

A Note on Roberto Unger's Style: The Task of Normative Thought Today¹

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I . Introduction

In any investigation, we find that possible directions and conceptions of a solution to a problem are anticipated partly from the form the problem takes. We recognize that the way in which we pose the problem is crucially relevant. Of course, at the beginning of the investigation, we only have vague directions and conceptions in hand, but it is nevertheless true that once we have formulated a problem, the formulation will structure our thinking throughout the discussion. Thus, this introduction is to keep the author well aware of such structures that constrain and enable his thought in this essay.

For a student who holds an interest in society, the single most important formulation has been, is, and will be, “ What possible forms of social life would realize human coexistence? ” Alternatively, “ What forms of social order make people happy or happier? ” Or simply put, “ What form should society take? ” Thus, the problem has to do with possible conditions or *forms* of human happiness, and therefore, its solution will be addressed in the direction toward visions of such forms. The distinctiveness of this direction will be clearer as the discussion deepens in this essay.

It might be said that since the mid-twentieth century, several theoretical approaches such as “ theories of justice ” and “ philosophy of law ” have addressed the above problem deeply enough. Thus, one may suspect the problem to be out of date. However, one of the contentions in this essay is that, in fact, they have not. They have pursued a seemingly similar, but in fact, significantly different task and problem: the justification of the existing social order by resorting to a set of master principles. A large part of the discussion in this essay is spent for criticism of this predominant tendency.

However, these approaches have posed and struggled with a legitimate question: “ How *should*

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we live as both individual and collective beings?" Indeed, their great achievement is the revival of the question of goodness or righteousness in political, legal, and social studies: that is, the resurrection of normative argument. A general answer to the question would be "We should live *happy* lives. So, let's define our happiness." A more subtle answer would be "How should we? Well...I don't know for sure. But I presume, we *cannot help* but strive for happiness. So, I guess, people should live *their own* happy lives. Let us as theorists think about a frame – as neutral a frame as possible – in which all the people can live as happily as possible."

Thus, one of the major tasks all normative arguments – whether predominant or deviant – share is to elucidate the conceptions of happiness. Given that the task is shared, normative thought *today* would have to radicalize it in the direction suggested above, and such radicalization would result in its revision. Moreover, human happiness may have to do with the empowerment of the self or the realization of self-assertion, and self-realization appears to be based on conflicting requirements of the need for others and the independence from them. Therefore, the revised task shall be to envisage the way to reconcile these conflicting requirements.

It appears that this brief speculation already suggests where we may find a solution: it suggests, on the one hand, that the solution shall *not* exist in the sphere of abstract, universal principles or ideals, for conflicting abstract principles – say, autonomy vs. community or liberty vs. equality vs. solidarity – seem incapable of reconciliation. On the other hand, it suggests that the solution shall *not* exist in the sphere of discrete interests or desires either, for what we want is not relentless relativism but a set of conceptions that claims normative authority for criticism and construction. Thus, we may fairly anticipate that the solution exists elsewhere, somewhere between the abstract and the concrete: that is, the sphere of consciousness and institution.

This short essay focuses on a few methodological problems of normative argument today based on the work of a great contemporary legal, political, and social theorist, Roberto Mangabeira Unger.² It recognizes that today's social study is threatened by "Hume's Guillotine" (fact-value dichotomy).³

2 References to Roberto Unger's works are as follows.

R. M. Unger, *Knowledge and Politics* (1975). [KP]

———, *Law in Modern Society: Toward a Criticism of Social Theory* (1976). [LMS]

———, *Postscript of Knowledge and Politics* (1983). [KP Postscript]

———, *Critical Legal Studies Movement* (1983). [CLSM]

———, *Passion: An Essay on Personality* (1984). [Passion]

———, *False Necessity: Anti-necessitarian social theory in the service of radical democracy* (1987). [FN]

———, *Social Theory: Its Situation and Its Task* (1987). [ST]

———, *What Should Legal Analysis Become?* (1996). [WSLAB]

———, *The Self Awakened: Pragmatism Unbound* (2007). [SA]

3 James Boyle, *Modernist Social Theory: Roberto Unger's Passion*, 98 Harv. L. Rev. 1066, 1071 (1984-1985)

Therefore, the above problem can be reposed in the following form. “How should and can we think and talk about a *better* form of social life despite the cult of Hume’s Guillotine?” I believe that taking Unger’s intellectual enterprise seriously will open up the possibility of alternative ways of thinking and talking about a better form of future society, that is to, an alternative style of normative argument.

In the first chapter, I will examine Unger’s critique of the dominant tendency of contemporary political, legal normative arguments. Faced with the influential preconception of the fact-value dichotomy, “the ideas of a philosophical tradition ... sought intellectual safety in an attempt to avoid committing itself to any particular substantive conception of society, personality, or nature.” That is, “[t]he whole course of modern moral and political philosophy can best be understood as an effort not to base prescriptive conclusions upon substantive conceptions of personality and society.”⁴ However, Unger insists that this effort has been distorted by theorists’ characteristic attitudes toward social order and reality and, therefore, has not succeeded. Modern philosophy and other branches of normative argument based on it can be interpreted as a special technique of avoidance from the very contexts, the structures of our existence, which is doomed to fail. Thus, it is necessary to present a more adequate thesis of our shared human nature and its relation to the institutional order of society if we desire to realize a better form of social life.⁶

The second chapter will focus on Unger’s proposal of reconstructed normative thought, which is supported by his thesis of human nature. The main concern is to understand how he attempts to overcome the cult of Hume’s Guillotine and grasp the aims and practices of a revised style of normative argument that serves his intellectual and political program.

II . Critique of the Dominant Tendency in Contemporary Normative Arguments

This chapter examines Unger’s critique of the dominant style in contemporary normative arguments. Before going addressing this predominant style, however, let us have an overview of his criticism of social theory. This detour will help us clearly understand the kernel of the main discussion on the prevailing tendency in the present normative thought.

4 KP Postscript at 340.

5 Passion at 43.

6 FN at 365. Unger writes, “The program refuse to follow the main line of modern moral and political philosophy in the futile attempt to make normative argument independent of particular conceptions of self and society.”

Toward a Critique of Modern Social Theory

It is commonly acknowledged that “the dominant tradition of modern philosophy since Hume and Kant has emphasized the difference between the is and the ought.”⁸ Social theory was born within this modern tradition and reached its culmination in the late nineteenth century.⁹ Since its birth, “modern social thought affirmed its identity in part by the resoluteness with which it tried to overcome the loose confusion of normative and explanatory ideas.”¹⁰ Furthermore, social theory proclaimed its birth with a rebellion against the ancient notion that there is a supra-historical, universal human nature.¹¹ Its thesis indicates that human conduct can and should be explained and understood not by a supposedly universally shared aspect of humanity – human nature –, but by or through a relational, historically unique aspect of human life – society –.¹² Thus, in its path of struggling with its central, “sociological” question, “What holds society together?” – the problem of social order – modern social thought proposed solutions with the help of various theoretical assumptions and devices that were so designed as to dispense with the prescriptive, universal conceptions of self and society.

In one of his earliest works, *Law in Modern Society* (1976), Unger argues that the stage for the discussion of the problem of social order was set by a struggle between two traditions of thought, between what he calls “the doctrine of instrumentalism or private interest” and “the doctrine of legitimacy or consensus.”¹³ Modern social theorists considered these two approaches to be flawed owing to their one-sidedness, and therefore, deemed it to require reconciliation or synthesis. Unger contends, however, that the attempted reconciliation failed, and most importantly, their failure “has helped determine the present responsibilities of social thought.”¹⁴ Let us overview Unger’s discussion of these two doctrines, which provided the point of departure for modern social thought.

7 This section refers to his earliest work, *Law in Modern Society: Toward a Criticism of Social Theory* only, although I should have inquired into his *Social Theory: Its Situation and Its Task* to clarify his critique of social theory in a more complete manner. However, that would require another essay. My hope here is that by shedding light on the limitations of the approach that classical social theory took, even this incomplete examination could describe the direction a revised style of social thought we need should take. Furthermore, I hope to suggest that the present mainstream political philosophy and legal thought that a later section will examine can be understood as another series of the efforts to deal with the same issues as the traditional social thought did.

8 FN at 341.

9 LMS at 3-6.

10 FN at 341.

11 LMS at 5.

12 LMS at 23.

13 LMS at 23-37.

14 LMS at 24.

The first view of social order, the doctrine of instrumentalism, holds that “ men are governed by self-interest and guided by judgments about the most efficient means to achieve their privately chosen aims.”¹⁵ Thus, its two central themes are the primacy of individual purposes and the commitment to means-end judgments.¹⁶ It acknowledges that individual purposes tend to conflict with each other, and therefore, human coexistence needs to be mediated and coordinated by a system of rules: the main bodies of such rules are those of democratic process and market economy. Individuals regard these rules either as instruments or means to reach their own ends effectively or as the cost or sanction that they would have to bear if they were to act against the rules. Given this instrumental view of rules, the primary task of the doctrine of private interest is to show that the system of rules is established according to “ fair ” procedural rules, and that the commitment to those procedural rules accords with everyone’s self-interest in the long run.¹⁷

However, there is a hidden, fundamental incoherence in the doctrine, especially in its notion of rules. From the view of private interest doctrine, rules are abided by when individuals regard them as useful instruments to advance their purposes or when the fear of punishment exceeds the expectation of gains by their breach of the rules. However, none would agree that any rule or punishment regardless of its content or form, may be used as means to any end. That is, in order for a stable social order to exist and be sustained, we need moral standards that enable us to identify certain rules that demand our allegiance because of their rightness or goodness irreducible to individuals’ private interests or fears. A stable order is one whose legitimacy is recognized by its members. Thus, the doctrine of instrumentalism, in fact, smuggles in a non-instrumental view of rules.

