is often identified, as well as from much critical legal theory that followed, as discussed in Chapter III, 'Unger and Critical Legal Studies: Common Ground and Wrong Turns' in that it provides a rationale for a normative reconstructive program based on an institutionalist approach to legal thought. As discussed at length in Chapter IV, 'The Lesser and Greater Vocations of Legal Thought' unlike conventional doctrinal analysis, an institutionalist approach does not aim to put the best face on the law in the Dworkinian sense, instead it aims to show how the law actually fares in relation to its professed ideals, which means focusing on 'the disharmonies of the law and on the way in which the ideal conceptions...get truncated in their fulfilment and impoverished in their meaning by their received institutional forms'.² As such, the purpose of mapping/criticism is to analyse a piece of law according to different sets of ideals and interests so that legal analysis can expand the range of political possibilities. Rather than restricting the construction of social alternatives, for Unger legal analysis should instead be 'the master-tool of institutional imagination in a democratic society'. Under his proposal therefore the theorist and the practical reformer share a stake in putting actual institutions in their place 'by understanding and judging them from the vantage point of suppressed and unrealized possibilities'.³ Several examples of institutional imagination were discussed in Chapter IV, drawing on existing ideas in legal thought including the disaggregated property idea, mobilizational political democracy, social law (legal regimes existing outside the control of the state) and the idea of a social inheritance.

However, to succeed in the critical legal scholars' moral brief of achieving real (structural), progressive social change partly through the wise use of law, Unger understands that beyond adopting an institutionalist approach, it is also necessary to relate such an approach to a (visionary) normative practice informed by ideas in social theory. As Unger has recently written, 'a practical alternative to institutionally conservative social democracy and to identity politics need(s) help from a theoretical alternative to Marxist social theory and to liberal

² Roberto Unger, *What Should Legal Analysis Become?* (Verso, 1996), 133. Hutchison illustrates Unger's method in relation to the law of contract as a law of contradictions: see Allan Hutchinson and Patrick Monahan, 'The "Rights" Stuff: Roberto Unger and Beyond' (1984) 62 *Texas Law Review* 1477, 1511-12.

³ Unger, above n 2, 26.

political philosophy,⁴ So although part of a larger sociological jurisprudential tradition that Tamanaha has labelled ‘social legal theory’, as discussed in Chapter V, ‘Reuniting Jurisprudence and Social Theory’ Unger makes a unique attempt to reunite jurisprudence and social theory to inform a contemporary, normative jurisprudence and it is this attempt that I argue is the most significant and potentially enduring aspect of his legal thought.

In Chapter VI, ‘Radicalised Pragmatism and Law’ Unger’s unique social theoretical approach was discussed and the role of law within it. For Unger the abstract idea of society (a view of ‘the structure’ and ‘the normative’) must be translated into prescriptions of human association in various contexts (internal normative). Consistent with his philosophical pragmatist account of human agency, whilst we are constrained by structure, we always maintain a power of rebellion over the structure. For Unger, the marriage of his account of ‘the structure’ and ‘the normative’ can inspire the imagination of institutional alternatives. The project is not to define dogmatic blueprints, but to imagine and develop structures that are corrigible to accommodate our structure defying freedom, and that can help to reduce the inevitable tension between accounts of individual freedom and the common good. The project of (radical) democracy then becomes about mastering the structure, through the perpetual creation of the new and in law and legal thought we can find some of the instruments to achieve this in practice.

The potential practical import of Unger’s account of structure when combined with his account of the normative is that it can help to resist what he describes as the current legal and political minimalism on both the left and right of politics which, by acquiescing in conventional legal and human rights discourse and by adopting various policies of tax and transfer, leave the existing institutional and ideological structure of society largely untouched. Unger wants to follow the 19th century rather than the 20th century liberal project of pursuing ‘deep freedom’ through institutional reconstruction rather than what he calls ‘shallow equality’.⁵

So Unger’s jurisprudence is significant in that it represents an important attempt to address the anti-normativity of contemporary legal thought and culture discussed in Chapter I, by reuniting jurisprudence and social theory. His jurisprudence is also contemporary because it relies on contemporary social theoretical insights consistent with ideas within the pragmatist and critical

⁴ Roberto Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso Books, 2015), 44.

