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ON "THE CRITICAL LEGAL STUDIES MOVEMENT"

J.M. FINNIS

Roberto Unger's very long article, "The Critical Legal Studies Movement" (1983), has been acknowledged as a seminal guide to the ideas of the "Movement." The present study critically examines the account of legal thought there developed by Unger, and tests it against Unger's own account of certain "exemplary" difficulties in the Anglo-American law of Contract. These scrutinies reveal that Unger's account fundamentally misunderstands the ways of legal thought, and disguises its misunderstanding behind equivocations on "(in)determinate" and "(un)justified." The complexities of the problems of fairness with which Contract law must grapple are not captured by Unger's triadic schemas, which are at once too complex and too simple. Behind all this is a poverty-stricken conception of the forms of human good and the requirements of practical reasonableness, and a scepticism which rests on unsound arguments.

I

THE CRITICAL LEGAL STUDIES MOVEMENT is perhaps no more than a passing fashion. But one ought not to assess arguments by guessing whether they portend the wave of the future or a mere footnote for historians. And attention to the arguments of the Movement can help in a reflection on two of the permanent questions of legal theory: (i) Why should law be treated as a social form or type that warrants a place in the grand explanatory typology of social forms that makes up social theory? (ii) What is the relation between the positivity of law, its ability to make obligatory now what was optional only a moment ago, and the principles or critically grounded requirements of plain practical reasonableness ("background principles")?

One preliminary remark about names. The term "The Critical Legal Studies Movement" is one which, like the terms "liberalism," "conservatism," "socialism," "fascism," and the like, has no place in a critical social theory or legal study. It is a label chosen, in this case by supporters, as an instrument of persuasion in the rhetoric of political action within the academy. To point to the rationale of this act of choice is not to make an adverse judgment; the act in question is substantially concerned with both the content and the method of legal education and thus also of much of the practical public life of our

communities; and the marshalling of supporters for programs of action does indeed require labels to identify the programs with sufficient brevity for purposes of debate and resolutions for action. Still, no one will simply take for granted that those who use the label with self-identificatory intent are actually sufficiently critical in method, or have a clear conception of legal studies, or constitute a movement fit to accomplish coherent goals by persuasion or other action. An assessment of those matters is not my purpose here.

Rather, the purpose of this essay is to pursue the two standing questions already mentioned, by way of a critical reflection on a recent work of the most influential, philosophically adept, and historically and sociologically learned exponent of the Movement. Roberto Mangabeira Unger's "The Critical Legal Studies Movement"¹ is an essay which, like his earlier books *Knowledge and Politics* (1975) and *Law in Society* (1976), is rich in insight into the predicament of social theory and of those (including himself) whose intellectual stance and principle of self-interpretation includes the concern to be modern men.

II

Unger introduces the Critical Legal Studies Movement as a movement critical of objectivism and formalism in legal thought, i.e. in the thinking of those who have to interpret the law and to remake it by the judicial techniques familiar in American and other common law constitutional orders.

By "objectivism" he means,

the belief that the authoritative legal materials—the system of statutes, cases and accepted legal ideas—embody and sustain a defensible scheme of human association.²

The critique of objectivism is said to be

essentially the critique of the idea of types of social organisation with a built-in legal structure and of the more subtle but still powerful successors of this idea in current conceptions of substantive law and doctrine.³

He identifies an "insight required to launch the attack against objectivism—the discovery of the indeterminate content of abstract institutional categories like . . . the market."⁴

1. 96 *Harv. L. R.* (1983), pp. 561-675. Among the many themes of Unger's engaging article which are not touched on in my discussion are the organization of government, the organization of the economy, and the theory of equal protection.

2. *Ibid.*, p. 556.

3. *Ibid.*, p. 568.

4. *Ibid.*, p. 570.

One of the reasons for attending to Unger's work is to find ready material for a reflection on the contemporary incomprehension of the the master thesis of classical legal theory, the thesis that in positive law we can find a mode of derivation of specific norms of action, i.e. of practical reasonableness, by an intellectual process which is not deductive and does involve free choice (human will) and yet is intelligent and directed by reason. This process Aquinas labelled *determinatio*: we might translate this by "specification," "concretization," or "implementation," but the point is not securely made by any one word.⁵ A simple example, to indicate his point, would be the process by which an architect gives specificity or determinateness to a building plan in accordance with his commission to build a maternity hospital for South Bend. Much can be understood by reflection on such an example. But the process of *determinatio* in law has additional complexities which need to be identified, complexities derived from the fact that law works not in the order of making things (though it of course affects that order) but in the order of the self-constitution of human persons by choosing and doing in community with other *persons*.⁶

In the passage just quoted from Unger, we see a first example of an ambiguity which is going to recur. When he says that certain abstract institutional categories, such as "the market," have an "indeterminate content," what does he mean by "indeterminate"? Does he mean formless, empty, and useless as a guide to practical reasoning and decision? Or does he mean orientative and decision-guiding by calling for and suggesting further specifications whose content however is neither required by "logic" nor rationally unconnected with the (partially) indeterminate idea with which we began? Not seeing this ambiguity and possibility, Unger fails to see that one might reasonably defend a set of rules and doctrines authoritatively established in the "legal materials" (say, the current rules and doctrines of an American law of Contract), and defend them as "embodying" and "sustaining" a "defensible" conception (say, of fair "market" relationships), without claiming that, in all or even most respects, they are the *uniquely* reasonable rules and doctrines available for such embodiment and sustenance, or that such a conception is the *only* "defensible" conception of a fair market.

