# ESSAYS

## UNGER AND MILTON†

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I propose to take Roberto Unger as seriously as he takes the questions he raises. One mark of his seriousness is his insistence on beginning at the beginning, asking each question as if it had never been asked before. As he puts it, with the combination of modesty and ambition that makes his voice so distinctive, "[M]y purpose will be to think as simply as I can about the problems I discuss. In our age, philosophy has won some triumphs because a few men have managed to think with unusual simplicity."[1]

Thinking simply about Unger, or trying to, means going back to his early work in an effort to understand more fully those later writings that have recently brought him public attention. I shall begin with *Knowledge and Politics,*[2] with a view toward identifying a structure of concerns that continues to underlie his more recent publications. For a while I shall try, quite uncritically, to lay out "as simply as I can" the very complex argument of a difficult book.[3] It is only when I turn to *The Critical Legal Studies Movement*[4] (and I shall make no attempt to characterize that movement, an effort that now constitutes a genre of its own) that I shall introduce my reservations and criticisms.[5]

My use of Milton is at once illustrative and polemical. In general the legal academy, even that part of it that admires Unger, has been puzzled and discomforted by him. This discomfort reflects, I think, the uncongeniality of theological discourse to the legal mind, and in linking Unger's thought to Milton's (with no suggestion of influence, although

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1. R. UNGER, KNOWLEDGE AND POLITICS 30 (1975).
2. *Id.*
3. *See infra* notes 26-105 and accompanying text.
4. Unger, *The Critical Legal Studies Movement,* 96 HARV. L. REV. 561 (1983).
5. *See infra* notes 106-77 and accompanying text.

influence is by no means impossible) I hope to provide a context in which the nature and direction of his project becomes clear. At the same time I am preparing the way for my most general conclusion about Unger,[6] which is that insofar as he is a religious thinker, concerned always to inform the particular moments of everyday life with the imperatives of a universal and Godly vision, he will never be able to fashion the politics for which so many of his readers wait. (Speak, Unger.)

## I

At a crucial moment in *Areopagitica* John Milton declares that "[t]hey are not skilful considerers of human things who imagine to remove sin by removing the matter of sin."[7] Milton's point is that sin is not a property of objects but of persons, and that therefore the elimination from the landscape of (supposedly) sinful objects will finally do nothing to eliminate or even reduce a sin that lives within, a sin that cannot be starved because it feeds on itself: "Though ye take from a covetous man all his treasure, he has yet one jewel left—ye cannot bereave him of his covetousness."[8] It follows then that no amount of *external* policing or surveillance will be of any effect, since the *internal* condition of sinfulness will not have been touched and the sin will "remain entire": "Banish all objects of lust, shut up all youth into the severest discipline that can be exercised . . . , ye cannot make them chaste that came not thither so . . . ."[9]

How then do you make them chaste? The answer, not surprisingly, is by focusing on the true object of correction and reform, the inner constitution of the sinner, and by laboring to alter that constitution so that it will "naturally" express itself in virtuous behavior. Such an alternation, should it ever be achieved, will involve the exchanging of one compulsion for another; where previously the individual, literally in the thrall of covetousness, was compelled to be covetous (covetousness was his essence), now what compels him is whatever principle of desire (e.g., to be chaste) lives in him as a constitutive force. The difference, then, is not between a state of bondage (to sin) and a state of freedom, but between two differing states of bondage; and in either state the possibilities for action will be defined not by some set of external constraints (whose presence or absence will finally be irrelevant) but by those inner constraints of which any action will be the involuntary expression. Milton's name for this

6. *See infra* notes 92-105, 159-68, and accompanying text.

7. J. MILTON, *Areopagitica*, in COMPLETE POEMS AND MAJOR PROSE 716, 733 (M. Hughes ed. 1957).

8. *Id.*

9. *Id.*

condition, in which the individual is at once free of external compulsions and yet bound by the securest of ligaments, is "Christian Liberty," which he defines in *The Christian Doctrine* as "that whereby WE ARE LOOSED . . . FROM THE RULE OF THE LAW AND OF MAN;"[10] but he adds that to be so loosed is not to be left free to do anything we like but to be given over to the even stricter rules that now reside within us and, indeed, *are* us:

> So far from a less degree of perfection being exacted from Christians, it is expected of them that they should be more perfect than those who were under the law . . . . The ouly difference is, that Moses imposed the letter, or external law, even on those who were not willing to receive it; whereas Christ writes the inward law of God by his Spirit on the hearts of believers, and leads them as willing followers.[11]

They will be willing followers not at this moment or at that moment but at every moment, since there will be no distance or tension between their own inclinations and the bidding of an *internalized* law. They will not be in that divided state Milton satirizes in the person of the man who, finding the demands of religion and morality too stringent, delegates to some "factor" (hired agent) the "whole managing of his religious affairs":

> He entertains him, gives him gifts, feasts him, lodges him. His religion comes home at night, prays, is liberally supped, and sumptuously laid to sleep, rises, is saluted, . . . and better breakfasted than he whose morning appetite would have gladly fed on green figs between Bethany and Jerusalem, his religion walks abroad at eight, and leaves his kind entertainer in the shop trading all day without his religion.[12]

This sardonic portrait illustrates the consequences of conceiving of law as an external check on individual desires; the law is experienced only as an alien constraint, and it does not enter into a relationship with those desires that might lead to their reformation. So long as law is a matter of what someone *else* wants you to do, what you yourself want will never be put into question. No genuine inner change occurs, merely the superficial changes that result from the perpetual conflict between public and personal wants. Moreover, the conditions of this conflict are accepted as natural and inevitable, and the possibility of transforming them—of bringing communal rule and individual desire together—is never seriously entertained. The result is a general, if varied, complacency in which everyone is satisfied with the state of his own knowledge and eager to impose that state on everyone else. The status quo is canon-

10. J. MILTON, *The Christian Doctrine,* in COMPLETE POEMS AND MAJOR PROSE, *supra* note 7, at 903, 1012.

11. *Id.*

12. J. MILTON, *supra* note 7, at 740.

ized, and the law becomes (ironically) the guardian of "received opinions"[13] in the name of a liberal tolerance, rather than a means of transcending opinion and ascending to the realm of truth.

For Milton this stasis is the worst product of a law that fails to reach the true source of error, not outward behavior but inward affections. It is a loss, he says, "[m]ore than if some enemy at sea should stop up all our havens and ports and creeks," for it "hinders and retards the importation of our richest merchandise, truth," and operates to "settle falsehood."[14] As it turns out, falsehood is defined as anything that is settled, a definition that follows from Milton's thinking of truth not as a property of the world, but as an orientation of being, an orientation that will never be achieved if one remains confined within the partial and local perspectives of custom and tradition. "Truth is compared in scripture to a streaming fountain; if her waters flow not in a perpetual progression, they sicken into a muddy pool of conformity and tradition."[15] From this negative definition (negative because it refuses, necessarily, to say what truth is) comes Milton's positive program, "perpetual progression," keeping the waters stirred up so that stagnation never can occur. In practice this means a continual refusal to be satisfied with any currently persuasive vision of what the truth is. The general rule is, distrust anything that makes a general claim, that claims to be something more than a way station along a road that is still to be traveled: "he who thinks we are to pitch our tent here, and have attained the utmost prospect of reformation that the mortal glass wherein we comtemplate can show us, till we come to beatific vision, that man by this very opinion declares that he is yet far short of truth."[16]

The politics that emerges from this epistemology is (as every school child once knew when *Areopagitica* was required reading) one of tolerance. Given that our visions are now clouded (now we see through a glass darkly), "if it come to prohibiting, there is not aught more likely to be prohibited than truth itself; whose first appearance to our eyes bleared and dimmed with prejudice and custom, is more unsightly and unplausible than many errors."[17] It therefore behooves us to prohibit nothing, but to welcome each and every voice that together, if in different tune, will form so many "brotherly dissimilitudes"[18] and "neighboring differences."[19] It is statements like these that explain why Milton has

13. *Id.* at 741.
14. *Id.*
15. *Id.* at 739.
16. *Id.* at 741.
17. *Id.* at 748.
18. *Id.* at 744.
19. *Id.* at 747.

been seen as an honored precursor of a democratic liberalism that centers upon the values of free inquiry and freedom of expression. But in fact, despite surface similarities, Milton's program is finally the antithesis of that liberalism. The similarity, of course, is in the toleration of differences, but in liberal thought that toleration follows from the severing of the realm of the political from the theological, an act that renders permanently unavailable the transcendent point of view theology assumes and to which it aspires; consequently, *all* one can do is honor the points of view held by individuals and make provisions through a political system for their peaceful cohabitation. Difference, then, becomes the bottom line, valued for its own sake and sanctified by being termed "individual freedoms" and "individual rights."