The greater one’s reliance on private interest, privately defined, as a key to the explanation of conduct, the more acute the need to account for the possibility of social order by the existence of noninstrumental rules that ought to be obeyed, and in fact tend to be obeyed, independently of the individual’s calculus of means and ends. Yet, at the same time, the theory seems to imply that all rules are instrumental. It provides no basis for exempting certain features of social life from the reach of efficiency judgments.¹⁸

15 LMS at 24.

16 LMS at 24-25.

17 LMS at 26.

18 LMS at 29.

The second view of social order – the doctrine of legitimacy – rejecting the two assumptions of the first doctrine, begins with the assumption of shared values and beliefs that make human coexistence possible. Internalization of these values and beliefs is the key mechanism of social order. Thus, this doctrine holds a different view of rules than the first doctrine: rules are “manifestations of shared values.”¹⁹ Their important function is “to clarify the implications and the boundaries of these collective ends and to reassert them against would-be violators”²⁰ rather than to coordinate and mediate conflicting individual purposes or to prevent violation through the threat of sanction. However, the doctrine of legitimacy also suffers from fundamental flaws. First, it cannot explain the existence of conflicts meaningfully, and therefore, second, cannot explain the significance of the rules or laws themselves, for, “[l]aws are the creatures of, and the antidote to, conflict, which is the very aspect of social life the doctrine of legitimacy leaves unexplained.”²¹

Having understood the limitations of these two traditions, modern theorists rebelled against both of them. However, they sought to overcome them less by rejecting both views completely than by reconciling or synthesizing them, because they hoped to do justice to each doctrine's partial truths. As Unger suggests, this intention to take the partial truths of each view seriously was not mistaken; however, nonetheless, modern theorists were mistaken in the way to do so. They proposed explanations for how the two views of social order merge. It appears that their essential strategy for such explanations was to understand the existence of social order as a matter of degree. First, admittedly, legitimate shared values are crucial for a stable social order (concession to the doctrine of legitimacy); however, they are “always more or less limited in their extension, concreteness, intensity, and coherence,” and therefore, the stability, and by definition the existence, of social order is limited.²² Hence, second, there is always the need for rules or laws that serve as instruments both for the sovereign to stabilize social order and for the people to calculate the means-end judgment and the cost of their deviant conducts (incorporation of the doctrine of instrumentalism).

However, in the first place, this approach of synthesis fails to explain in what conditions or circumstances the values crucial for the legitimacy of social order can and should be shared among the people. By the same token, it fails to explain exactly what circumstances require or allow more of the explicit laws that serve people's self-interests to compensate for the incomplete

19 LMS at 31.

20 LMS at 31.

21 LMS at 32.

22 LMS at 34.

stability of order. In short, the approach fails to do justice to “ the relative importance of the internalization of group values and of the calculus of means and ends to different forms of social life, ”²³ and hence, “ it fails to ... define the social conditions under which one of them becomes more appropriate, as a description or as an ideal, than the other. ”²⁴

Indeed, for example, what Weber gives us with such conceptions as instrumental rationality and value rationality is “ a classification when what we need is a theory. ”²⁵ We need a theory that elucidates under what conditions, that is, under what forms of social life, each view of rules can claim not only its own appropriateness and but also the appropriateness of the ideal embodied within it, for example, in the instrumental view of rules, individuality or autonomy, and in the consensual view, sociability or communality.

What lesson do we have from these failures of the great modern social theorists? Unger writes in the conclusion of *Law and Modern Society* as follows. It seems to me that the passages, though extremely abstract, are of crucial significance, suggesting many essential conceptions that this essay seeks to understand.

The ultimate reason why no society can resolve its problem of order...is that neither of these two attributes of humanity [“ the individuality ”and“ the sociability ”to use his own words in this book] allows itself to be completely suppressed.

A society resolves the crisis of order insofar as it manages to reconcile individual freedom with community cohesion, and the sense of an immanent order with the possibility of transcendence criticism. The more perfect this reconciliation becomes, the more does the society’s emergent interactional law reveal the requirements of human nature and social coexistence. Thus people can find criteria with which to evaluate agreement and to define equality.²⁶

The thesis that the problem of social order is not so much a theoretical, or logical problem as a *political, or practical* one is suggested here. The solution to the problem of order depends on the *real* reconciliation of the essential conditions of human existence: individuality and transcendence, on the one hand, and sociability and immanence, on the other. Such real reconciliation depends on

23 LMS at 35.

24 LMS at 37.

25 LMS at 36.

26 LMS at 264.

our real practices of creating certain enabling conditions, that is, remaking the forms of social life.

If this is true, the task of the study of society must be to envisage such real social conditions – the institutional structures of society – and furthermore, to *execute* these conditions through real practices: that is, *politics*. This is why we need a revised practice and thought that will enable us to take institutional structures even more seriously than the classical social theory. For such an alternative style of social thought, therefore, the question “What should be our attitude to the structures?” must always come to the forefront.²⁷

Critique of Dominant Political Philosophy

Now, let us focus on the main discussion of this chapter: Unger's critique of the twentieth-century mainstream political philosophy and legal theory. The preceding pages were necessary (especially for the author himself) to fully understand the significance and limitation of this mainstream thought, for, this contemporary dominant tendency of normative thought – what Unger calls the “humanization” tendency²⁸ – can be understood as another major effort to reconcile the doctrines of instrumentalism and legitimacy. In the first half of the next passages, I will give a brief outline of Unger's critique of the predominant tendency in political philosophy represented by John Rawls's work. In the second half, I will discuss in a detail a critique of the dominant legal thought that I believe is most represented by another great figure, Ronald Dworkin.

First, let us consider the humanizing political philosophy (utilitarianism, social contract theory). In his first book *Knowledge and Politics* (1975), Unger categorized John Rawls's theory as a compound of utilitarianism and social contract theory (by Lock and Rousseau) and sketched its major conceptual devices in the following way.

Rawls's theory proposes a procedure for law making (the social contract theory aspect), and simultaneously, seeks to prove that this procedure would result in specific principal laws governing power and wealth (the resemblance to utilitarianism). It tries to show the procedure to reach substantive principles “by imagining a hypothetical ideal situation [the original position] in which men would be able to legislate without knowing their positions in society [the veil of ignorance], and thus without knowing what their particular values as well as real individual [the self] would be.”²⁹ Thus, we can understand Rawls's effort as an attempt to reach a set of master

²⁷ SA at 3.

²⁸ SA at 118-122. See also WSLAB at 170-182.

²⁹ KP at 87. See also ST at 37-38.

principles, and therefore, a standpoint that claims normative weight to evaluate the situation without any substantive conceptions of the self or human nature. However, it suffers the following difficulty concerning the abstract, and thus the least useful, nature of the principles. Unger writes:

The less concreteness we allow to the persons in the ideal position, the less will they have standards by which to legislate specific laws, leaving the problem of legislation unsolved. But the more they become like actual human beings, with their own preferences, the more will they be forced to choose among individual, subject values in the ideal situation itself.³⁰

Furthermore, Rawls's project would make almost everyone wonder if such master principles are really capable of universal application. The reader cannot help but wonder if the principles are given not through the ahistorical procedure but by the historical context in which the philosopher himself lives. He wonders if the principles less serve as a criticism of the existing structures of the particular society he resides in than represents a summary statement of its glorious history. At least, the principles appear to serve to vindicate the basic structures of the society compared to which, the theorist suggests, we cannot hope to get better ones. Unger makes this point explicit in a recent philosophical work *The Self Awakened: Pragmatism Rebound* (2007), suggesting that his attack on the Rawlsian project has more to do with its disappointing consequence in relation to the existing institutional structures than its logical shortcomings.³¹

Unger contends that the predominant political philosophy represented by Rawls's work does not do justice to "the ambivalent relation of our wants and institutions to the present order of social life."³² This is because our consciousness possesses a dual structure: we have desires and intuitions that take the existing order for granted, but we also have desires and intuitions that transcend and transform it (I will return to this important thesis later). However, mainstream philosophers claim to generate specific principles of justice only by degrading our context-transforming aspirations as deviant. Thus, the consequence is acquiescence to the status quo. Mainstream philosophers thereby teach us, "we cannot change society fundamentally. If we

30 KP at 87.

31 Indeed, in *Postscript of Knowledge and Politics* in 1983, he stated that his focus had shifted to the problem of concrete institutional structures of society rather than the abstract logical structure of the theory. The social theory that we need has to do justice to "how much of what goes on in social life depends upon institutional arrangements and imaginative assumptions that are taken for granted." Furthermore, the social theory we want has to incorporate the view that sees structures as capable of being renewed or recombined piecemeal rather than all at once; revolutionary reform becomes its characteristic image of change." KP *Postscript* at 338-339.

32 SA at 119. See also CLSM at 99-103, ST at 37-38.

could, the attempt would be too dangerous, as the adventures of the twentieth century demonstrate. Let us then make the best of a world we cannot reconstruct.³³ It is this attitude toward the existing society that Unger labels and denounces as the humanizing tendency.

Thus, it would never be surprising that the generated principles function to vindicate, and as a result, to normalize and naturalize, the existing institutional order. After all, the aim of humanizing political philosophy is to “place a metaphysical gloss on the homely practices of tax-and-transfer under the contemporary social democracy.”³⁴ Humanizing philosophy works as the ideology of the program of social democracy. However, unless we believe that social democracy is the only best program we can hope for, we shall not “be left to sugarcoat what we no longer dare to reimagine or know how to remake.”³⁵

Critique of Dominant Legal Thought

Second, let us discuss more closely the critique of the dominant legal argument. We witness that the humanizing tendency stands out in the contemporary legal culture as well. Humanizing legal theories “idealize the law as a repository of principles that embody impersonal right and of policies that advance the public interest.”³⁶ It is such a benevolent enterprise that seeks to improve the law by constructively interpreting it in its best light. Thus, it would be granted that its good intention is to protect the most vulnerable and least influential “minorities” by protecting their fundamental rights based on the supreme moral principle of such as “equal respect and concern,”³⁷ but nonetheless, it shall be betrayed by its own bad method as the following discussion shows.

In his polemical book, *The Critical Legal Studies Movements* (1983), Unger labels dominant legal consciousness³⁸ in the contemporary legal culture as “objectivism” and characterizes it as follows.

Objectivism is the belief that the authoritative legal materials – the system of statutes,

33 SA at 118.

34 SA at 119.

35 SA at 121.

36 SA at 119.

37 See generally R. Dworkin, *Taking Rights Seriously* (1977), *Law's Empire* (1986).

38 In this essay, I use the technical terms of “legal consciousness” and “legal thought” almost interchangeably. However, I understand the former as the one preferred when the analysts adopt structuralist approaches. This usage of legal consciousness represents one of the main strands in critical legal studies. See, Duncan Kennedy, *The Rise and Fall of Classical Legal Thought: with a New Preface by the Author, “Thirty Years Later”* (2006).