⁵ See Unger, above n 2, for discussion of these terms. For a critique of ‘shallow equality’ in the Australian context see Peter Whiteford, ‘Australia: Inequality and Prosperity and their Impacts in a Radical Welfare State’ in Brian Nolan et al (ed) *Changing Inequalities and Societal Impacts in Rich Countries: Thirty Countries’ Experiences* (Oxford University Press, 2014).

social theoretical traditions. Since advancing the democratic project and a pragmatist world view are two of the most powerful contemporary social ideas, it is reasonable to hope that the reorientation of legal thought in the way suggested by Unger is feasible in the long term. This is obviously a prediction and hope but it is based on trends in the history of legal and social thought. As contemporary social theorist Roberto Frega has argued, Unger's approach to social theory shares the main features that have made critical theory the most promising tool for sustaining processes of emancipation, while avoiding some of its controversial theoretical assumptions and so philosophical pragmatism may be expected to play an increasingly important role in shaping social and legal philosophy for the next few decades.⁶ Perhaps Unger as well as being viewed as an inspirational leader of the critical legal studies movement could also become a talismanic figure in the reorientation of contemporary jurisprudence toward social legal theory or, more specifically, toward a 'radicalised pragmatist' jurisprudence in the 21st century just as Bentham and Austin were for legal positivism in the 19th century, and Fuller and Finnis were for natural law theory in the 20th century.

But despite the promise of a contemporary, normative jurisprudence suggested by Unger's work, there are several problems that confront Unger's suggested approach to legal thought. First, there are several questions in relation to Unger's preferred social theoretical approach, for example, how useful are the social theoretic insights about the structure of formative contexts and the normative vision? Hugh Collins, for example, has suggested that:

Formative contexts are holistic in the sense they comprise all the basic institutions and ideologies of a society. Yet since Unger insists that these institutions and ideologies can be blended in a nearly infinite number of ways by reason of his rejection of the logic of social types, we lack a perspective from which to distinguish those features of a society that establish fundamental constraints from those that are simply derivative or superstructural. This inability dangerously subverts the ability of...social theory to identify the structural constraints on freedom.⁷

⁶ See Roberto Frega, 'Between Pragmatism and Critical Theory: Social Philosophy Today' (2014) 37 *Human Studies* 57

⁷ Hugh Collins, 'Roberto Unger and the Critical Legal Studies Movement' (1987) 14(4) *Journal of Law and Society* 387, 408.

Indeed can social theory really help to identify the structural constraints on freedom?⁸ This goes to the question of methodology discussed in Chapter V. There it was suggested that Unger's political and philosophical motivation is to enlarge the institutional repertoire. Unger's super theoretical project can therefore be seen as a resistance or rebellion against the current trends in Anglo American intellectual culture, including legal culture and its promotion of conventional legal doctrine as the 'wave of the future'. On the other hand, Unger views law and political economy as important academic disciplines because they remain pluralistic - there is no generally accepted disciplinary method in either field, so that alternative approaches, such as those offered by critical and social legal theory, can be developed. Super theoretical approaches such as those of Unger and Selznick can provide legal scholars who identify as pragmatists and democrats with a coherent and persuasive social theoretical viewpoint from which to argue that law should not be identified solely with the work of courts and legislatures but with something else, and to develop what that something else should and could look like.

Kuhn argued that scientific paradigms remain unchanged until we are presented with a preferable theorized alternative. Unger's view is that super theory might be similarly useful in providing a definite, systematic social theoretical alternative, and therefore help to change the current dominant legal paradigms. While he provides a rudimentary normative social theory, that is, a vision of the normative in theoretical terms and a strong defence of his social theoretical approach⁹, Unger recognises that there is ultimately no answer to the radical sceptic or the foundationalist who either argues that anything goes, or that we need an absolute foundation for knowledge. Never the less he points out that choices need to be made on these normative questions and that these choices can be informed by our social theoretical ideas.

Further to the methodological questions regarding Unger's social theoretical project are questions in relation to the nature of Unger's normative vision. Unger's normative approach encourages us to move in a direction from shallow equality to deep, structure defying, freedom which presupposes a conception of ourselves as context transcending agents both formed by, and forming the context. Consistent with his radicalised pragmatism discussed in Chapter VI, these assumptions are not essential characteristics of human nature but constitute a 'waring vision' of what we can and should become. But does Unger provide an adequate account of

⁸ Ibid.