Milton, however, counsels not the managing of difference but its multiplication; and his aim is not to protect difference, in the sacred name of individual rights, but finally to eliminate it. That is why his insistence that we not pitch our tents *here,* on the campgrounds of any orthodoxy, is qualified by a future hope: "till we come to beatific vision."[20] Beatific vision names that state when all visions will be one and indistinguishable from the vision of deity. Difference then is only a temporary and regrettable condition, but one, paradoxically, that we must take advantage of if we are to transcend it. That is, since the glasses through which we see are presently, but differently, dark, the danger represented by any one of them—the danger that it will be mistaken for the glass of beatific vision—will be diminished to the degree that we are aware of all the others. It is by encouraging perspectives to proliferate that we minimize the risk of their settling into forms that limit our perception. In order to see further we must always be in the process of unsettling and moving away from the ways of seeing that now offer themselves to us: "The light which we have gained, was given us, not to be ever staring on, but by it to discover onward things more remote from our knowledge."[21] The entire process is named by Milton "knowledge in the making"[22] and the "constituting of human virtue,"[23] and it will not be completed, he acknowledges, until our "Master's second coming."[24] Meanwhile we must be ever on guard against the danger of freezing knowledge in its present form and making it into an idolatry; and our vigilance must continuously produce "new positions," new perspectives, which "were they but as the dust and cinders of our feet, . . . they may

20. *Id.* at 741; *see supra* note 16 and accompanying text.
21. J. MILTON, *supra* note 7, at 742.
22. *Id.* at 743.
23. *Id.* at 729.
24. *Id.* at 742.

yet serve to polish and brighten the armory of Truth."[25]

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Readers of Roberto Unger's work will have recognized in the preceding paragraphs the argument of his *Knowledge and Politics*,[26] a book written in 1975 before the full emergence of the Critical Legal Studies Movement, of which he is considered a major inspiration. The first half of *Knowledge and Politics*[27] is a critique of what Unger terms "the liberal doctrine," a related set of premises that, he asserts, "took their classic form in the seventeenth century."[28] Liberal doctrine comes into being with the denial of "the existence of a chain of essences or essential qualities that we could either infer from particular things in the world or perceive face to face in their abstract forms."[29] This denial creates the "modern conception"[30] of the relationship between nature and perception, in which "[i]t is possible to divide the world in an indefinite number of ways" but not possible to say that any of them "describes what the world is really like."[31] In the absence of a "master principle,"[32] a transcendent point of view, we cannot "decide in the abstract whether a given classification is justified," for the "only standard is whether the classification serves the particular purpose we had when we made it."[33] Indeed, it is precisely the realm of the abstract, of a perspective not already captured by some partisan vision, that is eliminated in the liberal, secularized, all too human world, which now becomes a landscape of ever proliferating particulars.

But even as modern man is committed by his denial of intelligible essences to this landscape, he is also committed to escaping it, because his practices depend for their justification on the abstract universality he elsewhere denies. He believes at once that "there is no direct appeal to reality, for reality is put together by the mind" and that "ultimately one can make a rational choice among conflicting theories [constructs of the mind] about the world."[34] These contradictory beliefs together form what Unger calls the "antinomy of theory and fact," the irresolveable conflict between two ideas to which modern man pledges allegiance:

25. *Id.* at 748.
26. R. UNGER, *supra* note 1.
27. *See id.* at 1-18, 29-144.
28. *Id.* at 3.
29. *Id.* at 32.
30. *Id.*
31. *Id.* at 31.
32. *Id.*
33. *Id.* at 32.
34. *Id.* at 33.

"the mediation of all facts through theory and the possibility of an independent comparison of theory with fact."[35] Behind this antinomy stands the "radical separation of form and substance, of the universal and the particular, for that separation is the basis of the difference between general ideas . . . , which are formal and universal, and the understanding . . . of individual events, which is substantive and particular."[36] In our practices, both scientific and social, we seek and assume the availability of a justification for our particular judgments; but our general conception of the human condition after the demise of intelligible essences—of unmediated knowledge—tells us that particular judgments are all there are.

The psychological form of the antinomy of fact and value is the antinomy of reason (conceived of as a formal universal) and desire. In a liberal world the individual is a bundle of appetites that are arbitrary "in the sense that we cannot determine what to want"; that is, we cannot "us[e] reason to justify their content."[37] The reason is that reason does not have desires; that's what makes it reason. Reason can *point out* desires, describe them, but the moment it acts to *prefer* one desire to another, it has become a desire itself, and is no longer reason, no longer formal and universal. Conversely, desires have no reasons except for the reasons they imply, which are not reasons at all since they spring from desires and cannot legitimately be cited in support of them. Were desire truly to submit itself to reason it would become absorbed by reason and cease to be itself. Reason cannot take serious note of desire without compromising itself; desire cannot defer to reason without denying itself. Desires cannot be the objects of rational choice because choice is the antithesis of desire, but rational choice is nevertheless honored as the only basis of a civilized society, of a society in which desires do not go unchecked. (Of course, in argument and council desires are often urged in the context of "reasons," and one does reject certain courses of desirable action by saying that they are wrong; "[b]ut the reason for this is that whenever we act we always have a host of goals other than the one to which the activity of the moment is directed, and we do not allow all our ends to be sacrificed to the achievement of an immediate objective."[38] That is, the preferring of one desire to another follows from a calculation of desire, of what we want *more*: "the priorities among conflicting ends must be settled by the will."[39])

35. *Id.*
36. *Id.* at 35.
37. *Id.* at 42.
38. *Id.* at 44.
39. *Id.*

Liberal politics mediates (and mimes) the antinomy of reason and desire—an antinomy that is the very structure of the liberal self—by dichotomizing human behavior into two opposed and ultimately irreconcilable realms, the public and the private:

> Since men are made up of the two different elements of reason and will, they move in two worlds only precariously bound together. When reasoning, they belong to a public world because knowledge, to the extent it is true, does not vary among persons. When desiring, however, men are private beings because they can never offer others more than a partial [i.e. partisan] justification for their goals . . . .[40]

Obviously this division merely reproduces in the larger society the split that is constitutive of liberal consciousness, leaving two spheres that show blind faces to one another: in the public sphere desires go unacknowledged (that, at least, is the fiction) except as forces that must be contained, and in the private sphere desires reign uncurbed and a man can do as he likes, trading in the shop of his appetites like Milton's "enlightened" moderu, free from the pressure of general censure and constraint. One sphere "assert[s] the priority of the good [the content of desire] over the right"; the other "the priority of the right [of the impersonally just and true] over the good."[41] Pleasure on the one hand, and principle on the other, triumph in their separate compartments, and human life is forever disunified.

Moreover, any effort at unity is doomed to failure, because "no synthesis of the two seems possible within liberal psychology."[42] This is so because the demands of the two realms do not allow them to interact or cooperate. Cooperation would require, at the very least, recognition of the one by the other. But since desire is arbitrary, and springs from personal appetite, it can only recognize the dictates and strictures of reasons as the expressions of someone else's desire, and it will reject them as illegitimate impositions. And since reason is by definition neutral—not oriented in this direction or the other—it can only note the existence of desires as items in a purely formal world; it cannot recognize them for what they are, and therefore it cannot say anything about them. To put it another way, the only imperative that reason might direct at desire is "be reasonable," but since reason is by definition "neutral toward the purposes [desires] of specific individuals,"[43] the imperative can never make contact with its object; for there to be contact, the "golden rule" of reasonableness would have to be more than an "empty shell," would

40. *Id.* at 45.
41. *Id.* at 51.
42. *Id.*
43. *Id.* at 53.

have to be "filled up" by something "concrete," that is, particular;[44] but once that happens, reason is no longer neutral but is all mixed up in the world of purposes from which it must keep its defining distance.

The antinomy of reason and desire is therefore ineradicable, and

> it is a fate that falls with terrible force upon those whose moral experience the principles of liberal psychology describe. Its mark on everyday life is the unacceptability, indeed the incomprehensibility, of the two halves of the self to each other. For reason, when it sets itself up as moral judge, the appetites are blind forces of nature at loose within the self. They must be controlled and if necessary suppressed. For the will, the moral commands of reason are despotic laws that sacrifice life to duty. Each part of the self is condemned to war against the other.[45]

This war plays itself out in the alternate claims of the public and private lives. "Public organization strikes the private [desiring] self as a preordained fact in whose making it had no part. Private interest . . . has, for the public [reasoning] self, the appearance of enslavement to blind instinct and ambition."[46] "Thrown back and forth between [the] two," the self "cannot accept either as a resting place."[47] The result is a politics that has exactly the form Milton critiques in the *Areopagitica*:[48] an external constraint (public morality and law) asserts itself against an inward orientation that can only perceive it as threat and coercion and therefore cannot respond in any constructive—i.e., self-reflective—way to its pressures. Consequently, the whole of life becomes an endless succession of momentary adjustments of two contending forces—an unjustified law and an unjustifiable desire—to one another. The best that government can do (and indeed this becomes the stated goal of liberal politics) is to guarantee, or *claim* to guarantee, a minimal level of formal procedure—of due process—so as to allow contending desires equal access to the battlefield on which they must endlessly fight. In this dreary landscape the face of things is continually changing, but genuine change of the kind that would provide desire with a justification outside of itself, and reason with a content that was not merely formal and therefore empty, seems forever unavailable.

The great *desideratum,* then, is to find a way out of the liberal antinomies of fact/value, reason/desire, public/private, to bring together in fruitful cooperation the two halves of a sterile and stagnating antagonism. The second half of *Knowledge and Politics* is concerned to set us

44. *Id.* at 53-54.

45. *Id.* at 55.

46. *Id.* at 60.