5. See Thomas Aquinas, *Summa Theologiae Prima Secundae*, q. 95, a. 2; John Finnis, *Natural Law and Natural Rights* (1980), pp. 284-6, 294-5, 380.

6. On the four "orders" in which human life is lived, see Finnis, *ibid.* pp. 136-8; on the significance of choice as self-constitutive, see John Finnis, *Fundamentals of Ethics* (1983), pp. 139-42.

To see, in principle, how this might be so (before seeing how it is so in a fragment of the law of Contract), consider the other target of the Movement's critique: "formalism." Formalism is said to be the belief that there is

a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life. . . . The formalism I have in mind characteristically involves impersonal purposes, policies, and principles as an indispensable component of legal reasoning.⁷

"An indispensable component": the other indispensable component(s) of legal reasoning, and the only component that could begin to "contrast" legal with any other form of practical reasoning about social life, is carefully omitted by Unger here and virtually throughout: authority, the *fiat* of legislation, precedent, or custom, binding (though not absolutely) and determinative for legal reasoning (though not absolutely determinative) precisely because (though not only because) it has been *made* by relevant persons in relevant circumstances and because we need such exercises of authority to terminate disputes and resolve coordination problems both now and for the future, in a consistent and fair fashion.⁸ As has been seen, Unger does observe the existence of "authoritative legal materials,"⁹ or "the constraints of institutional context."¹⁰ But he never stops to ask what the authority of these "materials" is, and what could explain it.

(This failure to consider the source of positive authority is a weakness shared with the jurisprudence of Ronald Dworkin, a jurisprudence scornfully and not too scrupulously attacked by Unger as the "hocus pocus" of the "rights and principles school."¹¹) Dworkin's failure, to use his own terms, is a failure to do the relevant parts of political philosophy, in which, as he rightly says, jurisprudence is embedded. Unger's failure, in *his* own terms, is a failure to pursue thoroughly the typological analysis of social forms which he thinks is the legitimate successor to the largely discredited methods of classical political philosophy.¹² Back to "formalism." Its vice, Unger says, is

7. Unger, "The Critical Legal Studies Movement," p. 564.

8. See John Finnis, "The Authority of Law in the Predicament of Contemporary Social Theory," 1 *N.D.J. Law Eth. Pub. Pol.* (1984), pp. 115-37.

9. Unger, "The Critical Legal Studies Movement," pp. 564, 577.

10. *Ibid.*, p. 572.

11. *Ibid.*, p. 575.

12. Unger, *Law in Modern Society*, pp. 43-5. On some relations between the problem of authority and the problem of the typology of social forms, see John Finnis, "On Positivism and Legal Rational Authority", 5 *Oxford J.L.S.* (1985), pp. 74-90.

to regard the purposes, policies, and principles of “the law” as “indispensable” to resolve “what would otherwise be incorrigible indeterminacy in the law.”¹³ Note “indeterminacy” again, and observe in passing that, being resolvable, it cannot be *sheer* indeterminacy. Observe also: the formalist is supposed to think that the indeterminacy is “corrigible” by reasoning; but Unger does not stay to explore how formalists suppose (as, by the definition of formalism, they must) that legal reasoning differs from “open-ended” reasoning about “the basic terms of social life.” (Whatever Unger may think, we can make our own guess that the difference has something to do with the authoritativeness, for *legal* reasoning, of the *determinations* of enactments and judicial precedents).

The link between objectivism and formalism, in Unger’s account, is this. Formalist legal doctrines “often included” a third level beyond the levels of (i) authoritative rules and precedents and (ii) ideal purposes, policies and principles. This third level is the one with which objectivists, by definition, are concerned, the level of “conceptions of possible and desirable human association to be enacted in different areas of social practice.”¹⁴ For:

just as the ambiguities of rules and precedents require recourse to imputed purposes or underlying policies and principles, so the ambiguities of these policies and principles can be avoided only by appealing to some background scheme of association. . . .¹⁵

Thus, such third-level conceptions “help make the entire body of law look intelligible and even justifiable”¹⁶ by “offer[ing] guidance about the relative reach and the specific content of the opposing principles and counterprinciples which, as we shall see, are supposed to settle provisionally what would otherwise be pervasive ambiguities in the more concrete legal materials.”¹⁷

Notice the claim: third-level ideas “. . . make the law look intelligible and justifiable.” But “justifiable” hovers between “not unjustified, not unreasonable, not wrongful” and “required by reason, rationally necessary.” By overlooking the ambiguity, Unger insinuates what he never clearly affirms, that dominant (i.e. pre-“critical,” “objectivist,” and “formalist”) legal doctrine proceeds on the unwarranted belief that the third-level conceptions of possible and desirable

13. Unger, “The Critical Legal Studies Movement,” p. 579.

14. *Ibid.*

15. *Ibid.*

16. *Ibid.*, pp. 578-9.