Legal Consciousness... refers to the particular form of consciousness that characterizes the legal profession as a social group, at a particular moment. The main peculiarity of this consciousness is that it contains a vast number of legal rules, arguments, and theories, a great deal of information about the institutional workings of the legal process, and the constellation of ideals and goals current in the profession at a given moment (at 27).

cases, and accepted legal ideas – embody and sustain a defensible scheme of human association. They display, though always imperfectly, an intelligible moral order. Alternatively they show the result of practical constraints upon social life – constraints such as those of economic efficacy – that, taken together with constant human desires, have a normative force. The laws are not merely the outcome of contingent power struggles or of practical pressures lacking in rightful authority.³⁹

It would be useful to go over the general history of modern legal thought to understand this characterization fully. According to Unger’s concise narrative of legal moments, the preceding – yet still alive – consciousness to contemporary objectivism is what he calls “ nineteenth-century legal science.”⁴⁰ “ The animating idea [of legal science] is the effort to make patent the hidden legal content of a free political and economic order. This content consists in a system of property and contract rights and in a system of public-law arrangements and entitlements safeguarding the private order.”⁴¹ This nineteenth-century version of objectivism relentlessly looks for the natural, predetermined legal content into various normative thoughts or theories presiding “ inside/outside ” legal materials: theories such as natural law theory, political philosophy, economic theory, and theory of human nature. Hence, for legal science, there is no clear line between legal doctrines and other moral, political or ideological discourses on society. Thus, although it is tainted by a false naturalistic premise, the project of nineteenth-century legal science indicates that legal analysis is about a scheme of human associations.

At the end of the nineteenth century and the beginning of the twentieth century, the natural law theory that mainly had sustained belief in the objective moral order began to lose its authority while legal positivism stood out with its defense of a clear distinction between legal discourses and other normative discourses – thus, we witness the influence of the Hume’s Guillotine in legal history as well –. The law, the legal positivism argues, is not a representation of the fateful natural moral order but a “ command issued by the uncommanded commander – the sovereign ” (John Austin). That is, the law is not to be “ discovered ” as given, but to be “ made ” by the autonomous

For Unger as well, legal consciousness contains complex information, among which the most important are the vision of law and the method of legal analysis. Furthermore, his thesis is that each moment of legal consciousness in history becomes superimposed on the preceding ones. As a result, the structures of legal consciousness have become highly complex in which distinct ideas of law and legal methods coexist. See WSLAB at 41.

39 CLSM at 2

40 WSLAB at 41-46.

41 WSLAB at 41.

human (the sovereign). Legal positivism's right message was that the law is a human-made artifact: that is, legal-institutional arrangements are always up for grabs. In other words, "[a] major virtue of positivism...is to acknowledge or even highlight the judicial lawmaking [that nineteenth-century legal science] obfuscates."⁴² However, the problem is that solely because it relentlessly severs the fact (the law) from the value (the morality), once the conceptually separate sphere of the "legal system" is set, the jurist tends to be preoccupied with the idea that the main issue for "legal" argument has to do with "coherence."⁴³ He believes that the legal *validity* of discrete judgments comes from their consistency with the higher law and ultimately with the "basic norm" (H. Kelsen) or "rule of recognition" (H.L.A. Hart) on which the system is based.⁴⁴ Thus, legal positivists precariously seek to reconcile "formalistic" and "realistic" positions by making use of a metaphor of areas. On one hand, in an area of so called "penumbra," a jurist "makes" laws at his discretion, but on the other, in the core area of certainty, the preferred method assumes the formalistic, syllogistic style.⁴⁵ In this way, legal thinking, regarded as a whim of the jurist in the former and as mechanical jurisprudence in the latter, would exhaust its genius as legal-institutional creativity.

However, objectivism resurrected in a diluted form in the middle of the twentieth century, and since then, it has once again occupied the central position in the legal culture. It is a self-conscious purposive legal analysis that attempts to reconstruct the entire bodies of legal material into an integral, consistent system based on impersonal moral principles and economical, political policies, taking those policies and principles as the representation of the purpose of law. To be certain, the objectivists have known the critique of natural law theory given by preceding legal positivists and, therefore, that which they mainly look into for the principles and policies is not "external" discourses but the "law" or the "legal" discourse itself: that is, the system of statutes, cases, and accepted legal ideas as a whole. For them, the existing authoritative legal materials are the representation of a defensible and intelligible moral or practical order that commands, with its normative authority, jurists and citizens to think and act in a certain way.

One might doubt if we really need this kind of rather pedantic conceptualization of objectivism:

42 Duncan Kennedy, *A Left Phenomenological Alternative To The Hart/Kelsen Theory of Legal Interpretation*, in *Legal Reasoning*: Collected Essays 153, 156 (2008).

43 Cf. Duncan Kennedy, *Thoughts on Coherence, Social Values and National Tradition in Private Law* in *Legal Reasoning*: Collected Essays 175 (2008).

44 Cf. Dick W.P. Ruiter, *Economic and Legal Institutionalism: What Can They Learn from Each Other?*, 5 *Constit. Polit. Economy* 99 (1994).

45 Cf. Kennedy, *supra* note 42.

he might suspect that we have only to highlight the jurists' familiar tendency to "stick with" legal materials because, after all, we all know their general tendency to be reluctant to practice legal arguments apart from the exiting legal materials. However, if it is true that the jurists stick with the law without any belief in or commitment to a certain underlying view of value structure or moral order, his "legal reasoning seems condemned to a game of easy analogies."⁴⁶ Or worse, his reasoning would end up with "mechanical jurisprudence" once again that helps to disguise his judicial "power." Thus, Owen Fiss reminds us that "[t]he idea of adjudication requires that there exist constitutional values to interpret, just as much as it requires that there be constraints on the interpretive process. Lacking such a belief, adjudication is not possible, only power."⁴⁷ Indeed, given that the meaning of the word "jurisprudence" is prudence of law, "mechanical jurisprudence" is no less betrayal of the law than an oxymoron. This mechanical style is not what objectivism identifies with. Thus, a critique of objectivism must begin with taking its commitment to a certain objective moral or practical order of human association seriously. Without this "internal view" of objectivism, we cannot explain or understand what it is. But then, what is wrong with this commitment?

In another book, *What Should Legal Analysis Become?* (1996), Unger redescribes the twentieth-century version of objectivism under the name of "rationalizing legal analysis."

[T]he same argumentative structure recurs in [rationalizing legal analysis]: the purposive ideal conceptions of policy and principle, whatever their substance, are partly already there in the law, waiting to be made explicit, and they are partly the result of the improving work undertaken by the properly informed and motivated analyst.⁴⁸

For example, according to Dworkin, one of the most influential rationalizing legal analysts not only in the U.S. but also in Japan, legal interpretation is "to impose meaning [serving some value, interest, or purpose or enforcing some principle] on institution – to see it in its best light – and then to restructure it in the light of that meaning."⁴⁹ Alternatively, Legal Process School calls the similar argumentative structure as "reasoned elaboration of purposive law."⁵⁰

46 CLSM at 8.

47 Owen M. Fiss, *Objectivity and Interpretation*, 34 Stan. L. Rev. 739, 763 (1982)

48 WSLAB at 37.

49 Dworkin, *Law's Empire* at 47.

50 See generally, H. M. Hart & A. M. Sacks, *The Legal Process—Basic Problems in the Making and Application of Law*, Foundation Press (1994).

The bold assumption of rationalizing legal analysis expressed in the above passage is not only that the existing law represents impersonal principles and policies that constitute a certain normative scheme, but also that the implications of the normative scheme overlap with any large portion of the received understandings of the law. The reason for this is as follows.

First, if legal argument is to analyze and evaluate “legal” materials and doctrines distinct from other “external” normative discourses, the analyst must be able to (a) keep the clear distinction between legal reasoning and other political ideological arguments, and at the same time (b) criticize some portion of legal understandings that fail to coincide with the justified and defensible principles and policies—notice that the “*some*” in the sentence (b) must mean “as small as possible.” However, what if it turns out, as a matter of fact, that there exists a large portion of legal materials that fail to fit the normative scheme for which the analyst claims righteousness? And what if as a result of this, he cannot help but reject as the mistake that large portion of the materials in light of the supposedly rightful scheme? Is this “legal reasoning” or the free-wheeling revision of the existing legal-institutional arrangements, that is, *politics*?

Thus, in order for him to believe that what he practices is “legal reasoning” or adjudication, he must assume both (a) that the normative scheme comes from within the law and (b) that the scheme contradicts a small enough portion of the received legal materials. In short, he must assume a dubious miracle that his imaginative scheme of principles and policies is able to explain and justify most portion of the law. Is it not an unbelievable miracle that a theorist’s imaginative world coincides with the complex, contradictory outcomes of the real democratic, adjudicative struggles by many people? After all, do we not know that the outcomes of democratic and judiciary conflicts—the statutes and judicial opinions—are inventive but contingent compromises answering for plural interests and ideals that would most often spill over from the normative scheme of the policies and the principles? However, the rationalizing legal analyst must suppose this miracle, whether consciously or unconsciously; otherwise, he could never be confident that he practices “legal” reasoning.⁵¹

Finally, if the analyst (falsely) assumes that “in theory” he is able to explain and justify the existing legal materials in light of those principles and policies with only a little rejection, then the policies and principles becomes – so the analyst concludes – “in practice” the useful, even rightful, and therefore, the necessary, natural normative scheme that any other analysts should use to criticize and eliminate any remaining anomalies that fail to fit the scheme.

51 For this manner of criticism of objectivism, also see CLSM at 8-14.

Unger encapsulates the discussion in a rather drastic way as follows, clarifying the gist of the discussion, which has to do with the analyst's attitude toward the institutional structure.

[Rationalizing legal analysis] represents the legally defined practices and institutions of society as an approximation to an intelligible and justified scheme of social life.... 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.⁵²

Thus, the rationalizing legal analysis has a twofold effect: first, objectification of a certain normative scheme in the mind of the analyst, and second, naturalization of existing social, legal institutions and practices. As a result of the reification of normative scheme and its relentless application by the analyst, the existing legal-institutional arrangements come to appear as the natural and necessary structures (“second nature”). These legal-institutional arrangements may come to appear as a rational and humane form of social life worthy of living in insofar as we believe in the idea that they are *the* institutional forms that represent the good policies and principles that would serve for the most people's happiness. To this humanizing teaching, however, we shall never be subject, now that we understand it to be based on dubious assumptions. Our ability to imagine and remake the institutional structures shall never be exhausted.

A Short Digression: a Preliminary Application of Critique of Objectivism to Legal Consciousness in Japan

In this digression, I would like to anatomize a few important cases with the help of the discussion explored in the preceding pages. A prominent constitutional scholar, Yoichi Higuchi has already presented a beautiful analysis of these cases,⁵³ but I will attempt to shed a different light on them from a broader perspective of critique of objectivism. Let me begin with the following two cases. In both cases, ruled by Osaka District Court, the plaintiffs are female employees (former or current) and the defendants, the employers (the corporation).