47. *Id.*

48. *See supra* notes 7-25 and accompanying text.

on that way,[49] but it begins by first considering and then dismissing one facilely attractive route:

> One way to solve the problem of the universal and the particular, and thus the antinomies of liberal thought, would be simply to deny its terms. Instead of assuming the separation of the universal and the particular, we would start off from the premise of their identity. Thus, in a single move, we might stand liberal thought on its head in the hope of escaping from its internal contradictions.[50]

The trouble with this "single move," this version of Hamlet's "thinking makes it so,"[51] is that it ignores the important truth the liberal antinomies tell us about our present condition, its distance from the more ideal condition in which the internal contradictions of liberal thought would not be felt. One does not bring about the union of reason and desire simply by declaring them to be unified; all such declaration accomplishes is the weakening of any impulse to critical analysis and reform, since, if reason and desire are *already* one, all impulses "have become by definition the good"[52] and there is no longer any bite to the "notion that the world might [now] be different from what we think it ought to be."[53] Consequently, we fall into "the sanctification of actuality,"[54] forgetting that our goal should be "the transformation of society."[55] The problematic of the universal and the particular cannot be theorized out of existence; it must be grasped in a way that both acknowledges the inadequacies of which it is the formulation and refuses to acquiesce in those inadequacies as a liberal politics—concerned to protect difference, but without any vision of its transcendence—will always do. "We need a way to make the universal and the particular at once the same and different."[56]

That way is found in a recharacterization of the universal and the particular in which the former is expressed by the latter, but never limited by it. That is, the universal is not an empty formal structure, but something that "always exists in a concrete way"; but that concrete way does not exhaust the meaning of the universal "or its possible modes of existence."[57] It thus becomes possible to say that the universal and the particular are at once the same and different. They are the same in that one could not have a form independently of the other; the universal needs

49. *See* R. UNGER, *supra* note 1, at 18-24, 137-295.
50. *Id.* at 137, 139.
51. W. SHAKESPEARE, HAMLET act II, sc. ii, l. 250 (H. Jenkins ed. 1982).
52. R. UNGER, *supra* note 1, at 140.
53. *Id.* at 139.
54. *Id.*
55. *Id.* at 141.
56. *Id.*
57. *Id.* at 143.

particulars into which to flow, and the particulars acquire their meaning and significance as instantiations of the universal. They are different because the universal is always more than any one of its instantiations, more even than their sum. Indeed, under this conception, the universal is not fixed, but is "the open set of concrete and substantive determinations in which it can appear."[58] Because the set is open, that is, because history brings with it more and more opportunities for concrete determination, the universal is always being changed by each new partial expression of it. The ideal and the actual do not exist in opposition to one another, nor are they merely names for the same static thing; rather they emerge together as a set of possibilities that is always finding a manifestation of itself that it is at the same time always exceeding.

Unger declares that human nature is itself such an open set, a universal filled out by the actions of particular individuals, but never wholly captured in those actions:

> [H]uman nature is neither an ideal identity that subsists in its own right [as a purely formal structure] nor a mere collection of persons and cultures [just a name for what already is]. Instead, it is a universal that exists through its particular embodiments, always moves beyond any one of them, and changes through their sequence. Each person and each form of social life represents a novel interpretation of humanity, and each new interpretation transforms what humanity is.[59]

What this means is that the nature of human nature is not settled but is always in the process of emerging as persons relate to the world in ways that define both the world and themselves as bearers of human possibility. In the absence of a fixed human nature, of a formal universal, the substantive universal that is human nature is always up for grabs. "[A]ll choices," declares Unger, "imply a decision about the kind of person one wants to be"[60] and therefore a decision about the emerging and changing shape of human nature. "Humanity consists in a continuous predicament and in the kinds of relations to nature, to others, and themselves with which persons respond to that predicament . . . ."[61]

In social terms the predicament is experienced as the tension between the integrity of the individual and the demands of community. (Duncan Kennedy, one of the leading proponents of Critical Legal Studies, calls this the "fundamental contradiction."[62]) The individual can only know himself in his relations with others, but insofar as he is defined

58. *Id.*

59. *Id.* at 195.

60. *Id.* at 204.

61. *Id.* at 246.

62. *See* Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211-13 (1979).

by those relations, he is in danger of losing his individuality (obviously this is the liberal antinomy all over again):

> To be an individual one must win the recognition of others. But the greater the conformity to their expectations, the less is one a distinctive individual .... The self is individual and it is social. But the requirements of individuality are in conflict with the demands of sociability in a way that does not seem immediately capable of solution.[63]

That is where liberal thought stops and resigns itself to keeping minimal order, but transformative thought chooses to see this dilemma as an opportunity, "as a circumstance in which others are complementary rather than opposing wills in the sense that to join with them in a community of understandings and purposes increases rather than diminishes one's own individuality."[64] Rather than seeing the other as a representative of a competing vision of what human nature should be, transformative thought sees the other as one of the many instantiations or interpretations of human nature that are necessary to its full emergence. Difference no longer marks conflict between irreconcilable individual wills, but marks rather the various but not opposing paths individual wills follow in their pursuit of a single goal. (The apt comparison is to Milton's "brotherly dissimilitudes."[65]) One therefore welcomes, indeed prizes, perspectives other than one's own as contributions to the end for which everyone works, the end that defines and gives shape to everyone's labors, labors that are therefore at once different and the same.

The model for this generosity toward others that returns as a credit and *addition* to the self is, not surprisingly, the Christian practice of loving one's neighbor as oneself and for the sake of the God who made both:

> To the religious man, every other person is a particular manifestation of the universal substance in which the soul, including his own soul, consists, and this universal substance is inseparable from its particular embodiments. Such a man cannot prize God or himself without prizing others as the individuals they are.[66]

Such a man is at once partial and many-sided. He is partial because he is situated in a particular historical position; but he is many-sided because he views his actions in that position as in concert with the actions of others whose different situation gives them a vantage point he cannot directly enjoy. The more he is able to see his efforts in this way—as one form of the human nature everyone is trying to express and construct—the larger they are, despite their partiality, for even as they are made, they will be made both for him and for the sake of those others

63. R. UNGER, *supra* note 1, at 217.
64. *Id.*
65. *See supra* note 18 and accompanying text.
66. R. UNGER, *supra* note 1, at 218.

with whom he is a co-striver; and at some point the exertions of such a man will "have become a gift to the entire species,"[67] a gift that is returned to him in the form of an enlargement of the self that he has been willing to lend to a common project.

The presence in the world of such an enlarged and enlarging self is contagious: he "cannot rest, or play, or even dream in peace until he has awakened his fellows from their slumber as he was awakened by others."[68] The slumber is the slumber of partiality as a prison forever separated from the universal; the awakening is to partiality as a participation in and fashioning of the universal. As more and more awakened selves see themselves in this way and act accordingly (differently but in the same spirit), the sense of shared purpose existing through a diversity of practices will result in the emergence of a "community of sympathy,"[69] a community marked by "conditions of diminishing domination,"[70] for each will see every other as affirming his own nature; furtherance of the others' ends "would mean the advancement of one's own," and "[t]he conflict between the demands of individuality and of sociability would disappear."[71] At that moment, all the other antinomies that fracture liberal thought will disappear too. Reason will be one with desire, because what the individual wants—to be more and more expressive of the essence of human nature—will also be the rule or norm against which he measures himself, and, of course, finds himself still wanting (pun decidedly intended). Fact will be one with value because every thing and action in the world will be seen and engaged as a manifestation of a controlling aspiration. Public will not be distinguished from private, because the act of the individual will simultaneously be his own and belong to the community that the act is even now building. The realm of the extraordinary—of those moments in which one grasps the disparity between what man is and what he could be—will pass over into the realm of the everyday. Indeed, there will no longer be any distinction between them, as the awakened man sees "the task he has set himself . . . before his eyes at every moment and in every circumstance."[72] It is to that task that Unger calls us in remarkably affecting terms, inviting us to be among those "who are able first to anticipate, then to recognize, but

67. *Id.* at 224.
68. *Id.*
69. *See id.* at 220-22, 224-26.
70. *Id.* at 225.
71. *Id.* at 220.
72. *Id.* at 224-25.

finally to embrace perfect being in imperfect, and fugitive, earthly form."[73]

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This last sentence, which has the ring of a conclusion, ends Unger's fifth chapter, but there is a sixth chapter, and it draws us back from the glorious promise of the sentence by reminding us of what stands between us and the embracing of perfect being. First there are the dangers that are the several faces of liberal politics: resignation, utopianism, and idolatry. Resignation is "acquiescence in pure partiality and the abandonment of the universal part of the self as a hopeless dream. The person is completely absorbed in his concrete social position and identified with it."[74] The same person may come to recognize the universal part of himself, but see no connection between it and the necessarily partial nature of his everyday life. He will have fallen prey to utopianism, "the tendency to define the good in such a manner that it cannot be related to the historical situation in which one finds oneself."[75] Or alternatively he may see all too close a connection between the historical situation in which he finds himself and the realization of the universal; he may think that the universal is already fully actualized in the forms his behavior routinely takes. Like Milton's journeyer, who pitches his tents "here" in the conviction that he has no further to go,[76] he will then be committing idolatry, "mistaking the present situation . . . for the accomplishment of the ideal";[77] he will accept the imperfect as the perfect and remain forever a prisoner of the social and political structures that mirror his complacency.