17. *Ibid.*, p. 619.

association both (i) necessitate or require the pursuit of *this* rather than *that* particular second-level purpose, policy, or principle, and *these* particular first-level rules, and (ii) are themselves necessary, i.e. are conceptions of what forms of association are *uniquely* desirable.¹⁸

Unger's own conception of "critical" legal doctrine retains the three levels. In plainly affirming this, he also affirms that the revised third level will still "assign distinct models of human association to different sectors of social practice," on the basis that different "kinds of human association . . . can and should prevail in different areas of social life."¹⁹ It remains simply unclear how the methodological relationships between the levels of "critical" legal doctrine will differ from those between the supposed three levels of existing doctrines; Unger says little more than that in the "critical" view, "no one scheme of association has conclusive authority" and there is a process of "mutual correction of abstract ideals and their institutional embodiments."²⁰ Pre-critical scholars will discern no novelty here. Unger, however, believes that they (wrongly) suppose the set of models of human association to be "given" and "rigidly defined" and "natural."²¹ It is time to see how he tries to show this by an examination of Contract doctrine.

III

Unger's showpiece of Critical legal doctrine is, in fact, his lengthy study of certain rules and principles of current Anglo-American law of Contract. It aims to show two things. First: that current legal doctrine hides the relationship between its second-level principles and the controlling third-level conceptions of desirable forms of human association, and that those third-level conceptions remain uncriticized, uncorrected, and falsely supposed to be "given" and "rigidly defined" (prior to their embodiment in legal principles, rules, and institutions). Second: that in current doctrine, the second level consists of principles and counter-principles, the latter being only grudgingly admitted, and marginalized by the principles which tend to extend, "imperialistically," to all social life.²²

18. See, e.g., *Ibid.*, pp. 579, 633.

19. *Ibid.*, pp. 619, 649.

20. *Ibid.*, p. 580.

21. *Ibid.*, p. 633.

22. *Ibid.*, p. 619.

So:

The structure of reigning ideas about contract . . . can be stated with the greatest possible simplicity, in the form of two pairs of principles and counter-principles.²³

The first principle is “that of the freedom to enter or to refuse to enter into contracts. More specifically, it is the faculty of choosing your contract partner.”²⁴ And its counterprinciple is:

the freedom to choose the contract partner will not be allowed to work in ways that subvert the communal aspects of social life.²⁵

One should be uneasy about these formulations. The counterprinciple is stated in a predictive or descriptive, not a normative form. Worse, the principle is never stated by Unger in other than a broken-backed form: “the principle of freedom to enter . . . ; the faculty of choosing your partner” I suppose that what is intended is something like: “each person is to be free of obligations purportedly imposed upon him by the agreements of other persons between themselves; correspondingly, no one has the power to impose, by agreement with another, obligations on one who does not agree to them.” Unger’s carelessness about the formulation of a principle is a small sign of his deep misunderstanding of the role of principle in practical thinking.

You would also be right to suspect that a principle as negative in form and content as the principle of freedom to contract is rather unlikely to extend imperialistically to all of social life. And, in the event, Unger takes the principle, its proper formulation and its intended range of application entirely for granted, and focusses instead on “manifestations”²⁶ of the *counter*principle that freedom to choose the contract partner will not be allowed to work in ways that subvert the communal aspects of social life.

The first manifestation is said to be the rules of law which, he says, “operate to prevent the principle of freedom to contract from tracing the limits of liability so rigidly and narrowly that the fine texture of reciprocities is left entirely unprotected.”²⁷ These rules include rules imposing liability “whether contractual or delictual”²⁸ based on occupancy of a status or exercise of a profession, rules or supposed rules

23. *Ibid.*

24. *Ibid.*

25. *Ibid.*, p. 620.

26. *Ibid.*

27. *Ibid.*, pp. 620-1.

28. *Ibid.*, p. 620.

of promissory estoppel, and the rules of quasi-contract for restitution on unjust enrichment. Now, to treat these rules as manifestations of a counterprinciple at work within the law of Contract makes sense only on the extraordinary assumption that the "principle" of freedom to contract is taken as asserting that one has no legal liabilities at all other than contractual (i.e. those one has freely agreed to)—an assertion very remote from the legal systems Unger is discussing, even if not altogether remote from some nineteenth and twentieth century theories of *Contract*.

Still, Unger's treatment of those rules was intended to be no more than fleeting, and he passes on to "the most instructive application of the counterprinciple . . . the rules of contract law that discourage contractmaking in noncommercial settings."²⁹ His example of such rules is "the norms that govern the interpretation of the intent to contract."³⁰ These norms he presents as three levels of rules (analogous in structure, but not to be confused with, the three levels of legal doctrine).

On the first level is the rule that a declaration of intent to be (legally) bound may be unnecessary (and is unnecessary where the parties are "devoting themselves to self-interest in the harsh business world,")³¹ and that a declaration of intent not to be bound at law may be effective. On the second level is a rule which "guides and qualifies the interpretation of the first-level one": that "whenever possible", intention is to be construed "in a manner that protects justified reliance and leads the parties out of a situation in which they stand at each other's mercy."³² The exclusion of liability will in such situations be interpreted as narrowly as possible. And on the third level is a rule which "limits the scope of both the first-level and second-level ones."³³ It qualifies the second-level rule by determining that, "in noncommercial contexts," an intent to exclude liability is *not* to be construed as narrowly as possible. And it qualifies the first-level rule by determining that "in family life or friendship the presumption of intent to be legally bound [is reversed]."³⁴

This grand structure of three levels of rules is illusory. The so-called third-level qualification of the first-level rule is no more than a component of that (in any case complex) rule, a component required to state

29. *Ibid.*, p. 621.