52 WSLAB at 39.

53 Yoichi Higuchi, *Kempo to Iu Sakui* [The Constitution as Artifact] 147-157 (2009).

Anatomy of a Few Judicial Opinions

Case 1. Wage discrimination based on sex. (Osaka District Court, Judgment July 2000; H.T. (1080) 126 [2002]),

Case 2. Wage discrimination upon a married female. (Osaka District Court, Judgment June 2001; Rodohohanrei (809) 5 [2001])

In Case 1, Okayama District Court rejected the plaintiff's entire claim, while in Case 2, it partly accepted the plaintiff's claim. That is, two similar cases on wage discrimination by the same Osaka District Court brought opposite rulings. What caused the difference?

Let me go examine Case 2 first. In this case, the plaintiff (X2) brought legal action against the defendant corporation (Y2) seeking compensation for damage and declaration of X2's higher position, a position into which X2 could have been placed if it had not been for the defendant's sex discrimination. The case alleged that Y2's discrimination against X2 concerning employment opportunities and promotion violates the principle of freedom of labor contract or Article 13 of the Labor Standard Law.* The Osaka District Court held for the plaintiff concerning a part of the compensation for damage, although it rejected other claims. The simple point in this case is that the court could declare the defendant's illegal discrimination referring to the plaintiff's concrete legal rights based on the statutory law, the Labor Standard Act.

*Article 3: An employer shall not engage in discriminatory treatment with respect to wages, working hours or other working conditions by reason of the nationality, creed or social status of any worker.

Article 13: A labor contract which provides for working conditions which do not meet the standards of this Act shall be invalid with respect to such portions. In such a case the portions which have become invalid shall be governed by the standards set forth in this Act.

Now, let me describe Case 1. In this case, the plaintiff (X1) brought action against the defendant corporation (Y1) seeking compensation for damage, alleging that Y1 engaged in discrimination concerning wage and employment promotion, by giving preferential treatment to male employees who were hired out of high school in the same way and around the same time as X1 was hired. The court found that there was wage and promotion disparity between men and

women and that the disparity was the result of the classification by which the corporation had traditionally recruited men as candidates for middle level executives and women as rank-and-file employees. The court also found that this way of classifying men and women reflected the employer's idea that hiring women was inefficient (This idea may reflect the prejudice that female employees generally retire after marriage). Thus, the court mentioned clearly that it is " nothing but discrimination based on sex that is against the spirit of Article 14 of the Constitution. "

Osaka District Court went on to present its legal theory: " Article 14 of the Constitution shall not be applicable directly to private conduct, while the Labor Standard Act does not contain a provision prohibiting discrimination based on sex with respect to recruitment, either. " Thus, the court argues that it must attempt to strike a balance between the corporation's constitutional right to " freedom of recruitment based on freedom of economic activities (Article 22) and property rights (Article 29), on the one hand, and " the accepted constitutional doctrine of unreasonable discrimination based on sex, " on the other. This means that the court employed so called " indirect application " approach to strike a balance between the constitutional right to freedom from discrimination and the constitutional property right.

However, soon after it referred to these countervailing constitutional values, the court gave the following statement.

It was by Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment Article 5 that the discriminatory treatment with regard to recruitment was prohibited for the first time... As of the 1960's when the plaintiff and others were recruited, the defendant corporation had no choice but to establish the most efficient labor management system in light of prevailing ideas in society and general length of women's service to the corporations.

In this way, the court ruled that the abovementioned classification shall not be deemed to be against public policy, arguing that there was no statutory law, and therefore, no concrete legal right concerning equal treatment of men and women with respect to recruitment. The argument could read that it assumes that the lack of a statute that polices the traditional system of recruitment almost naturally shows the general recognition of the system in Japanese society.

Then, what about the corporation's right to freedom of recruitment based on freedom of contract and property right? Let me first to refer to the following suggestive remark by a former

Supreme Court judge.

There is an idea of respecting the property rights that is supported by accumulated and well-elaborated legal doctrines in the judges' minds, and therefore, there is a general tendency of the property rights to occupy the predominant position in the value system of the law.⁵⁴

Indeed, any Japanese student of law knows that one of the most notorious judicial decisions (Mitsubishijushi Case. Supreme Court, December 12, 1973; 27 Minshu1536) vividly reveals its attitude of respect for property rights. According to the received view among constitutional scholars, the Mitsubishijushi case is the first in which the Supreme Court employed the indirect application method. In the Mitsubishijushi case, the Court said in the following:

The Constitution not only protects freedom of thought and conscience and equality under the law, but also protects a broad range of freedom of economic activities such as freedom to own and use property and freedom of business and others as human rights. Thus, the corporation has freedom of contract as part of such economic activities, and therefore, when they recruit workers they shall decide in principle freely what people and on what conditions they recruit unless otherwise regulated by statutes and other rules... To be sure, since a corporation holds a dominant position in relation to the individual workers, it cannot be said that there is no possibility that its way of recruitment has any influence upon the workers' freedom of thought and conscience. However, the abovementioned freedom of recruitment shall be deemed authorized to the corporation unless otherwise stipulated by statutory laws.

Thus, if we suppose that this idea of preferential position of property rights among judges' consciousness has been sustained by many other subsequent judicial decisions in lower and higher courts, the legal thinking by the judge in Case 1 may be described as follows—Of course, I must conduct a more extended, careful empirical study of a number of significant cases to corroborate this, but I would like to propose it as a daring hypothesis —.

54 Masami Itou, *Kenpo-gaku to Kenpo-saiban*, 59 *Kouhou Kenkyu* 23, 43 (1997)

It is found that there is no legal material concerning equal treatment of men and women with regard to recruitment. On the other hand, legal materials carefully designed to protect property rights spread into the every corner of the Japanese legal world. The Civil Code is the foremost sacred text. The fact that the existing legal materials are arranged in this particular form suggests that the system of freedom of contract and property rights constitutes the fundamental, indispensable structure of our society: it is the fundamental structure in the sense that it is less the outcome of political struggles for redistribution of powers and resources than the predetermined—thus natural and necessary—condition of a free society. Or it may well be assumed that the arrangements of legal materials—statutes, cases and doctrines—are the representation of our general will (or “Objective Spirit” (!)) about what form of society “We” think of as necessary and rightful to realize freedom. If the task of the judiciary is to protect and establish a free society, it must protect such a basic, rightful legal-institutional scheme of freedom: the system of contract and property rights. On the other hand, it can be assumed that constitutional principles of freedom of thought and freedom from discrimination have occupied only deviant positions in our law, given that there are almost no established statutes that protect these categories of freedom. And this fact suggests that the system of freedom of thought and freedom from discrimination is less predetermined conditions with the natural form indispensable for the realization of freedom than *artificial, political* arrangements: that is, it would depend on *political* decision-makings whether or in what institutional form these principles should be organized, about which, however, the Court has no legitimate authority or practical competency.

Yoichi Higuchi conceptualizes this characteristic way of thinking as “constitutionalization of private law.”⁵⁵ This thought identifies a certain institutional embodiment of the abstract, and therefore institutionally indeterminate, constitutional principles such as property rights in the existing most primary legal materials, the Civil Code. Once the institutional content of the Civil Code becomes constitutionalized, it has acquired the revisionary power to strike down the following legislation through constitutional invalidation. Thus, by resorting to “constitutionalization of private law” approach, a jurist is able to reconstruct the entire body of the law into an integral system consistent with the institutional order of the private law. As a result, the existing legal-

55 Higuchi, *supra* note 53 at 153-154.

institutional arrangements of private rights becomes entrenched and, in the end, naturalized.

The conception of “constitutionalization of private law” reminds us of the discussions of “substantive due process” in the U.S. The essence of the substantive due process approach consists in the method of (1) identifying the abstract term “liberty” in due process clause of Amendment 14 with the substantive right of freedom of contract, whose primary importance and institutional forms, so the analyst claims, have been represented and sustained by common law tradition of civil cases, and then, (2) in the light of this constitutionalized principle of freedom of contract, justifying the preceding and succeeding judicial opinions and legislation that fit in it. Indeed, Unger sees the judicial decision in *Lochner v. New York* (198 U.S. 45 [1905]), the leading case of the substantive due process approach, as one of the foremost examples of objectivism. “Lochnerism” as objectivistic legal thought is “fetishistic acceptance and constitutional entrenchment of a particular private-rights system against all efforts to redistribute rights and resources and to regulate economic activity,” and its central axiom is “a distinction between social arrangements that are politically constituted and social arrangement that are somehow just prepolitically there.”⁵⁶

We can refer to another important case, the *Shinrin-ho* case (Supreme Court April 22 1987) as an exemplary decision that reveals objectivism, although it can be said that it is a nineteenth century version of objectivism because it refers to a crude theory about the nature of modern society, through which we can perceive the court’s consciousness. The Supreme Court gave the following statement in this case.

The right to demand for partition of property in co-ownership has developed with the aim of realizing the public purpose [the public purpose of enhancing the economic value of the Thing owned by allowing each co-owner to control it freely] by leading the co-owners to *sole ownership as the principal form of ownership in modern civil society. The Civil Code has come to stipulate it.... as the essential attribution of co-ownership.* [Emphasis added]

A constitutional scholar, Junji Annen, anatomizing the discourses of the *Shinrin-ho* case in an impressive manner, points out that the passages distinctively suggest that the Court’s reasoning is based on the following half-conscious assumption or theory.⁵⁷ It is the theory that the definition

⁵⁶ WSLAB at 45-47.

⁵⁷ Junji Annen, *Kenpo ga Zaisanken wo Hogosurukoto no Imi*, in *Readings Gendai no Kenpo* Ch. 7 (Yasuo Hasebe ed., 1995).

of property rights in the Article 206 of the Civil Code (“An owner has the rights to freely use, obtain profit from, and dispose of the Thing owned, subject to the restrictions prescribed by laws and regulations”) represents a type of natural law rather than an artificial institution as an outcome of expedient policy-making in the legislature. Annen labels this theory as “prototype theory” because it regards the right to freely use the Thing owned as the prototype of property rights and therefore, thinks of this proto-type as the constitutionally protected institutional arrangement. He argues, “‘prototype theory’ [as] an institutional guarantee doctrine not only will control ex-post facto infringement of property rights but also will control what institutional form of property rights the legislature should design.”⁵⁸

Thus, the court’s reasoning can be paraphrased in the following way. Precisely because the institutional content of the property rights in the Civil Code expresses the prototype or natural form of modern free society, this content should be incorporated into the Constitution as the substance of the property clause of Article 29. And now that the prototype property has held the enhanced status of the constitutionally guaranteed institution, it shall exclude deviant institutional forms of property, such as co-ownership, from the entire Japanese legal system.