Although they are distinguishable, resignation, utopianism, and idolatry all have the same effect: they inhibit change and reaffirm the status quo. The resigned man sees no alternative to the imperatives of his own social and political situation, and he devotes himself wholly to those imperatives. The utopian man sees that there exists a mode of being more full and satisfactory than that which he now knows, but believes that his vision of the ideal is wholly discontinuous with the present state of things and that he "has no choice but to worship established power as a mystery [he] cannot grasp and as a fact [he] cannot change."[78] And the idolater, having mistaken "[t]he existing consensus . . . for the final ex-

73. *Id.* at 235.
74. *Id.* at 223.
75. *Id.* at 237.
76. *See supra* note 16 and accompanying text.
77. R. UNGER, *supra* note 1, at 236.
78. *Id.* at 237.

pression of the good,"[79] will naturally regard dissent as evil and change as corruption, and will fall easily into a conservative politics that "is always on the verge of becoming oppression."[80]

Against these dangers Unger poses a politics that is the direct descendent of Milton's, a politics of perpetual distrust and perpetual progression, a politics that "emphasizes the transitory and limited character of all forms of group life as manifestations of human nature."[81] Such a politics "will be committed to the plurality and diversity of groups, and it will prize the conflictual process through which community is created and made universal above the preservation of any one collectivity."[82] It will neither reaffirm the status quo by idealizing it nor celebrate change and disruption for their own sake; rather, it will utilize change and disruption as necessary mechanisms for the continuing of the journey toward a stability that would represent the domination of no one because it would mark the triumph and the emergence into full being of everyone.

Merely to rehearse the promise of such a politics, however, is to raise the question Unger is now obliged to answer, and indeed it is the question with which he opens this final chapter: "How can the ideal be realized in everyday life?[83] In fact, he has already provided the answer: "one must turn to politics. Only politics can make the ideal concrete, concrete in everyday life . . . ."[84] But that answer only provokes another question or series of questions. What exactly is the politics that can do this? How does it start? Where does it start? One obvious place to start is the enlargement of democracy, "the progressive replacement of meritocratic by democratic power in the ordinary institutions of society," so that "[d]ecisions about what to produce . . . , for which objectives to produce, and how to produce are increasingly defined as political and . . . collective."[85] Thus, public life would be more and more contiguous with private life, as every aspect of daily existence would become a matter of the political choices of fully enfranchised agents in a "democracy of ends."[86] But the questions persist, and again it is Unger who raises them. While the "adoption of the democracy of ends describes a process of [ever-eularging] choice, . . . it does not establish the standards by which individuals engaged in that process ought to choose."[87] Moreover, any

79. *Id.* at 266-67.
80. *Id.* at 266.
81. *Id.* at 267.
82. *Id.*
83. *Id.* at 236.
84. *Id.* at 230.
85. *Id.* at 268.
86. *Id.* at 267.
87. *Id.* at 269.

attempt to formulate such a standard would be disastrous to the entire enterprise since it "could not lay down . . . principles of choice without . . . lending a spurious authority to the beliefs and practices of a particular society or age."[88] It would seem then that there is a tension between the desire that the individual be fully enfranchised to make choices, and the necessity of some larger or communal sense of purpose whose invocation would ensure that the choices made were progressive and cumulative rather than merely ad hoc. Moreover, as Unger is quick to point out, this tension, discovered at the heart of the democratic ideal to which the entire book has been pointing, "is another aspect of that same conflict between particularism and universalism encountered before."[89] That conflict, rather than having been transcended by the notion of a community of ever-enlarging sympathies, is found to inhabit that notion, and, as Milton would have put it, to be there "writ large." Even as politics is proclaimed as the answer to the question—"[h]ow can the ideal be realized in everyday life?"[90]—the answer is revealed as fatally flawed, and Unger is forced to acknowledge, late in the game, that the "limits of politics are another side of the imperfection of all our efforts to achieve the good and to represent it in a form of social life."[91]

As *Knowledge and Politics* draws to its close, the admissions of failure proliferate:

> [T]he gap between the universal and the partial aspect of personality is never directly or completely bridged.[92]
>
> . . . .
>
> . . . [T]he ideal can never fully be achieved in history.[93]
>
> . . . .
>
> The ideal of universal community, like the ideal of the self from which it derives, is . . . incapable of being completely realized in history.[94]
>
> . . . .
>
> . . . [O]nly a person could fully realize the ideal and . . . this person cannot be man in history.[95]

Who then could it be? The answer is at once surprising and inevitable, and it is the title of the book's last section, "God":[96] "The idea of a union of immanence and transcendence or of a universal being who

88. *Id.*
89. *Id.*
90. *Id.* at 236; *see supra* note 83 and accompanying text.
91. R. UNGER, *supra* note 1, at 274.
92. *Id.* at 226.
93. *Id.* at 233.
94. *Id.* at 260.
95. *Id.* at 293.
96. *Id.* at 290.

pieces . . . ."[102]

Those few who wish to restore Truth's lovely form go constantly "up and down gathering up limb by limb" as they can find them.[103] "We have not yet found them all," says Milton, allowing us for a moment the prospect of a task almost complete, a task within our abilities to accomplish; but then he takes that prospect away with these chilling words: "nor ever shall do, till her Master's second coming. He shall bring together every joint and member . . . ."[104] It is the movement, in small, of the whole of *Knowledge and Politics,* the indictment of fallen history as the state of being separate from God—of partiality and difference unredeemed by a universal and universalizing vision—followed by a declaration that union with God, the reconciliation of individual actions with divine purpose, is something only He can initiate and achieve. Just as Milton's "nor ever shall do" is a rebuke to the facile hopes of a reader who expects to be exhorted to specific (and efficacious) acts, so is the entire second half of *Knowledge and Politics* a rebuke to the hopes that Unger has raised (and entertained) of a political remedy for the infirmities that attend fallen consciousness. The final lesson of *Knowledge and Politics*—a lesson that makes a joke of its title—is that redemption is theological, not political, that the union of reason and desire, fact and value, universal and particular, can only be realized in a union with deity in a process of which He must be simultaneously the goal and the way. "I am the way, the truth and the life."[105]

## II

It is a lesson the modern intellectual is ill equipped to hear and unlikely to applaud, and Unger seems to feel its inadequancy as much as anyone. In effect he writes *The Critical Legal Studies Movement*[106] to redeem the failed promise of the first half of *Knowledge and Politics,* by offering an "engineering" version of his theological vision. By "engineering" I mean that, rather than beginning with transcendence or requiring its intervention, he builds toward transcendence by identifying some route that is accessible to man in his present condition, by identifying a genuine politics. This is what Unger promises in his first paragraph when he says that the Critical Legal Studies Movement "implies a view of society and informs a practice of politics."[107] This is not the practice

102. J. MILTON, *supra* note 7, at 741-42.
103. *Id.* at 742.
104. *Id.*
105. *John* 14:6.
106. Unger, *supra* note 4, at 561.
107. *Id.* at 563.

of politics as one usually finds it in the dominant legal culture. That practice, which will be the sustained object of Unger's critique, is characterized (as is liberalism in general) by "a belief in the possibility of[ ] a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary."[108] This belief cannot survive "[h]istorical study," which has "repeatedly shown that every attempt to find the universal legal language . . . revealed the falsehood of the original idea."[109] That is to say, whatever has been offered as an alternative to open-ended dispute between interested actors has upon investigation been revealed to be an extension of some interest that is not acknowledging itself, not even to itself. There can finally be no contrast "between the more determinate rationality of legal analysis and the less determinate rationality of ideological contests."[110] Everything is ideological contest even if some ideologies succeed in masquerading as the "universal legal language."

Any such masquerade succeeds only by suppressing the conflict that would ensue if its own ground were contested. In order to avoid that contest the reigning (and always illegitimate) orthodoxy must devise ways to account for and accommodate pressures and problems that seem to challenge its hegemony. But as the challenges multiply the efforts to contain them become more frantic. The doctrine that was offered as "a canonical form of social life . . . that could never be fundamentally remade"[111] begins to crack under the strain; as the supposedly bedrock notions are stretched and redefined under the pressure of increasingly powerful counterexamples, "the initial conception of a natural form of society becomes weaker: the categories more abstract and indeterminate, the champions more acutely aware of the contentious character of their own claims."[112] And yet they hold on tenaciously, most probably, Unger speculates, in the fear that the abandoning of the claim to generality "would leave nothing standing. The very possibility of legal doctrine, and perhaps even of normative argument generally, might be destroyed."[113] The result is a situation in which lip service is paid to a putatively "defensible scheme of human assocation"[114] at the same time that "an endless series of ad hoc adjustments"[115] empties that scheme of

108. *Id.* at 564.
109. *Id.* at 568.
110. *Id.* at 565.
111. *Id.* at 576.
112. *Id.*
113. *Id.*
114. *Id.* at 565.
115. *Id.* at 572.

its pretensions to integrity. "It is always possible to find . . . radically inconsistent clues about the range of application of each of the models and indeed about the identity of the models themselves."[116] The claim is to be applying general truths to particular contexts, but in fact the so-called general truths increasingly "fall hostage to context-specific calculations of effect,"[117] "ad hoc qualifications"[118] of principles that leave the principles with no content. It is the worst of all possible worlds: a frozen and empty doctrine held in place by a "collection of makeshift apologies"[119] that mask a conflict that has no direction because it is never acknowledged. The prevailing orthodoxy threatens us with the choice between it and "the inconclusive contest of political visions"; "either resign yourself to some established version of social order, or face the war of all against all."[120] But so long as the established version of the order maintains itself by ignoring contest or by adapting shamelessly to contest's every changing shape, the war of all against all is what we really have.