30. *Ibid.*

31. *Ibid.*

32. *Ibid.*

33. *Ibid.*

34. *Ibid.*

it fully, by some such formula as: “Business deals are presumed to be intended to have legal effect; family or friendship arrangements are presumed not to be intended to have legal effect.” The separation of this fairly straightforward rule into two different levels has a rhetorical function: to elevate to attention the relevant (alleged) manifestation of the counterprinciple, so that “the principle” is depicted as the principle of a business or commercial realm of contract, while the counterprinciple is depicted as “defend[ing] private community against the disruptive intervention of the law,” that is, the law that flows (on Unger’s loose assumptions) from the principle of freedom to contract. As he says:

classical contract theory claims to describe and seeks to define [a form of life]—an existence separated into a sphere of trade supervised by the state and an area of private family and friendship largely though not wholly beyond the reach of contract.³⁵

Now this important thesis about a distinction between spheres of social life, such that one sphere (family and friendship) is treated as largely beyond the reach of legal contract, is hardly reconcilable with Unger’s general thesis that in current, pre-critical doctrine the principles are “dominant” over the counterprinciples, which are “pressed to the corner” and treated as “mere ad hoc qualifications to the dominant principles.”³⁶ Nor is the spheres-of-social-life thesis easily reconcilable with the most striking fact about nineteenth and twentieth century Contract theory: that its rules and principles are expressed with great generality, no distinction being made between types of party (such as trader, consumer, friend, relative) or of transaction (in corresponding terms); and that many of its leading cases concern agreements between relatives or friends, of a sort that can only extravagantly be described as “trade,” let alone “the pitiless world of deals.”³⁷

Still, we should look more closely at the working-out of the thesis that the law distinguishes sharply between spheres of social life. For the central claim of the Critical Legal Studies Movement, on Unger’s account of it, is that conceptions of desirable human association can retain their controlling “third-level” status in legal thinking without being conceived, as at present they supposedly are, as “given,” “natural” or “rigidly defined.” So: classical theory, according to Unger, involves a “polemical opposition of contract to community,”³⁸

35. *Ibid.*, p. 623.

36. *Ibid.*, p. 569.

37. *Ibid.*, p. 635.

38. *Ibid.*, p. 625.

“stark opposition of community as selfless devotion and contract as unsentimental money-making,”³⁹ between “a conception of community as an idyllic haven of harmony, and contract, as a realm of unadulterated self-interest and pure calculation,”⁴⁰ with “the practical result . . . [of leaving] inadequately supported the subtle interdependencies of social life that flourish outside the narrow zone of recognized community.”⁴¹

Thus: what is wrong with pre-critical doctrine, according to Unger, is its rigid, polemical opposition, at the third level, between two forms of human association, the world of commerce conceived as devoid (in fact, in conception, and thus in law) of mutual responsibility, and the world of private community, whose “prime instance” is “the nineteenth century bourgeois family or its diluted successor.”⁴²

To make his contrast plausible, Unger must introduce the family as “subordinat[ing] the jealous defence of individualistic prerogative to the promotion of shared purpose and the reinforcement of mutual involvement”⁴³ in a “flexible give-and-take that contract law . . . would disrupt.”⁴⁴ But the family unbalances Unger’s typeing. Within a page his depiction of this social type has taken a contradictory form:

the whole view of family beyond contract depends upon the interaction between an impoverished conception of community and a narrow view of law in general and contract in particular. The conception of community defines communal life largely negatively, as the absence of conflict.⁴⁵

“Absence of conflict?” Or “promotion of shared purpose . . . mutual involvement . . . and flexible give-and-take?”

And what about the other social form, the market, a “devolution of practical life to the harshest self-interest,”⁴⁶ excluding even a “partial

39. *Ibid.*, p. 641.

40. *Ibid.*, p. 644.

41. *Ibid.*, p. 625.

42. *Ibid.*, p. 623.

43. *Ibid.*, p. 624.

44. *Ibid.*, p. 623.

45. *Ibid.*, p. 625. Of course, Unger has earlier claimed (*Law in Modern Society*, p. 144) that, in “liberal society,” “familial relationships are abandoned to the exploitation of power advantages within the family under the guise of respect for the integrity of the family group,” so that “the impersonality of the public realm and the communal character of the private one are always changing positions.” That has some plausibility as an observation on the *effect* of liberal legal doctrines. What has no plausibility is that those legal doctrines are flagrantly self-contradictory, as they would be if they were what Unger claims in “The Critical Legal Studies Movement.”

46. *Ibid.*, p. 622.

reconciliation between the competing claims of self-interest and attachment to other people,"⁴⁷ a realm of "equality of distrust," and so forth? This depiction depends upon putting out of mind vast tracts of law. We have already observed Unger's oversight of the bodies of law outside Contract, such as Tort and Restitution, which though not treated as contractual are treated by the law as applicable and even primarily applicable to the world of commerce. It is now time to take into account the rules of law considered by Unger as subsumed under the second pair of principle/counterprinciple.