⁹ See Unger, above n 4, 179-98.

human nature, or of the direction that legal thought ought to take in the service of such human nature? What of those who may disagree, or propose an alternative ‘warring vision’? Hutchinson and Monaghan, for example, have argued that although Unger provides a powerful critique of existing conditions, this does not mean that weakening and revising social structures is infinitely desirable. That is, for them the idea of human as context transcending agent is the lesser, negative idea and it is the positive vision of society that is most important. They offer what in their view is a counter vision of personality which they argue is ‘not entirely consistent with Unger’s ideal of humanity as context transcender’¹⁰ claiming that ‘there is more to humanity than an insatiable, almost psychotic lust for context smashing’ and that ‘unless the individual is to be slave to his context smashing obsession, some anterior capacity must discriminate among various possibilities of action.’¹¹ Hutchinson and Monahan then compare Unger’s superliberalism with some other normative visions¹² and whilst they accept Unger’s characterisation of humans as context transcending agents, they argue that the ideal society ‘would afford not only increased and structured opportunities for action, but would provide a complex of bonds for such action.’ They argue that in contrast to Unger’s superliberalism, Dahrendorf’s structure of allegiances offers ‘the railings to which (individuals) can cling as they walk into the midst of their social lives’¹³ and thus provides a more complete account of normativity.

It is not clear, however, that Hutchinson and Monahan have provided a vision of the normative and its relation to structure that is inconsistent with Unger’s radicalised pragmatist approach described in Chapter VI. Rather, they seem to agree with Unger that normative vision is a necessary supplement to our natures as context transcending agents. Sure, the particular normative visions are partial, contestable and incomplete, but Unger recognises that we still require normative visions which can in turn be related to the structure of society as expressed in law. In Unger’s view we do not commit ourselves to any particular normative vision:

unless we believe that it offers us a world in which we can more fully reconcile our efforts at self-assertion expressed in the vicissitudes of desire and encounter, with our deepest identity. This is a thesis about the most durable role that normative practice plays in our lives, outlasting

¹⁰ Hutchinson and Monahan, above n 2, 1534.

¹¹ Ibid.

¹² In particular, those of humanist psychologists Erich Fromm and Abraham Maslow: *ibid* nn 278, 280.

¹³ *Ibid* n 292.

the apology for existing arrangements and the defence of conventional morality. This thesis remains true even if...we turn out to be that which is nothing in particular.¹⁴

There are also criticisms of Unger's suggested reorientation of legal thought as institutional imagination. Jeremy Waldron, for example, is sceptical of Unger's hopeful vision of jurists as becoming prophets as well as priests. Waldron argues that institutional imagination requires a deeper level of inquiry at the micro-institutional level, but that, 'there is little reason to think that *legally* trained analysts have any special insight into institutions once we abandon a preoccupation with their surface normative structure.' Waldron then suggests that we should look not to lawyers, but 'to those with social, cultural, political, and historical training for the special insight that radical reform requires.' He therefore questions 'whether there is any need to develop a specifically legal education *at all* for these tasks, given that other scholars are already being trained to perform them in other academic disciplines.'¹⁵

As argued in Chapter IV, however, Waldron's is too quick to reject Unger's suggestion to reorientate legal thought as institutional imagination on the basis that lawyers ought to be priests rather than prophets. Waldron's sceptical view of the capacity of the jurist to engage in institutional imagination assumes a positivist social scientific framework for legal thought, a framework that Unger rejects for reasons discussed in Chapters V and VI. However, this discussion suggests a related practical problem for Unger's jurisprudential approach which is that although one of the primary commitments of philosophical pragmatism is to the interrelationship of theory and practice, Unger's suggested reorientation of legal thought has no recognised agent to promote it. The problem of agency, alluded to in the discussion of the anti-normativity of legal thought in Chapter I, is that most law schools, students and the corporate bar appear to have no interest in reorientating legal thought in the way suggested by Unger. Indeed, Collins seems right when he says that:

Unger perhaps underestimates the forces of inertia and conservatism which permit the legal profession to ignore or discount alternative accounts of legal doctrine. Unger seems to think that lawyers have already lost their faith in the liberal legal order and the broader formative context of liberal societies, but this view must be difficult to maintain in the midst of the heated battle over tenure decisions at Harvard Law School.¹⁶

¹⁴ Unger, above n 4, 184.