False universals and the war of untransformed particulars—this is what orthodox legal liberal thought offers and where the first two sections of Unger's essay leave us. In section III, entitled "From Critique to Construction,"[121] Unger begins to unfold the positive program that will produce true universals in the form of transformed particulars. That program will be given many names in the course of the essay, and here, in the first few paragraphs of its introduction, it is called "enlarged doctrine," "expanded doctrine," and "deviationist doctrine."[122] By any name, it seeks to open up "the petrified relations between abstract ideals or categories, like freedom of contract or political equality, and the legally regulated social practices that are supposed to exemplify them."[123] Only the "casual dogmatism of legal analysis" prevents us from seeing that these abstractions "can receive . . . alternative institutional embodiments"[124] and that therefore the present arrangement of things is neither necessary nor even, when examined critically, plausible. It is just such a critical examination, informed by a general suspicion of the apparently authoritative, that is required; rather than acquiescing in the papering over of the cracks and fissures in the official account of legal doctrine,

116. *Id.*
117. *Id.* at 566.
118. *Id.* at 569.
119. *Id.* at 573.
120. *Id.*
121. *Id.* at 576.
122. *Id.* at 577-78.
123. *Id.* at 578.
124. *Id.*

deviationist doctrine seeks to exaggerate them—"to recognize and develop the disharmonies of the law"[125]—in order to open a window on the "indefinite possibilities of human connection," the many "alternative schemes of human association."[126] The more this is done, the less any one of those schemes will be able to entrench itself, and the larger will be the area of contest, the area in which basic questions about the structure of social life are raised and debated. "In this way no part of the social world can be secluded from destabilizing struggle."[127] "[T]he practice of expanded doctrine begins all over again the fight over the terms of social life."[128]

Obviously, this is the argument of *Knowledge and Politics* all over again: in a world of contesting schemes of human association, none of which has the status of a universal, we must guard against the danger of acquiescing to the claims of any one of them; and we can best do this by exaggerating rather than sublimating their differences, keeping before us the goal of achieving and becoming the universal to which their inadequacies (if only negatively) point. That is, we must prize "the conflictual process through which community is created and made universal above the preservation of any one collectivity."[129] In *Knowledge and Politics* this general statement of a program is unredeemed because we are never told how to move from the prizing of conflict as a cautionary strategy to the utilization of conflict as a way to create the universal. That is, prizing the conflictual process does not lead necessarily to a transcendence of conflict; rather it would seem to lead to more of the same, to the intensification of the war of all against all. What is required is some principle or lever that will enable us to grasp a foregrounded conflictual process and turn it in a positive direction. What is required is what in *Knowledge and Politics* could only be supplied by God, a starting point. (The naming of God as the starting point short-circuits the development of a politics since it takes agency away from man.) *The Critical Legal Studies Movement* should be understood precisely as an effort to supply that starting point; it will be my contention that the effort repeatedly fails and that Unger only escapes the war of all against all by once again invoking (if only implicitly) the theological intervention that marked his earlier failure.[130]

125. *Id.*

126. *Id.* at 579.

127. *Id.* at 584.

128. *Id.* at 583.

129. R. UNGER, *supra* note 1, at 267; *see supra* note 82 and accompanying text.

130. *See infra* notes 159-68 and accompanying text; *supra* notes 92-105 and accompanying text.

He begins briskly, with a concise and straightforward outline of a program:

> You start from the conflicts between the available ideals of social life in your own social world or legal tradition and their flawed actualizations in present society. You imagine the actualizations transformed, or you transform them in fact, perhaps 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. You might call this process internal development.[131]

Calling this process internal development is no casual gesture. The strong claim is in the word "internal," which suggests that the process generates its own direction. All you need to begin with is the awareness the foregrounding of the conflictual process will have given you, the awareness that the competing ideals of social life do not receive support from the practices we routinely engage in, or, what amounts to the same thing, that those same practices could be understood (by someone sufficiently skilled at rationalization) as supporting any number of ideals. At this point you will have recognized the inadequacy both of the present state of things and of the currently available visions in the name of which that state has been justified.

So far, so good. Then comes the crucial step. "You imagine the actualizations [the present state of things] transformed." But how do you do that? Or more precisely, from where do you do that? Obviously, given Unger's double thesis of the (present) unavailability of a general perspective and the flawed nature of the perspectives we now inhabit, the only position we could possibly occupy is the position of one of those flawed perspectives; and consequently any transformation would have to be imagined from the vantage point of that perspective, as an extension (even as it was a modification) of its partiality. "Transformation" is perhaps too grand a word for this process, which might be better called "change," understood as the passage from one limited (partisan) vision to another with no sense that during the passage the state of being limited will in any way have been relaxed. In short, while I am not denying that something of the sort Unger describes does in fact occur—we do revise our practices in the light of a felt inadequacy—its occurrence will not mean the loosening of limits because the light that provoked it will itself be equally, if differently, limited.

Of course, for the person who has performed the act of revision, the resulting practice will seem larger, more capacious than the practice he has left behind; but this capaciousness will be evident and palpable only from within the perspective that now becomes his horizon. For another

131. Unger, *supra* note 4, at 579-80.

person the new practice will seem not larger at all, but have the aspect of a restriction on the human capacity for growth and self-realization. In the eyes of some, *Roe v. Wade*[132] represents an extension of the ideal of individual rights (in the form of the right to privacy) "to some area of social life from which it had previously been excluded"; but in the eyes of others the same decision represents a disastrous violation of the same ideal, a setback to the efforts of society to enhance the lives of its members. Moreover, this is a difference of opinion that cannot be adjudicated by some third party, since the perspective from which that party would speak would be no less limited than the perspectives it presumed to judge. Without a mechanism for determining whether a proposed or imagined revision would constitute a step forward rather than a step backward on the journey to a truly transformed society, that journey can never begin, for no claimed beginning would have the authority it would need in order to serve as the uncontroversial basis for the next step. In such a world (the world Unger everywhere acknowledges we live in), the area of conflict can never be enlarged (as his doctrine requires); it can only be reconfigured. And the reason it cannot be enlarged is that the area exempt from conflict, the area bounded by the presently settled convictions of the agent, will always be the same size—the exact size of the agent's necessarily unexamined assumptions—even though its shape and its relationship to the (mutually constitutive) area of the unsettled will change. No matter how often that change occurs, the result will always be a perceiving consciousness for whom some things (facts, theorems, judgments, etc.) are undoubted *and undoubtable,* while others remain a matter of dispute; the members of the two categories will vary, but the structural relationship between them will not, and it will never be possible *absolutely* to diminish the one in the service of the other.

Unger in effect acknowledges as much when he says of the project of "internal development" or "enlarged doctrine" that its "weakness . . . is obviously its dependence upon the starting points provided by a particular tradition;"[133] that is, the to-be-transformed consciousness begins its task of bootstrapping its way to transcendence while still firmly embedded within a particular, limited point of view. He thinks, however, that this weakness can be overcome with the help of a recent shift in our understanding of our epistemological condition. "[T]o an unprecedented extent," he reports, we now understand "society . . . to be made and imagined rather than merely given."[134] What he is referring to, of course, is the emergence in a number of disciplines of an antifoundationalist epis-

132. 410 U.S. 113 (1973).
133. Unger, *supra* note 4, at 580.
134. *Id.* at 579.

temology in which both the facts and structures of our social world (along with the possibilities for action that world is thought to contain) are seen not as naturally or divinely ordained but as the *accomplishments* of interested, situated agents like you and me. Unger's reasoning is that since more and more people have been persuaded to this view of things and therefore know that whatever they take to be certain and unalterable is *in fact* so only within a contingent and revisable construction of the world, those same people should now be "naturally" inclined to regard with suspicion and skepticism any received system of ideas including (indeed especially) their own. In other words, the hold a "particular tradition" and its "starting point" may have on us will be loosened to the extent that we have become aware of its status as a revisable construction. All we need to do is begin with the assumption (identified by Unger as "crucial"[135]) that "no one scheme of association has conclusive authority,"[136] using that insight as a "starting point" with which to counter and critique the starting point of our received traditions.

The trouble is that as a starting point, the insight that no one scheme of human association has conclusive authority is empty; as a universal statement all it tells you about a particular scheme of association is that it is not the whole story. But it can't, in the absence of the whole story, tell you in what way the scheme is deficient; and therefore it can't tell you in what direction to move away from a scheme that has been the object of a *general* indictment. If that scheme is one to which you are committed—in the strong sense of proceeding within its assumptions and categories of understanding—the knowledge that it too must be included in that indictment will not even touch it, first because "it" is not something graspable by a critical consciousness (it is, after all, *constitutive* of consciousness), and second because its partiality is known at so abstract a level that there can be no bridge between that knowledge and anything in particular. Nor can it be made less abstract without losing its identity, for the moment the general indictment is given a content—the moment it has enough specific bite to urge you in some particular direction—it will have become a scheme of association of exactly the kind it urges us to escape. In short, insofar as the "crucial" assumption generates a program, it can only be a program of directionless suspicion, a program that falls under the criticism Unger himself makes of agendas that never advance beyond the stage of negative critique: "freedom to be real, must exist in lasting forms of life; it cannot merely exhaust itself in temporary acts of context smashing."[137]

135. *Id.* at 580.
136. *Id.*
137. *Id.* at 661.