IV

The second of the two principles governing the law of Contract is freedom of contract, stated by Unger in, at last, a proper form:

the parties must be free to choose the terms of their agreement. Save in special cases, they will not be second-guessed by a court, not at least as long as they stay within the ground rules that define a regime of free contract.⁴⁸

And the second counterprinciple, supposedly marginalized in pre-critical law and doctrine, is "that unfair bargains should not be enforced." As Unger says,

Fairness means not treating the parties, and not allowing them to treat each other, as pure gamblers unless they really see themselves this way and have the measure of equality that enables each to look out for himself.⁴⁹

Thus, for example, a contract made by one party under the economic duress of a party possessing significantly superior bargaining power can be treated as voidable by the weaker party. Or again, where a contract is frustrated by unforeseen circumstances, the modern law provides for a mutual adjustment of losses which Unger somewhat grandly describes as each party insuring the other against mistakes and misfortunes falling outside the limited and discriminate risks defined by the contract (including its unspoken presuppositions).⁵⁰ Such a "mutual insurance" amounts, as Unger says, to treating the contracting parties as if they were in a kind of partnership, or joint enterprise—a kind of community. To this extent, as Unger rightly says, the second counter-

47. *Ibid.*, p. 623.

48. *ibid.*, p. 625.

49. *Ibid.*, p. 632.

50. *Ibid.*

principle, requiring fairness, intersects with (i.e. reinforces) the first counterprinciple.

Unger's point, now, is that in pre-critical law and doctrine, operating in a society where gross inequalities of bargaining power exist, the counterprinciple of fairness is restrained from "running wild" and correcting almost every contract⁵¹ by drawing "unstable, unjustified and unjustifiable lines. . . ."⁵² But do we not find here the perennial sophistic complaint that wherever any line is drawn by law, "for every situation corrected, there seems to exist another similar to it that is left untouched,"⁵³ so that the line itself is arbitrary and thus unjustifiable and thus unjustified, i.e. ripe for subversion? Someone who accepts this refuses to acknowledge the rationality of *determinatio* (illustrated in sec. II, above). He cannot fix a speed limit, or a scale of progressively rated taxation, or divide examinees into first, second, and third class. . . .

And the further question, in relation to Unger's own enterprise, is whether he shows that in drawing its lines, the law is guided by some ideal of the market, an ideal stateable at a third level, i.e. prior to and independent of the (counter)principles of fairness and equality which work at the second level. To answer this question, we can look at Unger's claim that the Critical Legal Studies Movement has a counter-vision of Contract based on a countervision of the market, yielding not a competing concern within a shared conceptual framework of Contract law but rather a new conceptual framework. Unger offers to illustrate his notion of a "struggle between conceptual frameworks" by examining the progress of such a struggle in areas of "exemplary difficulty" in existing legal doctrine: his chosen examples are some problems concerned with mistakes made in the process of forming a contract.

Suppose that a contract is being negotiated not face to face or by telex but by correspondence, and one party changes his mind about the offer or counteroffer he has made, or about the acceptance he has sent off to the offeror, and so tries to revoke his offer or counteroffer or acceptance. A contract, once formed, cannot (of course) be simply revoked by one party. So the question is: Precisely when is the contract irrevocably formed? And precisely when does the purported revocation take effect if it can take effect? Unger says that the classic and current Anglo-American Contract doctrine refuses to distinguish,

51. *Ibid.*, p. 629.

52. *Ibid.*

53. *Ibid.*, p. 633.

for these purposes, between innocent and wrongful (purported) revocations. The explanation for this, he says, is that such problems arise in a “fully commercial context,” in which the parties are engaging in “pure gambles beyond the reach of the counterprinciples of community and fairness.”⁵⁴ Alternatively, he acknowledges that the current doctrine considers the relevant distinctions in the moral quality of the conduct of the revoking party to be “too fine and fragile to serve as useful bases”⁵⁵ for rules about formation and revocation. Critical legal doctrine proposes, on the other hand, to reverse the relations between principle and counterprinciple, under the guidance of a countervision of human association. It therefore proposes to distinguish between wrongful revocations, which will be treated as ineffective, and innocent, revocations, which may be effective even after the contract itself has come into existence. And what is the proposed distinction? Wrongful revocations are those attempted “because of afterthoughts about the profitability of the deal or changes in market conditions supervening upon the dispatch of the acceptance.” Innocent revocations are those made “to correct a mistake that does not concern business judgment,” for example “faulty calculations or . . . a misapprehension of what [one] has agreed to do” *including* “negligent” miscalculations and misapprehensions, and an “ordinary” measure of inprudence.⁵⁶ And then, where the revocation is in that sense “innocent,”

the losses ought to be divided between the offeror and the offeree according to the degree of the [revoking party’s] negligence and even the comparative ability of the parties to bear the loss.⁵⁷

Comparative ability when? And which losses? Objections to Unger’s proposal will spring to mind.

Unger’s proposal asks A to “insure” B in relation to the very matter over which B has exclusive control, i.e. over B’s own conduct in making his calculations about the content of the obligations, costs, and benefits he is proposing to contract for. But as to external market conditions, affecting price, profit, feasibility of performance, etc., each “party” is treated as a self-insurer, a high-risk gambler, simply because these are, according to Unger, “business judgments.” Here is a distinction which *does* seem arbitrary, not because it draws a line be-

54. *Ibid.*, p. 643.

55. *Ibid.*, p. 634.

56. *Ibid.*, pp. 634-5, 638.