¹⁵ Jeremy Waldron, 'Dirty Little Secret' (1998) 98 *Columbia Law Review* 510, 525.

¹⁶ Collins, above n 7, 408.

Rather than seeing the lack of an obvious agent as a problem for his approach, however, Unger sees this situation as one that ripe for criticism and reform. Drawing on his pragmatist commitments¹⁷, Unger points out, just because there is no agent currently to advance the radical democratic project through the reorientation of legal analysis as institutional imagination, that does not mean that we should not try to create the conditions for a suitable agent to emerge. For Unger, we can only try and then hope.¹⁸

B Research Contribution

Despite the existence of several theoretical and practical obstacles that might prevent the reorientation of legal thought suggested by Unger, these obstacles are not insurmountable. This thesis argues that there is clearly a role for institutional and ideological criticism and imagination *within* the discipline of law. While such work is carried out by many legal theorists and scholars,¹⁹ it remains the case that the paradigm shift which would reorientate the dominant style of legal analysis as institutional imagination is yet to occur.²⁰ The major research contribution of this thesis then, is that it draws on the work of Unger and others to show *why* legal critique, institutional imagination and social legal theory matter to the future of legal thought and legal education, particularly in this neo liberal age of the corporate university.

C Thesis Limitations and Suggestions for Future Research

The paradigm shift in legal thought that Unger calls for would require continued engagement in the type of normative legal scholarship called for by West²¹, but it would also require the development of Unger's transformative theoretical project. Questions remain then of how to develop Unger's transformative theoretic project and who will be the agents of such a transformation? Within a pedagogical framework, it may be an important long term project

¹⁷ See further Chapter VI above.

¹⁸ See Martin Krygier, *Philip Selznick: Ideals in the World* (2012), 279.

¹⁹ See for example the Critical Legal Thinking website <http://criticallegalthinking>. For examples of some interesting Australian critical legal scholarship, see Margaret Davies, 'Legal Theory and Law Reform: Some Mainstream and Critical Approaches' (2003) *Alternative Law Journal* 168; Paul Babie, 'Government, Private Property and Individual Action' (2011) 11 *Sustainable Development Law and Policy* 19; Margaret Thornton, 'The Dissolution of the Social in the Legal Academy' (2006) 25 *Australian Feminist Law Journal* 3.

²⁰ Ian Duncanson, 'Legal Education and the Possibility of Critique: An Australian Perspective' (1993) 8 *Canadian Journal of Law & Society* 59, 82.

²¹ See Robin West, *Normative Jurisprudence: An Introduction* (2011), 192-203.

within law schools or elsewhere, to develop and teach ‘social legal theory’ curricula in the sense discussed in Chapter V, drawing on the work of Unger and other theorists. By engaging in some of the arguments and ideas discussed in this thesis and elsewhere, students could not only develop important conceptual tools to understand and critique existing approaches to law and legal thought, but would be openly encouraged to recognise that institutional and ideological imagination, what Unger calls the ‘larger vocation’ of legal thought, ought to be seen as an important aspect, if not the canonical style, of legal analysis. Another pedagogical project to be further explored would be to utilise Unger’s process of internal development discussed in Chapter IV, in law schools or elsewhere, to enlarge the institutional repertoire in various areas of social life using the materials of law as a point of departure.

In terms of academic research, there is the empirical research question, unexplored in this thesis, of the extent to which what Unger terms, the ‘greater vocation’ of legal thought currently exists. To ascertain this, it would be necessary to map out and conduct research into the various arenas of western legal culture alluded to in Chapter I, that is, within legal practice, legal education and legal scholarship, in which both normative and anti normative attitudes may exist. Finally, there is an important theoretical project that is unexplored in this thesis. While this thesis has focused on the contemporary relevance of Unger’s legal thought, it does not attempt to provide its own sociological jurisprudence. As Tamanaha has suggested, the parameters of social legal theory must be ‘made concrete and filled in through the construction of theories that illuminate the social nature of law.’²² Part of this project would be for legal scholars to continue to study and develop the various elements of social legal theory, including Unger’s work.

²² Brian Tamanaha, ‘The Third Pillar of Jurisprudence: Social Legal Theory’ (2014) 56 *William & Mary Law Review* 2235, 2277.

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