Once again, let me refer to Unger’s passage on objectivism: “[Objectivism] represents the legally defined practices and institutions of society [the property right in Article 206 of the Civil Code] as an approximation to an intelligible and justified scheme of social life [‘prototype theory’].” By doing so, it naturalizes the existing legal-institutional arrangements as if they are incapable of reconstruction.

The Significance of the Critique of Objectivism: the “Power” of Legal Consciousness

Thus, my hypothesis is that objectivism occupies the predominant position in the legal consciousness of the judiciary in Japan as well, and it has helped consolidate the structures of Japanese society. Especially as the critical review of the first two and the Mitsubishi case shows, what the objectivistic legal thought has produced and reproduced is a society in which the corporations hold great power over the employees, enjoying the immunity and privilege under the name of the constitutionally protected freedom of contract and property rights. Thus, objectivism has rendered a service to a characteristically Japanese form of social life, in which the corporations—the social powers—are entitled to establish their own citadels: that is, the effect of objectivism in Japanese legal culture is to preserve and reproduce the collectivistic, corporation-

58 *Id.* at 147.

oriented status quo.⁵⁹

However, my argument is not so much that the judiciary has taken sides with the corporation ideologically as that the legal consciousness—objectivism—has shaped and, thereby, canalized the judges' legal argument in a specific direction. Thus, my argument is that the judges' minds are so deeply structured by the predominant legal consciousness (the polemical theme of structuralism) that their reasoning cannot be explained by such conceptions as judges' willful value judgments for the development of the country's economy, or their preferential or ideological commitment to the interests of the corporations.

In fact, a familiar critique of adjudication (e.g., critique by legal realism) would explain that those judicial decisions reflect the ideological, political position of the judges who favor a corporation-centered society or collectivism. I do not mean to deny the significance of this critique, for there seems to remain, as a matter of fact, a conservative predisposition among elite lawyers. However, if that is the case, all the critics can propose would be either 1) to make the judge aware of his own ideological or value commitment so that he forces himself to practice a "value-free" analysis as it were (preach by legal realism) or 2) to make the judge so aware of his decision's social effect that he attempts to reach a more "reasonable" conclusion (one by sociological jurisprudence). To be sure, these teachings are no less important. However, it seems to me that these proposals have less to do with "internal critique."

By contrast, my internal critique of objectivism in Japanese legal culture suggests that the problem has more to do with the form of legal argument or legal thinking itself. A judge whose mind becomes canalized by objectivistic legal thought—that is, canalized by the belief in the natural scheme of moral and practical order embodied in the existing legal materials—may reach a particular conclusion that results in protection for the corporate interests without his commitment to the corporation-centered ideology, or with it being kept suppressed—with it being "bracketed" as it were—if he does in fact hold the commitment. Alternatively, it may well be that a sincere and knowledgeable judge who believes that his work is to practice "legal" reasoning to protect the defensible scheme of a free society would reach the same conclusion favorable to the corporate interests, precisely because the objectivistic legal consciousness commands him to rule not by his own moral or ideological hunch, but by the "law" that has the natural, rightful institutional contents. "It is not that the legal subject speaks the legal language

59 Cf. Yasuo Hasebe, *Rights of Corporations, Rights of Individuals: Judicial Precedents in Five Decades of Constitutionalism in Japanese Society* 73 (Yoichi Higuchi ed., 2001).

but that the legal language gets the subject to speak.⁶⁰ That is, the legal subject is subject to the legal consciousness—The structure as the power.

Thus, if a law student assumes his own task to criticize the consolidated structures of contemporary Japanese society—yes, *if he does want to realize his own ideological commitment at all, the commitment to the radical project for democracy*—his fundamental task should be to struggle with the predominant legal consciousness (i.e. the structure of thought) and to transform its form as well as its substance. He must grasp a new form of legal analysis. The motto here is that he must search for something new within the existing bodies of ideas and languages: “He must imitate the artist who makes the familiar strange, resorting to our understanding of our situation some of the lost and repressed sense of transformative opportunity.”⁶¹ This motto itself anticipates the revised form of legal discourses.

III. Roberto Unger’s Revised Normative Argument: Programmatic Thought; Internal Argument and Visionary Thought

Deviationist Doctrine or Legal Analysis as Institutional Imagination

Working assumption and “fundamental practices”

This chapter inquires into a revised practice of normative thought that Unger himself proposes: what he calls “programmatic argument.” According to Unger, pragmatic argument is to think and talk about a program of social reconstruction, addressing “both the major institutions of social life—the large-scale organization of governments, economies, and workplaces—and the fine texture of personal encounters and social roles.” (This essay mainly focuses on the former). What are the natures of programmatic argument? Why does Unger believe that we need such a style of normative argument? Where does its normative authority come from? The aim of this chapter is to paraphrase Unger’s answers to these questions.

Let us begin with keeping in mind the following working assumption of the discussion. Normative argument such as legal analysis or moral, political philosophy has no permanent and universal content. There is no eternal mode of discourse. All we have are the historically situated and relatively local and ephemeral practices (Unger’s suggestion in his lecture at Harvard Law

60 Motoaki Funakoshi, *Hotekigiron no shakaigaku he mukatte [Toward the Sociology of Legal Argument: CLS Reoriented]*, 55 Hoshakaigaku [The Sociology of Law] 175, 189 (2001)

61 WSLAB at 133.

School). Thus, we can always ask, "What should normative argument become to respond to the situation?" or "What is the most promising practice? What should we turn it into?" We understand all practices available to us to be, in principle, corrigible and capable of reconstruction. At the same time, however, Unger reminds us that "[s]ome of the practices are fundamental in the sense that they influence broad reaches of our experience and generate other, more short-lived or narrowly focused activities."⁶² According to him, only by taking these basic practices seriously and through reconstruction of them will we grasp an alternative style of normative argument.

What are these fundamental practices? Unger's aphoristic answer is illuminating. They are "us" or "our existences as practices": that is, "We are our fundamental practices."⁶³ Note, however, that we as fundamental practices are also capable of reconstruction. What characteristics do these basic practices have, then? One of the most common is that in such practices, we usually link the is and the ought consciously or unconsciously, and it is this link that the modern moral philosophers have been anxious and obsessed with. Thus, one of the most influential forms of the practices is to "attempt to draw guidance for action from factual conceptions of personality or society. The guidance consists both in the definition of certain ideals of individual or collective striving and in hypotheses about how these ideals may be most effectively realized. The ideals and the hypotheses cannot be clearly distinguished."⁶⁴

Furthermore, the following passages are of great significance as the essence of the discussion.

On an alternative characterization, the core of the practice... is the attempt to describe the conditions of empowerment or self-assertion. We simultaneously define a conception of self-assertion and an account of the requirement for its realization in the life of individual or the society.... [W]e cannot neatly divide the definition and the strategy. We must recognize that the view of self-assertion counts less as the depiction of a limited, contentious value, to be weighted against competing values, than as a summation of our striving for happiness. If the effort to formulate such views of self-assertion has a central theme, it may be the struggle to resolve the conflict between the imperative of engagement in shared forms of life and the dangers of dependence and depersonalization such engagement brings.⁶⁵

62 FN at 351.

63 Passion at 41, FN at 351.

64 FN at 351.

65 FN at 351-352.

Let us paraphrase the kernel of the passages. First, the fundamental practices consist in simply our strivings for happiness or self-assertion or empowerment. Thus, they incorporate the definitions of happiness or empowerment (“What does happiness mean?”). Second, when we strive for happiness, we think and talk not only about the definition of happiness but also about the strategy and the condition to realize it (“How can and should we realize it?”). Thus, we must recognize the close—reciprocal or more precisely dialectical—link between the definition and the condition of empowerment. However, the dominant forms of contemporary normative discourses have a tendency to refer to the basic abstract values or master principles such as liberty, equality, solidarity and others, when they talk about *the should*, that is, the prescriptive standards to evaluate concrete actions and forms of life, as if we could reach a solution to the problem of social thought, “What should society be? ”, the moment we become certain of which value is to be chosen.⁶⁶

Indeed, we witness such characteristic practices of referring to the master principles and the basic values in such controversies as between “liberalism” and “communitarianism,” especially in the context of American moral and political philosophy, as we saw earlier under the name of humanization tendency. Admittedly, these conversations have deepened the understandings of our moral intuitions to be justified by various views of goodness or righteousness, but we notice that, in fact, the participants in the controversies share a similar condition or strategy to realize each value they choose (e.g., a catalogue of basic human rights, and a certain mechanism of retrospective redistribution of resources and powers that supposedly compensates for the effect of individuals’ or organizations’ political and economical actions protected by the basic rights). If we look into each position (e.g. compare J. Rawls and M. Sandel) by asking the question “What are their attitudes to the structures of established organization?” we will find almost the same way of thinking in which the theorists resort to the abstract principles to justify or humanize the existing legal-institutional structures of social democracy. However, we must recognize that the view of self-assertion counts more as a summation of our striving for happiness, that is, as a multilevel amalgam of the definitions (the ideals or purposes) and the conditions (the measures or embodiments for their realization) of happiness.

66 This flawed attitude used to be actually Unger’s own as well when he wrote *Knowledge and Politics*.

Knowledge and Politics is marked by an all-or-nothing attitude toward mental and social structures...The clearest sign of this attitude is my search for the master principle or ruling mechanism that supposedly keeps a system of thought or a form of social life going. Once we identify the key elements, the argument of the essay implies, we can replace it (KP Postscript at 338).

See also ST at 36-37, in which he refers to this attitude as “tragic liberalism.”

Third, Unger suggests not only that the most basic sense of normative argument has to do with the discussion about the condition for realization of the values, but also that it has to do with the reconciliation of the conflicting, nonetheless indispensable, values and principles for humanity. Thus, the right question must be formulated less as “ Which value should be chosen as the master principle of social order (e.g., liberty or equality)? ” but as “ In what condition can we reconcile between liberty and equality ” or “ In what condition can we acquire more of equality and of liberty? ” The task to answer this question is indeed daunting, but as long as we recognize social theorists' responsibility as taking humanity seriously, we must heed thus widespread and tenacious characteristics that our fundamental practices assume.