57. *Ibid.*, p. 636.

tween "similar situations," but because it is groundless or wrong in principle.

And if one makes this objection, one is surely not participating in the advertised "struggle between conceptual frameworks." Rather one is pointing out that Unger is just using, ineptly, an existing conceptual framework—a framework which does, in various contexts, take account of negligent and wrongful conduct, and in others of that sort of autonomous responsibility for one's own affairs which Unger calls high-risk gambling; and that he is doing so without regard to the costs of unpredictability and of the extensive litigation required to settle, ad hoc, the relation between such incommensurables as "degrees of negligence" and "ability to bear the loss."

Contract law has to grapple, in any case, with complex situations. Consider, for example, another of Unger's "exemplary instances," a variant on the preceding case. A careless subcontractor discovers his carelessness, and seeks to revoke his bid before it has been accepted but after the general contractor has become bound to the client on terms which presupposed the subcontractor's original bid. No need to go into the details of Unger's discussion and proposal, which share the weaknesses of his earlier discussions. Notice only the fact, which he records but glides past: pre-critical Contract doctrine makes the legal solution turn on the question whether the general contractor knew or had reason to know or suspect that the subcontractor's bid was predicated on a miscalculation; for if he did have this knowledge, suspicion or ground for suspicion, he cannot hold the subcontractor to the bid, despite his own costly reliance on the bid.⁵⁸ Unger is bound to glide past this, because it illustrates the principle of fairness already embodied in a body of law which he wrongly treats as sponsoring "harsh self-interest," "high-risk gambling," etc.

The fact is that existing Contract law and doctrine is rich in concern for moral principles of fairness and can expand or contract its *determinatio* of those principles without engaging in any struggle between conceptual frameworks. The competition, which no one thinks can be resolved by deduction, is between such considerations as excluding the unfairness of taking advantage of another's mistake; the unfairness of defeating actual reliance; the unfairness of submitting the relations between parties with many diverse interests to the indefinite delay and unpredictability and incidental waste of litigation necessitated by rules which are indefinite because formulated in *terms* of "fairness"; and

58. *Ibid.*, p. 637.

so on. Unger is aware of the latter problem. He confronts the objection that there is a

need to choose between a ready but crude generality [in the legal rules] and a subtle but painstaking and uncertain particularism, with its potentially invasive probing of the springs of conduct and the nuances of moral discrimination.⁵⁹

This formulation of the objection to his countervision rather overdoes the concern about invasiveness and underplays the concern about certainty, predictability, consistency, and finality. Anyway, he parries it in two ways.

First, he says it is “often” advanced as a cover for an “ideological” attempt to “confine to a narrow range of situations the idea of contract as a common enterprise animated by mutual loyalty.”⁶⁰ Maybe. But the problems of early certainty about the rights and liabilities of the “parties” remain real problems, quite apart from ideology. And it also remains that the question in issue was precisely whether there is yet a contract to which the parties ought to be loyal, or only an uncompleted negotiation.

His second parry points out that his own countervision itself accommodates some “brightline” rules of contract of “the classical form” in “special cases.” He does not stay to consider whether, and how, there can be a (in his sense) non-arbitrary and “justifiable” “bright line” between “special cases” of this sort and other situations where the critical legal doctrine is going to authorize courts to impose obligations and create entitlements in ill-defined ways unrecognized by pre-critical Contract law.

V

The key move in Unger’s “critical” strategy is a fallacy. For it is a fallacy to assert that “bright lines,” i.e. definite rules—such as those in Contract which refer only to events, times, states of mind, etc., and not at all (in their formulation) to reasonableness or fairness or *ex post facto* ability to pay—could be justified only if there were a bright line, a “stark contrast,”⁶¹ between ideals of human association, say between community and commerce, between family (or friendship) and the market.

On the contrary, the case for bright lines at the first level of rules is best made on the basis that the ideals of human association are related

59. *Ibid.*, p. 642.

60. *Ibid.*, p. 642-3.

61. *Ibid.*, p. 644.

one to another in the way indicated by Aristotle's analogy of *philia*, friendship, which extends, in differing but related forms, from the central case of friendship to play-friendship, communal good neighborliness (*philia politike*), and business friendship.⁶² And what is the substance of these lines of analogy or relationship between forms of association as different as "real" friendship and business friendship? It consists surely in the fact that each of these forms of association exemplifies the basic human good of community, and that each is structured, though in differing ways, by common principles of fairness, honesty, and responsibility.

Indeed, the realm of commerce as envisaged in the law of Contract is a realm in which the mutual obligations are not only controlled by the side-constraints of fairness but are actually grounded on fairness and on the common benefits made available by respect for undertakings; and these principles of fairness and common good are not different from the principles of fairness and common good which structure forms of interdependence and loyalty *not* involving the deliberate undertaking of mutual obligations by mutual promises.⁶³ They are principles which have a claim and a bite more or less independently of any descriptive or ideal typology of forms of human association.

Unger does not understand the moral underpinnings of existing, pre-critical Contract. According to him, it is only his countervision that "treats the counterprinciples of community and fairness as possible generative sources of the entire body of law and doctrine, [and] finds the standard source of obligations in the only partly deliberate ties of mutual dependence. . . ."⁶⁴ According to him, pre-critical doctrine sees the counterprinciples of community and fairness "as mere ad hoc qualifications to the dominant principles, [and] identifies the fully articulated act of will and the unilateral imposition of a duty by the state as the two exhaustive sources of obligations."⁶⁵ In other words, before the Critical Legal Studies Movement, everyone was a voluntarist or a positivist.