If the effects of context smashing are to be more than temporary, something must be added to the insight that "[n]one of the social and mental forms within which we habitually move . . . escapes the quality of being partial and provisional,"[138] and immediately after reiterating that insight Unger moves to provide that something additional: "But these mental and social worlds nevertheless differ in the degree as well as the character and severity of their constraining quality."[139] That is to say, while all social and mental forms constrain our visions and therefore cause us to be confined within some or other partial perspective, the constraints imposed by some forms are looser than others, and therefore it behooves us to begin by identifying those forms and inhabiting them so as to afford the most scope possible to man's "most remarkable quality[,] . . . the power to overcome and revise, with time, every social or mental structure in which he moves."[140] As that power is increased, it will then express itself in an "institutional structure, itself self-revising, that would provide constant occasions to disrupt any fixed structure of power and coordination in social life."[141]

The idea is that you build up a community of enlarged sympathies by taking advantage of those forms of community whose constraints are sufficiently loose to permit and even to encourage innovative and context-transcending activity. But as an idea it founders on the very difficulty it proposes to remedy: in order for it to work, there must be a way of identifying which structures of constraint are looser—less committed to the limits and norms they declare—than others. Unger, however, gives us no guidance here. He simply declares that "societies differ among themselves in the extent to which they lay themselves open to self-revision" and adds that if we wish evidence of this difference, "it is enough to compare the liberal democracies themselves to the societies that preceded them."[142] But it is not enough, and indeed if it were, if "schemes of association" were self-evaluating and wore their labels ("conducive to freedom," "tending to the totalitarian") on their faces, they would not constitute the danger that gives urgency to Unger's project; they would not be compelling forms of idolatry. And since they *are* forms of idolatry, that is, forms of belief, they come with their own calibrations of difference in relation to which the "obvious" differences Unger invokes would become matters of contest. That is to say, the attribution of openness and freedom to one social or mental structure

138. *Id.* at 584-85.
139. *Id.* at 585.
140. *Id.*
141. *Id.* at 592.
142. *Id.* at 586.

relative to others would itself have to be made from *within* one of those structures, and therefore it would not be accepted by someone who was hearing it from within the assumptions of some other structure. Every society believes that its forms are calibrated so as to stimulate and nourish freedom, but freedom is a contested concept, and there is no neutral space in which one can coolly survey societies and decide by which of them it is best embodied. The point can be made by recalling something as crude as the ritual comparisons in the American and Soviet media: the one assures us that Soviet society is closed and permits only a few activities, while in the United States the possibilities are infinite and we are (relatively) free to do what we like; the other responds by observing scornfully that what we are "free" to do is purchase the endless succession of consumer goods produced by a capitalist economy in relation to which we are all slaves whether we know it or not. The example is, as I have already said, crude, but the lesson to be drawn from it is generalizable: the extent to which self-revision or anything else is a feature of some "scheme of association" cannot be determined in the absence of that universal perspective whose (current) unavailability is Unger's first thesis.

But there is an even greater difficulty. Not only is it impossible to determine uncontroversially which of the infinite number of schemes of association are more open to revision than others; the very notion of schemes of association that are more or less constraining is itself incoherent. Here we must be careful, for the point is an important and difficult one. It is important because Unger's project finally rests on a distinction between two limit-case types of mental and social structures, or, as he later calls them, "formative contexts."[143] Some formative contexts, he explains, are especially "open to self-revision,"[144] and therefore they do not press their claims with the exclusiveness characteristic of less flexible contexts. At the other end of the scale, standing as the chief obstacle to the achieving of maximum openness and plasticity, are contexts that have become so "entrenched" that they have gained "immunity to challenge and revision in the course of ordinary social activity."[145] These are contexts (or schemes of association) whose hold on us has become so strong that, in the absence of some revolutionary intervention, we will never be moved to look outside them or go beyond them. The doctrine of "internal development"[146] or "destabilization rights"[147] urges us to

143. *See id.* at 582-83.
144. *Id.* at 607.
145. *Id.* at 650.
146. *See id.* at 580-81.
147. *See id.* at 611-15.

activities that will fragment and weaken the frozen demarcations protected by such contexts, so that they will become less and less the prison houses of human possibility and more and more the areas in which human possibility can exercise its capacity for growth.

My response to this urging is to assert that there exist no contexts of either type, because all contexts are equally (if differently) constraining. The assertion may seem counterintuitive, but it can perhaps be rendered less so if we consider one of Unger's concrete recommendations, that we engage "in the systematic remaking of all direct personal connections . . . through their progressive emancipation from a background plan of social division and hierarchy."[148] As long as such a plan is in force, Unger explains, people are confined to "fixed roles . . . according to the position that they hold within a predetermined set of social or gendered contrasts,"[149] and he urges us to unfreeze these roles by combining them. "For example, people may be enabled and encouraged to combine in a single character qualities that ruling stereotypes assign separately to men and women."[150] Now, of course, many people can and have done exactly that, inspiring articles in the popular press and even motion pictures; and the result certainly has been a change in the way many men and women conceive of their roles. But it is not correct, I think, to describe that change as one in which constraints have been eliminated or even relaxed in a way that contributes to the freeing of the individual from background plans of division and hierarchy. Rather, the shape of the background plan will have been altered, so that its components—those assumptions and distinctions that are for the time being unquestioned and unquestionable—will not be what they were before; but the *category* of the (currently) unquestionable will be as firmly in place as it ever was and will not in any way have been diminished on some absolute scale. In order to put into question the fixity of the qualities assigned by stereotypes to men and women, innumerable other fixities (the distinction between home and workplace, adult and child, workweek and weekend) must remain unchallenged; and were they challenged the challenge could ouly be intelligible against the background of hierarchies and divisions that could not themselves be challenged because it would be within them that thinking, critical or any other kind, was going on. In short, all contexts have the same (general) shape, a "background plan" made up of "predetermined . . . contrasts"[151] and an area of "free" inquiry or "open texture" that has exactly the extent and content the background plan

148. *Id.* at 587.
149. *Id.*
150. *Id.* at 588.
151. *Id.* at 587.

allows. Although the structure is a binary one—settled/unsettled—the unsettled is itself configured in a dependent relation to the settled. It follows, then, that no context is looser—more open to revision—than any other; no context is "naturally" suited to be the starting point on the road to liberation.

That's the bad news, but the good news (actually the same news) is that no context is more set—less open to revision—than any other; no context can gain "immunity" to challenge, because challenge—in the form of a background plan, *parts* of which can always be foregrounded—is built into what Unger variously calls "schemes of associations" and "formative contexts." And indeed he himself says as much when he speaks of the "transformative possibilities built into the very mechanisms of social stabilization."[152] It is just that he thinks these possibilities—the possibility of turning a critical eye on a previously unexamined "given"—can only be tapped by a special reflective attitude that is developed in conscious opposition to routine ways of thinking and acting, whereas I think that routine ways of thinking and acting can themselves generate the moments in which their transformative possibilities are seized.

Consider as a humble but accessible example the following classroom situation. In the midst of a discussion of a poem, a student raises his hand to offer an observation and is told by a teacher that while his comment is an interesting one, it isn't literary; it is appropriate to some other discipline, history, or economics, or anthropology. At this point the student will have at least two options: he can acquiesce in the instructor's dismissal of his point, or he can challenge the grounds of that dismissal by questioning the notion of literature by which his observation has been stigmatized as irrelevant. If he takes the latter course there is the possibility (not the inevitability) that the "grounding" definitions and categorical distinctions within which the course had been proceeding will be changed and that at least in one classroom literature will no longer be thought of as an activity performed independently of social and political pressure. Of course, should that possibility be realized, constraints will not have been eliminated or relaxed, but reconfigured, so that other questions will be regarded as obvious, and other concerns will be known in advance to be beside the (newly defined) literary point. (There will still be a background plan, as much in force as ever, but it will not be the same one.)

But, someone might respond, isn't it the case that change of that kind or any other will be more or less likely depending on the structure

152. Unger, *supra* note 4, at 583.

of the classroom situation? Won't a pedagogical context in which student questions are encouraged and even solicited be more conducive to reconsiderations of basic assumptions than a context in which the instructor's authority is strongly asserted and there is no regular procedure for challenging it? In short, aren't some schemes of association more open to revision than others? The answer to all these questions is no. The difference between a classroom in which participation is routine and a classroom in which a student question would constitute an intervention, is not a difference between structures less and more constraining, but a difference between types of structures of constraint. If in one structure there is a pressure to refrain from speaking, in the other there is a pressure to refrain from keeping silent. A student who feels that he must speak (because he knows that silence will be held against him) is not free relative to the student who feels that speaking carries with it the risk of disapproval and penalty; both students are directed in their actions by their understanding of what is and is not an "acceptable" form of behavior in the situation, and the fact that in one situation it is acceptable and indeed *obligatory* to speak doesn't mean that participants in that situation are freer than those who, in another situation, are *allowed* to remain silent. Indeed, it seems that for many students no situation is more threatening and intimidating than one in which they are enjoined from remaining passive. ("Be ye free" is not the command of a liberator.)