However, remember once again that “ [a]fter all, the dominant tradition of modern philosophy since Hume and Kant has emphasized the difference between the is and the ought. ” If so, how can we rescue the fundamental practices from such ambulation by the Guillotine? Furthermore, how can we not repeat the failures made by mainstream modern moral and political philosophers?

Now, here is another important passage that follows the one just paraphrased. It is highly abstract, but I believe it is suggestive enough if we read it based on what we learn in his legal theory.

The views of self-assertion just mentioned support existential projects and social visions. Existential projects are an individual's plans to live his life so that the best and most important things will occupy their proper place; they are most often attempts to attain a happiness that does not depend on the instability of illusion or the surrender to routine. Social visions are efforts to imagine an intelligible and defensible ordering of a life in common. Each such vision trades the indeterminate conception of society for a unique model of human association or for several distinct models, meant to be realized in different areas of social life.⁶⁷

The conception of “ social visions ” as “ efforts to imagine an intelligible and defensible ordering of a life in common ” is extraordinarily important for the theme of this essay. (The other conception of existential projects is, of course, important as well, but to examine it is beyond the scope of this essay.) Indeed, the account of the conception reminds us of the previous discussion

67 FN at 352.

of criticism of objectivism or rationalizing legal analysis. The critique saw the drawback of rationalizing legal analysis in its predisposition to identify an intelligible and defensible scheme of human association with the authoritative legal materials—the system of statutes, cases, and accepted legal ideas—that sustain the existing institutional structures.

Although objectivistic legal analysis is deeply flawed in the way in which it practices legal analysis or so called “legal reasoning” by presupposing that the existing legal structure approximates a scheme of human association, it at least tells us rightly that legal analysis has three dimensions: “the authoritative rules and precedents; the ideal purposes, policies, and principles; and the conceptions of possible and desirable human associations to be enacted in different areas of social practice.”⁶⁸ In this sense, one of the most important, but least discussed, lessons from a close inquiry into legal materials is that law and legal thought are the most fecund repository of enacted social visions or conceptions of human associations. “Law and legal thought have been... the place at which an idea of civilization takes detailed institutional form. In law and legal thought, ideals must come to terms with interests, and the marriage between interests and ideals must become incarnate in practical arrangements.”⁶⁹ In other words, the law and legal analysis moves “at the level of full detail in representing the relation of practices and institutions to interests and ideals and in connecting the realities of power to the discourse of aspiration.”⁷⁰

Thus, legal thought is the reservoir of inspiration for novel practices and institutions. In this sense, we can fairly expect that “[f]ar more than the abstract doctrines of moral and political philosophers, these legal... traditions embody visions and projects that have withstood the test of experience enabling large numbers of people over long periods of time to make sense of their experience.”⁷¹ If this is right, legal thought can be understood as one of the most promising practices to be reconstructed in which we might be able to grasp, envision, and enact an alternative social vision. Once again, notice the difference specified in the following passage between the familiar form of legal argument and the revised style that we keep in mind.

Thus, a person who thinks of normative judgment as largely a matter of general principles used to criticize or justify particular acts, or one who sees it merely as a fancy way to redescribe a devotion to a desire, has a conception of the practice different from the

68 CLSM at 17.

69 WSLAB at 1.

70 WSLAB at 131.

71 Passion at 48.

theory developed [by Unger and us]. He therefore also has a somewhat different view of what it means to say: you should. [In contrast], [t]he should of the existential project or the social vision means: execute this project and enact this vision, or find a better vision and a better project, or else fail at self-assertion.⁷²

A reconstructed normative argument is to think and talk about social visions that will realize self-assertion, happiness or empowerment. It is more about detailed visions of institutional structures of society than about “value judgments” or “legal reasoning” within such structures taken for granted. This is what Unger calls programmatic arguments. Furthermore, his inspiring message to a student of law is that legal thought is one of the most seminal candidates for the practice that would inform us of how to think and talk about a better future life: legal thought can and should become the master tool for pragmatic thought.⁷³

Now, let us take a closer look at a revised style of legal analysis Unger proposes: what he calls “deviationist doctrine”⁷⁴ or “legal analysis as institutional imagination.”^{75,76} Legal analysis as institutional imagination contrasts with rationalizing legal analysis in that it holds persistent fidelity to “the should” of the execution in the preceding passage.

Legal analysis as institutional imagination: an example of internal argument

According to Unger, programmatic argument can be supported by two styles of normative

72 Passion at 48. See also the following passages in CLSM at 105. “[The content of the social ideal] is an analysis of the conditions of life that constitute freedom. Thus, it leads into the search for the concrete forms of institutional reconstruction and cultural-revolutionary practice that can make the end of freedom concrete.”

73 In *The Critical Legal Studies Movement and False Necessity: Anti-necessitarian social theory in the service of radical democracy*, he proposes a program of “empowered democracy,” which includes ideas for a revised system of individual and collective rights (immunity rights, destabilization rights, market rights, and solidarity rights); proposals for reorganization of the state (destabilization branch of the government) and economy (rotating capital fund); and the sketch of a new constitutional system, the details of which are, however, beyond this essay’s scope.

74 CLSM at 15-22.

75 WSLAB at 129-134.

76 I suspect that his proposal might be reinterpreted as a systematic methodology for socio-legal analysis. He suggests in *The Critical Legal Studies Movement* that his revised version of legal doctrine requires the following three bodies of supporting ideas. The first is a credible theory of social transformation, the second is a conception of the ideal that should guide the reconstruction, and the third is a conception of the proper relationship between law and society. One way to understand his discussion is that he indicates four distinguished branches (i.e., the revised method and the other three ideas) of socio-legal analysis or what he calls legal analysis as institutional imagination. With all these four branches or ideas, we are informed of the knowledge and practice to talk and think about a better future life. Hence, I suspect that if properly and actually pursued in a more specific manner, his reconstruction of legal analysis could be a highly ambitious undertaking whose inspiration toward the succeeding generations’ amounts to that of sociological jurisprudence by Roscoe Pound and others.

practice: what he calls “ internal argument ” and “ visionary thought. ” I understand that the revised legal analysis as institutional imagination is an exemplary practice of internal argument.⁷⁷

Unger’s critique of rationalizing legal analysis implies the aims and tasks of this alternative idea of legal analysis. First, one of its aims should be free from the two flaws of rationalizing legal analysis: what Unger labels as “ institutional fetishism ” and “ structural fetishism. ” Institutional fetishism has to do with the flaw of rationalizing legal analysis I closely discussed earlier: naturalization of the existing institutional arrangements. “ [I]nstitutional fetishism is the identification of abstract institutional conceptions like the market economy or representative democracy with a particular repertory of contingent arrangements. ”⁷⁸ On the other hand, according to Unger, structural fetishism has to do with the failure to do justice with the most important modernist insight of contextuality. Modernism has taught us that we are “ infinite imprisoned within the finite, ”⁷⁹ but the finite context that imprisons us can be remade into an alternative structure that differs in its quality as well as content (I will discuss this point of modernist insight more closely later). Thus, structure fetishism is the failure to recognize that we can remake or reimagine a more plastic, therefore more revisable, context that does justice to our infinite personality.

Another purpose of the new style of legal analysis can be described as enabling us to grasp the internal conflict or incongruence between the commitment to the ideals and the acquiescence in the institutional arrangements that frustrate their realization or impoverish their meaning, so that it can be free from the two drawbacks of rationalizing legal analysis. In short, “ it should seize upon the internal relation between thinking about ideals or interests and thinking about institutions or practices. ”⁸⁰

Now that its aims are understood, Unger explains, legal analysis as institutional imagination would assume the following two tasks: the descriptive task of “ mapping ” and the evaluative task of “ criticism. ” Mapping is an attempt to describe in detail the legally defined institutional microstructure of society in relation to its legally articulated ideals. Its task is “ to understand 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

77 CLSM at 18, FN at 367. However, the point is not to emphasize the distinction or distance between internal argument and visionary thought. Rather, it is to revise the traditional practices of internal argument such as legal doctrine and moral argument so that they “ incorporate more of the characteristics we traditionally attribute to visionary thought. ”

78 WSLAB at 129.

79 Passion at 4.

80 WSLAB at 129.

mixed economy,' 'representative democracy,' or 'industrial society.'⁸¹ In *The Critical Legal Studies Movement*, Unger skillfully carries out this mapping practice. For example, in terms of market economy (contract theory), we see a strange and surprising picture as we execute the practice of mapping. Here, I will not examine the details of his attempt to apply mapping practice to American contract theory, but the next oft-quoted passage from *The Critical Legal Studies Movement* is suggestive enough of what sort of picture mapping will provide.

First, there are the exclusions: whole areas of law, such as family law, labor law, antitrust, corporate law, and even international law, which were once regarded as branches of unified contract theory but gradually came to be seen as requiring categories unassimilable to that theory. Then there are the exceptions: bodies of law and social practice such as fiduciary relationships that come under an anomalous set of principles within the central idea of contract. Finally, there are repressions: problems such as the solutions provided by a theory oriented primarily toward the one-shot, arm's-length, and low-trust transaction, are nevertheless more often dealt with by ad hoc deviations from rules and ideas than by clearly distinct norms. When you add up to the exclusions, the exceptions, and the repressions, you begin to wonder in just what sense traditional contract theory dominates at all. It seems like an empire whose claimed or perceived authority vastly outreaches its actual power. Yet this theory continues to rule in at least one important sense: it compels all other modes of thought to define themselves negatively, by contrast to it. This intellectual dominance turns out to have important practical consequences.⁸²

Thus, mapping presents us with a complex and contradictory structure of the situation of each legal domain. It is filled with deviations and anomalies with which we can begin to reconstruct the legal-institutional order. With this picture, the second task of legal analysis works. Thus, criticism's task is to explore the disharmonies between the detailed institutional arrangements of society as represented in law and the professed ideals these arrangements frustrate and make real, or between those ideals themselves.⁸³ It tries to seize upon the deviations and anomalies and to imagine them transformed, or transform them in fact, into organizing conceptions and practices.⁸⁴

81 WSLAB at 133.

82 CLSM at 58.

83 CLSM at 19, WSLAB at 131.

Following is the simplest but most important point of the discussion. That which the legal analysis should focus upon and rescue is “ the middle ground of alternative trajectories of institutional and policy change.”⁸⁵ The *middle* means that it lies between the abstract ideals and principles, on the one hand, and the particular interests and desires, on the other. It is the sphere of institution and consciousness; the very heart of normative argument of today as well as of the past and future.⁸⁶

Toward Normative Authority: What is Visionary Thought?