A glance at the pre-critical discussions of the obligation of promises in Charles Fried's work⁶⁶ or mine⁶⁷ will correct that impression. And a

62. See Aristotle, *Nicomachean Ethics* VIII, 2: 1155b17-20; 3-4: 1156a6-1157b6; Finnis, *Natural Law and Natural Rights*, pp. 139-44, 157-8.

63. Finnis, *ibid.*, pp. 298-307.

64. Unger, "The Critical Legal Studies Movement," p. 569.

65. *Ibid.*; cf. pp. 597, 639.

66. Fried, *Contract as Promise: A Theory of Contractual Obligation* (1981), pp. 13-17.

67. Finnis, *Natural Law and Natural Rights*, pp. 299, 303-8, 320-5, 344-6.

fair assessment of the existing law will show what I have already indicated, firstly, that pre-critical doctrine treats Contract as only a fraction of the legal universe, a universe in which duties of compensation, of restitution, of fiduciary obligation and trust abound; and secondly that the law of Contract itself is shot through with conceptions of honesty and fair dealing, and with public policies supported but not merely invented by the state.

The case for having a brightline rule, such as that preventing revocation of a contract once formed but allowing free revocation of offer, counteroffer, or acceptance until the moment of formation, is a case which does not at all rest on the superstition that an act of will has some normative significance on its own or when linked with another, contemporaneous act of will. Nor does the case rest on the absurd thesis that contract, being commerce, is part of a distinct form of human association in which harshest self-interest must be allowed to flourish without the restraints of community or fairness. It is a case which points partly to the advantages to all of a "business efficacy" enhanced by clarity and stability of expectations at each stage of conceiving and conducting a business venture; partly to the unfairness typically occasioned to third parties whenever a contract is revoked or invalidated; partly to the risks of unfairness occasioned by rules which encourage perjury; and partly to the waste, misery, and unfairness, of having to leave disputes to the hazards of litigation and palm-tree justice, instead of solving them with brisk efficiency, months or years earlier, by pointing to the relevant brightline rule in the "rule-book."

To say this is not to say that this case is so overwhelming that reform of the law in the directions suggested by Unger and others would be irrational or unreasonable. The existing brightline rules, even where reasonable, are not *deductions* from the principles of fairness and community of which they are *determinations*. It is Unger who is the absolutist, that is to say the disappointed methodological absolutist, who if he cannot find deduction proclaims that the movement of legal thought from his two higher levels (which I have been arguing are really but one, complex, higher level) to the first-level rules is a movement "flawed,"⁶⁸ "confused,"⁶⁹ "arbitrary,"⁷⁰ "unjustifiable," and even "unjustified" in (he hints) the strongly negative sense of demonstrably wrong. Most of the time—and, when criticizing others, always⁷¹—he (like, with opposite motivations, Ronald Dworkin)

68. Unger, "The Critical Legal Studies Movement," pp. 580, 615, 647.

69. *Ibid.*, p. 570.

70. *Ibid.*, p. 633; cf. also p. 577.

71. Cf. p. 615, where, in relation to his own proposed doctrine he acknowledges

overlooks the distinctive reasonableness of *determinatio*. By *determinatio* there can be a particularization of general ideals, commitments, and principles by architects, musicians, legislators, and jurists, by steps none of which is itself necessary, and all of which could reasonably have been in some respect different—so that there is, in these myriads of instances, no uniquely correct solution—but all of which are reasonable and none of which could without risk of *error* have been taken randomly or without regard to coherence with the larger whole constituted both by the initial general idea or ideas of value, commitment, or principle and by the steps already taken.

It is this requirement of coherence—of the integrity of the system both as a set of rules and principles extending analogously over many different but comparable forms of relationship and transaction, and as a set of interrelated institutions (e.g. a hierarchy of courts, themselves more or less subject to legislatures)—that distinguishes legal thought from “open-ended” practical reasoning: “formalism,” if you will; fairness, “due process and equal protection of law,” and systematic integrity, if one wants more accurate labels. This is a form of that loyalty of officials—say, judges and even legislatures—to their own previously settled and announced standards, that fidelity, which Lon Fuller rightly made the feature which distinguishes law from managerial direction, i.e. from the bureaucratic rule to which Weber had more or less assimilated it.

VI

Determinatio is practical reasoning, whose principles are provided by the understood basic forms of human goods, and the normative requirements of one of those goods, practical reasonableness. Like Kronman's positivist,⁷² though with a different animus, Unger's Critical Legal Studies Movement uncritically supposes that norms and obligations can be justified or explained simply by pointing to facts about the present or the past. Obligations, he says in his set-piece account of the “premises” of his countervision, “arise primarily from relationships of mutual dependence that have been only incompletely shaped by state-imposed duties or explicit and perfected bargains.”⁷³

that “at each crucial juncture” in the steps from higher to lower levels “different conclusions might reasonably be drawn”; his normal assumptions, however, are displayed on p. 571: “it would be strange if the results of a coherent, richly developed normative theory were to coincide with a major portion of any extended branch of law.”