The point of the example is not to show that the reconsideration of basic assumptions is impossible, but to demonstrate both that no particular formative context or scheme of association is "by nature" the site of reconsideration and that when reconsideration occurs it will not be because a special self-reflective stance—a capacity existing apart from the capacities inherent in ordinary contexts of practice—will have been assumed, but because someone for some reason (the reasons cannot be cataloged or predicted) has raised a question that an ordinary context of practice already (implicitly) contains. The power of which Unger continually speaks, the "power of the self eternally to transcend the limited imaginative and social worlds that it constructs,"[153] the power of the individual "to overcome and revise, with time, every social or mental structure in which he moves,"[154] is not a power exercised in opposition to the sway of contexts, but a power that contexts make available, a power whose effect is not to transcend the limits of social and mental structures, but to redraw the lines of structures that will be no less limiting than they were before. Rather than being the property of someone characterized

153. *Id.* at 587.

154. *Id.* at 585; *see supra* note 140 and accompanying text.

by an ability to break contexts, the power of revision is the power contexts confer on someone who can only exercise it in a context-specific shape. It is not an abstract power, and therefore it cannot be stored in a reservoir from which one can freely draw. It is not a power that can be cultivated or summoned up at will (you can't turn it on by throwing a switch marked "critical reflective capacity") because it does not exist apart from the particular conditions of its possible emergence. In short, the context-breaking power is entirely contextual, and rather than transcending contexts its exercise will, at the most, reform (or not reform) them.

For it to be otherwise, for there to be the possibility that change could mark an emancipation from background plans rather than the *ex*changing of one for another, both selves and contexts would have to be reimagined in unimaginable ways. And that is in fact how Unger's argument works, by conceiving of selves and contexts as entities with the capacity of being without content. Selves that are progressively emancipated from social division, hierarchies, and roles would be selves with no orientation or angle of habitual vision that included them in this direction rather than that. They would be selves without a core of assumptions in relation to which the shape of things (physical, mental, moral) came into immediate and unreflective view. The creation of such selves is the goal of what Unger calls the "system of destabilization rights," the right to "disrupt those forms of division and hierarchy that . . . manage to achieve stability only by distancing themselves from . . . transformative conflicts."[155] It is the right perpetually to unsettle and to be unsettled, and were the condition of being unsettled to become more and more constitutive of the self, the contexts of its activities (such as they might be) would be correspondingly unsettled, characterized (a word in danger of being incoherent) by an openness to revision so total that revisability would be their essence. But of course all of this is a contradiction in terms. Contexts and selves in perpetual movement can have no stability of form, and while that is precisely the state of being (or nonbeing) that Unger desires, it does not correspond to anything that is possible for a finite creature, for a creature defined by his situatedness. Such a creature must always be somewhere (in a context) in order to be something (a self); and if it is never anywhere, if it stands free of all confining hierarchies and roles, it is nothing.

Yet paradoxical though it may seem, nothing is what Unger wants us all to be, and late in the essay he declares as much when he gives his

155. Unger, *supra* note 4, at 612.

program its final and most revealing name, "negative capability."[156] "Negative capability" is defined as "the practical and spiritual, individual and collective empowerment made possible by the disentrenchment of formative structures,"[157] and we can see exactly what that means by recalling the original context of the term in Keats's praise of Shakespeare:

> [I]t struck me what quality went to form a Man of Achievement, especially in Literature and which Shakespeare possessed so enormously—I mean *Negative Capability,* that is when man is capable of being in uncertainties, Mysteries, doubts, without any irritable reaching after fact and reason—Coleridge, for instance, would let go by a fine isolated verisimilitude . . . from being incapable of remaining Content with half knowledge.[158]

In this famous comparison, Coleridge comes off badly because he insists on being certain, on being firmly placed within a perspective that delivers stable facts and is intolerant of doubt. Shakespeare, on the other hand, is capable of entertaining and even multiplying doubts indefinitely and seems not to feel the need to be grounded by an unshifting structure of fact and reason. Generations of Shakespeare critics have enlarged on Keats's observation by saying that what distinguishes the poet is the ability completely to sublimate his own convictions. Whatever position he may have occupied on a particular matter, he manages to project himself sympathetically into the positions occupied by his many and varied characters. He therefore seems, continued the critics, to be all of them and none of them, to be nowhere and everywhere. Or to put it as it has often (and revealingly) been put, he seems to be not a man, but a God.

I say "revealingly" because the vision (and specter) of God is waiting for us at the end of *The Critical Legal Studies Movement* just as it was at the end of *Knowledge and Politics.*[159] You will recall that the whole point of the essay is to come up with a program that does not require God to speak its details and direction. The point is underlined early on when Unger distinguishes between the method of internal development that "pushes by gradual steps toward ever more drastic ways of reimagining society," and "visionary" insight that "begins with the picture of a reordered human world."[160] Unger attempts to soften the contrast by claiming that the prophet can only be understood because something of what he urges "may be discerned already at work in the anomalies of personal encounter and social practice."[161] But as I have

156. *Id.* at 650.

157. *Id.*

158. Letter from John Keats to George and Thomas Keats (Dec. 22, 1817), *reprinted in* M. FORMAN, COLLECTED LETTERS OF JOHN KEATS 71 (4th ed. 1952).

159. *See supra* notes 92-105 and accompanying text.

160. Unger, *supra* note 4, at 580.

161. *Id.*

argued here, any discerning of an anomaly will occur from *within* some social practice, and therefore cannot be the beginning of a process by which social practice is transcended altogether. The distinction between the internal and the visionary, between something engineered and something revealed, is sharper than Unger wants it to be, and it is only by blurring it (after having introduced it) that he avoids the realization that without a revelation—without a God who has spoken—internal development can't get started. If negative capability is the "empowerment made possible by the disentrenchment of formative structures,"[162] then it is not an empowerment of the kind that Unger requires, because the disentrenchment of one formative structure is always simultaneous with the establishment of another. Whatever "power" the agent acquires he acquires by courtesy of the new structure, and therefore it cannot be a power by which he is emancipated (even partially) from the sway of structure altogether. Truly emancipatory power can only be provided by an agent who is already emancipated, contained and constrained by no structure, capable of entering and exiting from every structure at will.

It is such an agent that Unger hopes to produce by the bootstrapping agendas he variously calls "deviationist doctrine," "internal development," "institutional reconstruction," "expanded doctrine," and "destabilization rights."[163] He hopes, that is, to institute conditions that will promote "the growth of negative capability."[164] But negative capability is not something that can grow. Either you have all of it, or you have none of it. If you are a finite being, and therefore situated, you are wholly situated, and no part of you or your experience is asituational; your every capability is positive, a reflection and extension of the system of belief that bespeaks you and your possibilities, and there is nothing negative (detached, independent, free) to nurture. And if you are not a finite being, if you don't believe anything in particular and therefore don't believe anything at all (since beliefs are by definition particular, products of partial perspectives, a phrase obviously redundant), but straddle all beliefs like the colossus Shakespeare's Caesar seemed for a time to be, you are a god, and growth is beside the point. Despite all his efforts Unger is unable to provide a traversable middle ground, a space in which transcendence has not yet arrived but constraints have in part been relaxed, a space that offers the opportunity of transforming (rather than merely extending) work, a space of *politics,* not of politics as "a disconnected series of trophies with which different factions mark their

162. *Id.* at 650; *see supra* note 157 and accompanying text.

163. *See supra* notes 122, 146-47, and accompanying text.

164. Unger, *supra* note 4, at 650.

victories,"[165] but of a politics that "promises to liberate societies from their blind lurching between protracted stagnation and rare and risky revolution,"[166] a politics whose end will make what we know as politics unnecessary. Simply by calling his project "negative capability" Unger acknowledges (if only inadvertently) that he is once again at the impasse he had reached at the end of *Knowledge and Politics,* unable to chart a route by which the ideal of universal community can be realized in history and by historical processes. The capability that is required is at once unimaginable, since our imaginations can only imagine it in their own form, and unmanufacturable, since to manufacture it you would already have to be in possession of it and in the place—no place and every place—to which it was to bring you; it is a capability that can only be invoked, either forthrightly as Unger does when he cries, "Speak, God," or more obliquely by a phrase ("negative capability") that has no possible realization in everyday life.