Point of departure for a good from of social life: secular social doctrines of emancipation on a good social life

From the preceding discussion, we understand that the legal analysis revised as institutional imagination begins with the internal relation between thinking about the existing institutions and that about the ideals that the former supposedly serves to realize, and it attempts to imagine the ubiquitous deviations and exceptions as the germination of an alternative social order. This means that it starts by plainly acknowledging “ the subversive fact ” that we need to “ rely upon conceptions generated by a particular culture or enacted by a particular society.”⁸⁷ This fact is subversive, because we must admit that we can no longer claim to access to the authoritative revelation or the absolute, privileged intuition. But then, where can we find the criteria for good or better social visions that support the deviations and anomalies to be tapped by and to tap our institutional imagination? This theme pertains Unger’s suggestion that internal argument is supported by the democratic project. The conception of the democratic project consists of a picture of a reordered social world as well as the ideal of democracy. Unger calls the other style of argument that begins with such a picture of a possible reordered world as visionary thought, in contrast with internal argument.

This section attempts to grasp what visionary thought is and how it works to provide normative authority for our transformative practices. However, we should remember that a

84 CLSM at 9. See also Unger’ following guidance at 18.

You start from the conflicts between the available ideals of social life in your own social world or legal traditions and their flawed actualizations in present society. You imagine the actualization transformed, or you transform them in fact, if only by extending an ideal to some area of social life from which it had previously been excluded. Then you revise the ideal conceptions in the light of their new practical embodiments.

85 WSLAB at 131.

86 WSLAB at 13.

87 CLSM at 18, Passion at 40.

vision of a reordered society is not a utopian fantasy.^{88 89} Unger insists that “the political prophet can be understood and he can persuade only because the principles of the world he invokes may be discerned already at work in the anomalies of personal encounter and social practice.... If not internal to the interplay between ideals and institutions within a particular tradition, [every normative argument] must be internal to an analogous interplay on the scale of world history.”⁹⁰ Hence, we must always begin where we are. One may immediately notice that this theme of “we begin where we are” echoes with a tone of pragmatism. In fact, Unger believes that pragmatism should become the operational ideology of his project, because the genius of pragmatism is its “assertion of personal over the impersonal, the determination to begin from where we are, in our human world.”⁹¹ Thus, a visionary thinker must be not a vulgar utopian but an authentic pragmatist. However, before progressing to the discussion of pragmatism, let me briefly consider the most influential belief that represents the world history of modern thought, which we should take as a point of departure. It is the shared ground of great modern secular ideologies of emancipation: liberalism, socialism, and communism.

From a broad perspective, the perspective that identifies the structure of society as the central issue regarding human empowerment, the teaching of the secular doctrines can be interpreted as a shared faith in the characteristic view of individual and collective happiness. It is the faith in the provocative hypothesis of modern social thought that the human happiness consists in the creation of as less hierarchical and less rigid social structures as possible. In fact, the faith has to do with the modernist hope that our shared identity (human nature) will be gradually revealed as we succeed in the creation of a less repressive structure. Thus, Unger succinctly argues that all these secular doctrines “emphasize the link between individual or collective empowerment [or happiness or self-assertion] and the dissolution of social division and hierarchy.”⁹² “All hold that such dissolution depends upon the remaking of practical institutions. They differ, of course, in their understanding of institutional reconstruction (a voluntary act? a reflection of underlying forces?), in their specific proposals and their resulting evaluation of present society, and therefore also in their way of characterizing the content of empowerment.”⁹²

We witness that this faith has penetrated the contemporary law and legal thought as well. As

88 CLSM at 22.

89 Cf. William A. Galston, *False Universality: Infinite Personality and Finite Existence in Unger's Politics in Critique and Construction: A Symposium on Roberto Unger's Politics 14* (Robin W. Lovin & Michael J. Perry eds., 1990).

90 CLSM at 19.

91 SA at 54.

92 KP at 339, CLSM at 22-23, FN at 348, 364-365.

discussed earlier, the nineteenth-century legal thought holds a contrasting belief that there are the predetermined, natural structures that define a free society. Such “objective” structures consist in a certain system of rules and rights that, by definition, realizes human happiness—moral, political and economical freedom. Thus, according to nineteenth-century legal science, all jurists should do is enshrine such predetermined rights and rules, because their doing so means logically and necessarily holding up the free society and the protection of individual and collective freedom. In comparison with this naturalistic idea of predetermined objective order, the social conception of contemporary law and legal thought stands out. Contemporary legal thought acknowledges that human freedom, or “self-determination,” depends on more carefully designed, multileveled “practical conditions of enjoyment, which may fail.”⁹³ Even though frustrated by that humanizing tendency of rationalizing legal analysis, our knowledge that human happiness depends on the reconstruction of practical legal-institutional arrangements, always and already, defies what the tendency teaches us.

To this shared faith or the project based on it, Unger gives another name: the democratic project or democratic experimentalism, because the same broader viewpoint as we take to understand the major secular ideologies shows that democracy means much more than the conventional sense of party politics (“party pluralism and the electoral accountability of government to an inclusive electorate”⁹⁴). From this viewpoint, we understand that “the democratic project has been the effort to make a practical and moral success of society by reconciling the pursuit of two families of goods: the good of material progress, liberating us from drudgery and incapacity and giving arms and wings to our desires, and the good of individual emancipation, freeing us from the grinding schemes of social division and hierarchy.”⁹⁵

We see a strong faith penetrating the project, the faith in our effort and capability of remaking our own society less tainted with social division and hierarchy. It is the faith in our capacity as citizens and specialists, or rather participants in a collaborative experimentation of both, to remake the institutional arrangements as the condition for the realization of more of or more variety of happiness. Therefore, we shall call the most powerful faith democratic experimentalism.⁹⁶ Thus, we as modernists have identified our point of departure as the frustrated attempts by liberalism, socialism, and communism to advance the democratic project. We must push the democratic spirit to the hilt to rid our project of any naturalistic suppositions (false necessity).

93 WSLAB at 26.

94 WSLAB at 6.

95 WSLAB at 6.

Now, Unger argues for his project's advantage that it is distinct from "these doctrines in its holding of a far more inclusive view of possible institutional forms of human coexistence, a view focusing upon the conditions and consequences of our ability to alter the basic character of our relation to our established frameworks."⁹⁷ Here, he suggests that his program is *better* than the forerunners because it contains more inclusive conditions of human happiness, which are so arranged as to enhance our ability to remake social structures. This obviously means that he identifies the criteria to evaluate a state of social order as its capacity to advance human capability to reconstruct society. To fully understand the meaning of this contention, we must turn to his account of personality or human nature. We finally have come fairly close to a possible answer to the problem of how to dispel the cult of Hume's Guillotine.

Another point of departure: modernist doctrine of personality and radicalized pragmatism

In *Passion*, and his later work *The Self Awakened*, Unger develops his conception of personality or human nature.⁹⁸ The conception appears paradoxical or ambivalent, but nonetheless, he asserts that it contains the fundamental truth so that it can claim normative authority for social theory

96 This theme of "we make our own society" is indeed the very beginning and genius of the modern social thought. The opening remark of *Social Theory: Its Situation and Its Task* is more succinct.

Modern social thought was born proclaiming that society is made and imagined, that it is a human artifact rather than the expression of an underlying natural order. This insight inspired the great secular doctrines of emancipation: liberalism, socialism, and communism. In one way or another, all these doctrines held out the promise of building a society in which we may be individually and collectively empowered to disengage our practical and passionate relations from rigid roles and hierarchies.

See also the following passages about modern theory by a prominent Japanese political philosopher, Masao Maruyama.

Medieval man considered the prototype of all social relations to be natural and inevitable bodies (*societates necessariae*) like the family. Modern man, on the other hand, believes that whenever possible, social relations should be founded on the free will of the individual (*societates voluntariae*). Herein resides the real significance of the "discovery" of man in the modern period...The discovery of man does not mean recognizing the existence of man as an object, but that man began to be conscious of his autonomy. Until then man had fatalistically accepted the various social systems into which he had to fit. But now he found himself in a position to establish or abolish these systems freely according to his own will and ideas. Man, who used to act according to the social order, now began to act upon it. (Masao Maruyama, *Studies in The Intellectual History of Tokugawa Japan*, 225-226 (Mikiso Hanae trans., 1974))

Thus, this view of society as artifact, born in the real and theoretical revolution against the medieval society as the natural order, is the kernel of modern social thought. In modern social theory, human freedom is defined as autonomy from/upon the fateful social arrangements and as an autonomous creation of social arrangements themselves.

97 FN at 348.

98 Daid Trubek, *Pragmatic Thought and the Critique of the Social Disciplines* 233 in *Critique and Construction: A Symposium on Roberto Unger's Politics* 232, 233 (Robin W. Lovin & Michael J. Perry eds., 1990).

and programmatic thought. The aphorism is that the self is “an infinite imprisoned within the finite [context]”⁹⁹ or that “we all have an experience of consciousness, which is also an experience of infinity.”¹⁰⁰ It is absolutely true that we are “situated” as communitarianism tells us, but it is nonetheless true that we can transcend our social structures and even personality, our inner structure, itself as our world history teaches.¹⁰¹

Unger insists that to fully unravel and support the above conception of the self, we need “a reformed philosophy: a philosophy that refuses to close the list of our practices, or to interpret the list we have as the expression of a higher necessity, or to identify the list with our very selves.”¹⁰² It must be a philosophy as practice “by which we survey all other practices from a historicizing angle.”¹⁰³ It must be one that enables us to examine ourselves not from the metaphysical perspective but from where we are (a historicizing angle). Thus, in *Self Awakened*, Unger takes up “pragmatism as the philosophy of the age” as the starting point for such new philosophy to illuminate and awaken the self. He argues that pragmatism, especially when radicalized by being rid of its naturalistic premise, becomes the operational ideology of context-transcending capability.

Indeed, Unger’s aim is to turn pragmatism into a form of thinking that will advance the democratic project: the empowerment or “divinization” of the individual and the creation of democratic forms of social life that nourish the empowerment and divinization.¹⁰⁴ The following will offer an outline of the discussion central to what he calls “radicalized pragmatism,” focusing on the conceptions of human nature and empowerment and their relation to the institutional structures. (Although it is necessary to examine Unger’s critical discussion on

99 Passion at 4.

100 SA at 12.

101 Unger gives a short but vivid enough list of examples, which shows that we can transcend our social and personal contexts.