The last sentence of *The Critical Legal Studies Movement,* like the last sentence of *Knowledge and Politics,* is justly famous. Speaking of the "cold altars" before which the legal academy's shamefaced members insincerely pray, Unger says of himself and his fellows, "we turned away from those altars, and found the mind's opportunity in the heart's revenge."[167] It would seem that the difference between this confident affirmation and the note of passive supplication on which the earlier book ends could not be more marked. But the difference blurs and disappears when we ask: what exactly is the heart's revenge? In Unger's terms, it is the refusal of the awakened heart to bind itself to the laws of any received system of authority in order that it might expand to accommodate the laws that underwrite the universe. But simply to put it that way (a way fully in harmony with the direction of Unger's thought) is to recall the context in which the manner of that heart's making is prescribed in 2 *Corinthians*: "*Forasmuch as* yee are manifestly declared *to be* the Epistle of Christ . . . , written not with inke but with the spirit of the living God, not in tables of stone, but in fleshy tables of the heart."[168]

It is all here, the opposition of external and inefficacious constraints to the constraints that, because they have been internalized, have joined the universal and particular. But here also is the insistence that this joining can only be effected by an agency more than human, by the Spirit of the living God. Only a God can make gods in his image. The heart's revenge is finally the revenge of human actuality on the aspiration Unger

165. *Id.* at 582.
166. *Id.* at 650.
167. *Id.* at 675.
168. 2 *Corinthians* 3:3.

is no closer to achieving than he was when he sent up his prayers to a still silent God.

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In offering this critique of Unger, I may appear to fall into one of the categories he scorns, "people who implicitly deny the transformability of arrangements whose contingency they also assert."[169] That is, although I agree with Unger when he asserts that no scheme of association has conclusive authority, I deny that this insight can in and of itself loosen the hold of the schemes of association within which we live and move and have our being (although I do not deny that transformation of those schemes can be effected in many ways). My reasoning is simple: the insight that all schemes of association are contingent—rest on a historical rather than a natural authority—does not provide us with a point of leverage on any particular scheme. All it tells us is that any particular scheme, no matter how firmly established, has been put in place by political efforts and that in principle political efforts can always dislodge it. But once that is said, the political efforts still have to be made, and the assertion that they *can* be made is not one of them. That is, you don't challenge the presuppositions of some formative context merely by saying that a challenge is possible. All the work remains to be done, and until it is done, no currently entrenched scheme of association will even tremble, much less be shaken to its foundations.

"Arrangements," then, are not transformed simply by realizing that their transformation is a possibility. The authority of contingent schemes of association is not shaken simply by an awareness of the contingency. Moreover, contingent authority itself cannot be weakened *in general* because particular manifestations of contingent authority have been challenged and set aside. Contingency *itself* is never on trial, only those divisions and hierarchies that follow from the institution of some or other contingent plan; and when those divisions and hierarchies have been abandoned or supplanted it will only be because other divisions and hierarchies, themselves no less contingent, have been instituted in their place. In short, contingency, the fact that every formative context is revisable, is never overcome, even in part; it is merely given a new form in the victory (always temporary) of one partial vision over another. Oppositional activity is not transformative in the sense Unger requires; it is oppositional, a matter of faction warring against faction, interest contending with interest; and when the battle is over, emancipation from the

169. Unger, *supra* note 4, at 674.

background plan of firmly entrenched assumptions and categories will not have been advanced in the slightest degree.

It would seem that in saying this I will have affirmed Unger's darkest vision, a combination of idolatry and resignation in which the operations of law and other forms of social regulation and management are nothing more than "context-specific calculations of effect."[170] In such a world, Unger complains, "It will always be possible to find, retrospectively, more or less convincing ways to make a set of distinctions, or failures to distinguish, look credible."[171] That is to say, the distinctions will only be convincing from within the perspective of some newly victorious context; they will be merely "credible," that is, believable, perspicuous in the light of beliefs; and since beliefs are by definition partial, as distinctions and convictions they will be illegitimate. This is the logic that underlies the entire essay and provides its urgency, but I find the logic incoherent because I can make no sense of the notion of convictions that do not flow from belief. If I am convinced of something it will be because within the assumptions that ground my consciousness I cannot see how it could be otherwise. Independently of such assumptions—or some *angled* opening of the world—I would not be a consciousness and conviction would not be achievable. Moreover, if I *am* a consciousness and I do have a conviction, it makes no sense to say it "looks" credible, it *is* credible, and there is no better, purer kind of credibility to which my conviction might be referred for judgment.

What this means is that no one could occupy the position of false consciousness to which the liberal antinomies have supposedly brought us; none of us is possessed by convictions in which we do not fully believe or in relation to which we have a reservation rooted in some higher vision. Despite what Unger claims in *Knowledge and Politics,* the contradictions in liberal psychology do not describe anyone's "moral experience"; in no one are the "two halves of the self" at war, with a despotic reason struggling to control a blind desire.[172] Rather, desire and reason are always and already joined, for it is from the perspective of some way of conceiving of the world—some partisan vision complete with goals and norms and procedures—that one's sense of the reasonable derives. And since perspectival conceptions of the world are all we have—for finite creatures perspective is unavoidable—there is no more abstract form of reason in relation to which one might feel divided. All of which is to say that one believes what one believes, and therefore one believes that what one believes is true, correct, reasonable. Of course, the

170. *Id.* at 566; *see supra* note 117 and accompanying text.
171. Unger, *supra* note 4, at 570.
172. R. UNGER, *supra* note 1, at 55.

structure of one's belief is always challengeable in ways I have described elsewhere,[173] and should the challenge be successful, one will then believe something else, and it will be in relation to that something else that the category of "reason" will take shape.

The result will be the history (both personal and institutional) that Unger disapprovingly characterizes as "an endless series of ad hoc adjustments," a "collection of makeshift apologies," and merely "rhetorical posturing."[174] But these accusations lose their sting when one realizes that what they amount to is a complaint that disputes are settled and problems solved in relation to the norms and urgencies one experiences in particular contexts, and that since in the course of any practice the context of concern will be continually changing, the shape and content of resolution will be changing too. It is only from a point of view uninvolved in the practice (except as a deliberately distanced observer of it) that the succession of outcomes will seem inconsistent. To the participants in the disputes and negotiations that lead to the outcomes, there will be no inconsistency, because the pressures they feel and respond to are the *local* pressures of concrete urgencies rather than the abstract pressure exerted by a demand for transcontextual consistency. Moreover, that abstract pressure cannot properly be exerted on the history of concrete decisions, because it lacks the content that would render its judgments relevant. Not that the abstract pressure lacks content altogether. It has the content of the speculative—that is, philosophical—tradition from which it emerges, a tradition in which one of the primary tasks is to describe the shape and conditions of rationality as they exist independently of any practice or institution whatsoever. But having deliberately removed itself from the concerns and desiderata of practices and institutions, it cannot now with justice propose to judge those practices and institutions and find them inadequate. They are inadequate only with respect to a standard that rejects their urgencies in advance but itself remains empty, and I think that we are more than justified in rejecting that standard (which has nothing to say except "no") and deciding that for all practical purposes—the only kind of purposes there are—it doesn't matter.

When Unger declares that "every thoughtful law student or lawyer has had the disquieting sense of being able to argue too well . . . for too many conflicting solutions," and concludes that "[b]ecause everything can be defended, nothing can,"[175] he is confusing and conflating two

173. *See supra* pp. 996-97, notes 143-55, and accompanying text; *see also* Fish, *Change*, 86 S. ATLANTIC Q. 423 (1987).

174. Unger, *supra* note 4, at 572-73; *see supra* notes 115-19 and accompanying text.

175. Unger, *supra* note 4, at 570.

wholly disparate contexts of evaluation. In the one, the context of everyday determination, defenses are mounted against a background of presently acknowledged relevancies in relation to which different courses of possible (in the sense of thinkable) actions will have different significances. In the other, the context of the classroom or the rhetorical exercise, defenses are mounted in response to a demand that one display a gymnastic skill, the mastery of which is the only relevancy acknowledged. "Everything" can be defended only when the master rule of the context of relevancy is "defend everything"; but that is *never* the master rule in a particular situation, so that the fact that one *could* perform gymnastically if that was what was being required does not mean that one *is* performing gymnastically in any everyday setting. The same argument disarms Unger's complaint that "[i]t is always possible to find in actual legal materials radically inconsistent clues about the range of application of each of the models" of legal reasoning.[176] Of course it is possible, if finding inconsistencies (with respect to no positive vision) is the game you happen to be in; since the only rule in the game is "find inconsistencies," it will always be possible to imagine contextual conditions within which they will emerge. But "actual legal materials" are not the residue of a game in which contextual conditions are imagined; they are the records of what happened *within* contextual conditions that the participants experienced and from which they had no distance; and the fact that someone else, at a remove, and at a later time, can appropriate those conditions for philosophical purposes—purposes as special as any other, and no larger or more general than any other—is simply beside the point, or, rather, has a point wholly different from the point that made the materials "legal" in the first place.

This is to say no more than Unger says at the close of *Knowledge and Politics,* and, as usual, he says it better than I could: "the final union of immanence and transcendence is foreign to the earthly life of which philosophy speaks."[177] *The Critical Legal Studies Movement* is an effort to make philosophy speak and speak intelligibly—with content—of a life beyond the earthly and so to provide through social engineering what God withholds so long as he declines to speak. The effort is grand, but it fails, and at the end of the essay God has not yet spoken. This leaves us where we were before the essay began, situated in whatever structure of conviction gives us our world and its indisputable facts, and asserting those facts with a vigor unqualified by philosophical reservation. If this is "rhetorical posturing," so be it. It is all we have and all we shall have

176. *Id.* at 572.

177. R. UNGER, *supra* note 1, at 294.

until the perfect and whole shape of Truth returns at "her Master's second coming."