Even in our most accomplished exercises of analysis, as in mathematics and logics, we can never reduce our insights to ideas that can be justified and generated by a closed set of axioms; our powers of insight outreach our capacities of proof. Our ability to master languages is characterized by a recursive ability—a power to string words and phrases together in endless but significant combinations—a power to which linguists have given the name ‘discrete infinity.’ In the life of desire, we find at every turn that our most intense longings, attachments, and addictions constantly transcend their immediate objects. We ask of one another more than any person can give another: not just respect, admiration, or love, but some reliable sign that there is a place for us in the world. And we pursue particular material objects and satisfactions with a zeal that they cannot, and, in the end, do not sustain. Having relentlessly pursued these objects, we turn away from them, in disappointment and discontent, as soon as they are within our grasp. Only the beyond ultimately concerns us (SA at 13).

102 FN at 354.

103 FN at 354.

104 SA at 28.

central conceptions of the American pragmatists so that I should clarify how Unger justifies his usage of the label “pragmatism,” doing so would require for further careful research and another paper, for which once again, I must admit I am not yet prepared.)

Three ideas about the self in its relation to the institutional settings are central in radicalized pragmatism. They have to do with what Unger calls in *Passion* as the “modernist thesis about contexts.”¹⁰⁵ The first idea is particularity: “[w]e have our being in the particular bodies as well as particular societies and cultures shaped by discursive arrangements and beliefs.” The second idea is the infinity of our ability to change the content of the structure. “[T]he habitual settings of action and thought, especially as organized by the institutions of society and the conventions of culture, are incapable of containing us.”¹⁰⁶ “[W]e can always break through all contexts of practical or conceptual activity.”¹⁰⁷ The third idea is our capability to loosen the severity of context. We can innovate the character of our relation to the contexts: that is, we can change the quality of the structure. I assume that this third idea is Unger's most unique but perplexing theme and therefore needs a bit more explication.

Our activities fall into two classes: moves within a context and those about it. Moves within a framework, or routine practices, take the framework for granted. As a result, the context remains unchallenged and even invisible. This invisibility or inconceivability of a structure is the meaning of its consolidation or reproduction. In contrast, activities about the framework transcend and transform it piece by piece and step by step. Unger insists that society and thought can be so arranged to soften the difference between context-preserving activities and context-transcending activities: that is, we can indoctrinate the spirit of democratic experimentation into our society and thought. Democracy is just another name for an area where routine and revolution merge into revolutionary routine.¹⁰⁸

Thus, we have reasons to think that our empowerment consists in the effort to advance our possibility to transcend our contexts, an ability that most often remains suppressed in the restraining social structure. For us to be able to transcend the contexts means that we are able to reach a certain vantage point to master them so that we can remake them, and thus our own society. Furthermore, this means that we can create not just a society with any *substance*, but a society so arranged that it does more justice to our ability to remake it, one that possesses more

105 *Passion* at 7-15.

106 *SA* at 55.

107 *Passion* at 8.

108 *SA* at 56-57.

flexible and open structures so that enables its own ceaseless reconstruction—flexibility and openness as the *quality* of the structures.

Therefore, the point is not to place one-sided emphasis on the transcendent aspect of the self, but to reconcile or solve the paradoxical nature of the self. David Trubek elucidates this point as follows.

Unger's concept of the self seems to rest on paradox: There is no self outside of social contexts, but no context exhausts the possibilities of the self. But it is the resolution of this paradox that gives Unger's view of the self normative force for the social disciplines. This resolution comes from his notion of the relative "plasticity" of all social contexts, including discourses, relationships, and institutions. The more a context is plastic, the more easily it can be revised, the more it will permit self-realization, given the infinite possibilities and contextual nature of the self. The radical project, as Unger conceives it, involves the search for ever more revisable bodies of knowledge, personal relations, and social institutions, for these will free us *from* bad contexts and free us for good relations.¹⁰⁹

Therefore, we argue that it is *good* to let the extraordinary, nonetheless true, aspect of personality—the transcendental aspect—dance more freely, and we hope that it will result in more happiness and empowerment. Note, however, that this argument must come from a keen understanding of our situation. It draws on the polemical understanding that the structure of our society and thought is not flexible enough to do justice to the transcendental aspect of personality. Hence, the argument itself is historically situated and therefore based on the contexts of society and thought each student inquires into. As I suggested in *A short digression*, my hypothesis states that the structure of Japanese legal consciousness that I have to struggle with the most is not plastic enough being tainted with objectivism, although it is still such a tentative one that it requires more careful elaboration, which I cannot pursue in this essay.

Now, let us return to Unger's insistence that his program contains a far more inclusive view of possible institutional forms of human coexistence than modern secular ideologies of emancipation: liberalism, socialism, and communism. In what sense is his program a far more inclusive? His support for his own program is extremely bold and polemic. In fact, I think that we

109 Trubek, *supra* note 98 at 233.

need more intensive empirical research or at least a lengthier explication in order for his argument to be persuasive. However, the kernel or the purpose of the project may be understood clearly enough if one reads his following remark. It has to do with three varieties of happiness or good that we want.

The shortening of the distance between context-preserving and context-transforming activities is the price of practical progress, including economic growth and technological innovation. It creates a setting in which experimentalist cooperation can flourish. It enlarges our freedom to recombine people, machines, and practices in the light of emergent opportunity. It is a requirement for the liberation of the individual from a strongly rooted hierarchy and division: any scheme of rigid social ranks and roles [gender, race and others] depends, for its perpetuation, on the naturalization or the sanctification of the arrangements that reproduce it. And it gives a chance for a fundamental experience of freedom and empowerment: transcending selves and engagement with a particular world.¹¹⁰

Thus, Unger's view of social and cultural reconstruction attempts to advance three classes of empowerment, the classes which compose the greatest human capability, what he calls *negative capability*: first, our productive, practical capability that contributes to economical development; second, our freedom from any rigid structure of hierarchy and social division; and third, our emotional, passionate capability that will result from our confidence that we are so free and empowered that we can accept each other and our vulnerability.¹¹¹

But once again, remember the crucial point of the discussion. We must keep in mind that what matters the most is not so much the values (freedom, wealth, and solidarity) themselves but the practices and conditions to realize or to reconcile them. What matters is not so much abstract values or principles but more concrete proposals of institutional conditions and practices: proposals for a different social world itself.

The aim [of clarification of empowerment] is not to exalt a discrete value at the cost of others but to present a detailed vision of the strengthening of human life...[A social] vision combines a picture of the aims of our striving with an argument about the conditions for

110 SA at 57. See also FN at 363.

111 CLSM at 93-94, FN at 277-312.

realizing these aims.¹¹²

To envisage a detailed picture of the institutional requirement is the main task of Unger's programmatic argument. To be certain, "[s]ome institutional solutions may privilege one type of empowerment at the expense of the others": for example, they may enhance individual freedom while diminishing solidarity with other people. However, Unger's polemical thesis or commitment is that "no necessary or permanent conflict exists among the enabling institutional conditions of the several modes of empowerment. It is up to us to discover in our historical situation which conditions of each variety of empowerment also satisfy the other varieties."¹¹³

When we know, as you know, we already knew, that the existing institutional order fails to keep its commitment to its professed ideals of empowerment, we believe that we must criticize it; otherwise we must stop striving for happiness. When we must criticize it, we must be equipped to be able to do so. This equipment is a program that depicts another society composed of alternative forms of human associations in each major domain of life: e.g., market economy, representative democracy, civil society, school, family, and work place. This is precisely why programmatic thought as a practice of social reconstruction is an essential element of normative argument on society. With this vision of alternative forms of social life, we can pass judgment on the existing forms by asking whether they realize human empowerment and whether they empower the people by developing their transformative opportunities and abilities: that is, we can ask whether a structure enables or suppresses the people's activities of destabilizing and remaking the very structure itself. We can then continue to reconstruct our society and thought in the direction of deepening democracy by asking whether each initiative of reconstruction cultivates our transcendent, transformative ability and practice: our infinite personality. Thus, Professor David Trubek points out the significance of programmatic thought succinctly.

[Unger's program] makes a basic methodological point, illustrating Unger's contention that an adequate *theory* of society must include efforts to reimagine social arrangements. By insisting that programmatic thought is not just a by-product or "application" of social knowledge, but an essential element in its production, Unger makes his broadest challenge to current practices of social inquiry and illustrates the deepest roots and most ambitious

112 FN at 354.

113 FN at 363.

goals of his project. I believe Unger's call for programmatic thought is one we must heed.¹¹⁴

Normative authority comes from the future. From this vantage point of the vision of the future, we can and must evaluate our existing practices and institutions: their getting close to or, even though still far away from, their taking the same direction to, the vision is a sign of goodness. With this sign, we can and must execute their reconstruction, "or else, [we] fail at self-assertion."¹¹⁵

IV. Conclusion

This methodological engagement into Unger's complex, voluminous work shall be *our* point of departure. However, I must confess that I have not yet found the way for a constructive criticism of his project, except that his polemical proposals of institutional arrangements appear still too abstract to persuade one. Thus far, however, I have been deeply inspired and fascinated by his spirit expressed everywhere in both his critique of mainstream legal, political thoughts and in his strongly indoctrinated task of normative argument. This is why I have had a strong desire to understand his method as much as I can, at the risk of indulging my slow brain in abstract methodological conceptions. Furthermore, I knew that writing this kind of essay was *the* betrayal of his teaching suggested everywhere in his work: "Writing a book about somebody's books is *not* what we should do." However, I must have written it to know why Unger has believed that we must rescue a style of social study that proposes a large-scale program in this era of deep disappointment at such a program—the "Grand Narrative"—before I myself attempt to think and talk about society. Indeed, I have been taught by almost everyone who shares dissatisfaction with the existing society to try not to legitimize the status quo, but nevertheless try not to engage in dangerous or even futile attempts to envision society as a whole. They say, the best we as the discontented can and should do now is practice a small-scale rebellion against, deconstruction of, or escape from, the "power" of structures. I have been wondering if that is really the case. I have been suspecting that criticism would be incomplete if it fails to connect to construction, and that construction would reach every domain of social life if it wants to be complete. The only exception to those doctrines of escapism has been the work of Roberto Mangabeira Unger.

Now, I believe and have been encouraged that after grasping his method and its key conceptions, I, as one who takes Unger's project seriously, have to execute and practice this

114 Trubek, *supra* note 98 at 232.

115 Passion at 48.

revised method in greater detail in society and thought, even in the materials he offers to us. Doing so shall allow us to deepen our understanding of the method and possibly even revise it. Within this process of execution, we shall gradually be able to develop our institutional imagination. The materials are abundant, waiting to be reconstructed.