72. Anthony Kronman, *Max Weber* (1983), p. 55 and *passim*; Finnis, “On Positivism and Legal Rational Authority,” pp. 80-84.

73. Unger, “The Critical Legal Studies Movement,” p. 639.

But when is interdependence a good to be maintained, and when had it better be moderated or superseded by relative autonomy or by other forms of interrelationship? When is interdependence no more than parasitism, and what distinguishes parasitism from the honorable dependence of the infant, the unborn, the insane, the infirm? Unger does not seem to ask.

Indeed, the content of the countervision, of the forms or ideals of human association to be encouraged by the Movement, remains almost wholly negative. The individual is to be “freed from the tyranny of abstract social categories” . . .

The search for the less conditional and confining forms of social life is the search for a social world that can better do justice to a being whose most remarkable quality is precisely the power to overcome and revise, with time, every social structure in which he moves.⁷⁴

A genuinely critical student will have two reflections on this. First, he will reflect that the truly dependent had better look fearfully to their future when they hear these proposals to overcome every abstract social category and every social structure. For what is the aspiration and reality that Aristotle named the Rule of Law, and what are the legal structures of fair trial, or of the “welfare” rights to food and water, or of the right not to be deliberately killed, but abstract social categories and structures to be “overcome”? The world envisaged (or at least spoken of) by the Movement is not a world for children.

Secondly, one will reflect that the fundamental program of the Movement—of introducing a society in which “social life makes available in the course of ordinary politics and existence the instruments of its own revision”⁷⁵—is at war with Unger’s own proposed revision of Contract law on the basis of the “counterprinciples” of fairness and community. For fairness and community are conceived by him precisely as extending (not revising, breaking down, remaking, or overcoming) the interdependencies and mutual obligations of persons—obligations which, indeed, he subsumes under the name of loyalty (e.g. loyalty between parties to a supposedly pre-contractual negotiation). But is not *loyalty* a strange name on the lips of those dedicated to the permanent revision of all confining social structures, all schemes of division and hierarchy? For what is Contract but a device for deliberately creating obligations backed by the coercively

74. *Ibid.*, p. 584-5.

75. *Ibid.*, p. 662.

confiscatory power of the State, for creating restrictions (on the freedom of the parties thereafter), for creating divisions (between those subject and those not subject to the obligations thus created), and for creating a kind of hierarchy (between the party who—at least legally—is dominant, because he has the unsatisfied right, and the party with the unperformed obligation. . .)?

As Unger seems to admit, his Movement has no “proposal about how to reconcile freedom with other ends.”⁷⁶ It rests uncritically content to ignore that problem of reconciliation, or at least to put off indefinitely the task of identifying and living out those “other ends.” I say “uncritically” because the value of freedom, which the Movement affirms, is arbitrarily exempted from its denial of objective human goods. The exemption is disguised by careful choice of words:

if the central tradition of modernism is to be believed, nothing lies on the further side of blind constraint . . . but a confrontation with the real and anguishing sense of freedom itself. . . . [But] freedom, to be real, must exist in lasting forms of life; it cannot merely exhaust itself in temporary acts of context smashing.⁷⁷

Here the words “real,” “must” and “cannot” conceal the affirmation of a good and the proposal to avoid an evil: a life of context smashing is not a good life . . . is worthless.

Note the assumption Unger has laid bare: “. . . if the central tradition of modernism is to be believed. . . .” A genuinely critical social theorist will ask a few questions before believing the central tradition of anything. He might begin by asking whether Unger has offered good reasons for denying that there are any objective human goods. And he will find that Unger has offered four reasons; two of them are contradicted by himself, and the other two rest on the characteristic modern failure to examine the possibility that the requirements of practical reasonableness, while ruling out a few classes of action and thus making possible an acknowledgement of a few fully specific human rights not to be treated in certain ways, for the rest have a directive quality, far short of specifying a unique set of individual or social commitments, yet far richer than emptiness.

To affirm objective human goods [says Unger] is to affirm that the mind can grasp and establish moral essences. . . . But this has never been shown, and the conception of reason on which it rests has been discredited in nonmoral areas of thought.⁷⁸

76. *Ibid.*

77. *Ibid.*, pp. 660, 661.

78. Unger, *Knowledge and Politics*, p. 77.

But this talk of the “essences” bogey is merely conjuring with a forgotten word. What is at stake is no more and no less than the question whether the mind can understand anything and hold and communicate some definite meaning to define and express what it understands; and the “what it understands” is no more and no less an “essence” in thought about human good than it is in thought about geometry, biology, chemistry, or particle physics. Unger’s denial of essence is contradicted by many of his own affirmations, not least his acknowledgement that there is a human nature.

Equally self-contradictory is Unger’s claim that “the doctrine of objective value falsely teaches us to forget the connection between what is good for us and what we are.”⁷⁹ For he had himself, in the same book, acknowledged that

the conception of objective value [proposes that we think] of . . . norms of conduct as ends whose fulfillment would bring our worthiest capacities to their richest development. . . .⁸⁰

As Aquinas does not tire of saying (but is often not *heard* to say), we come to know our nature (what we are) by coming to know what are our capacities, and these we come to know by understanding what we do (our actions), and these we understand by understanding their point, their ends, the goods that they realize and participate in.⁸¹

Unger’s third charge is that a theory of objective goods “degenerates into either meaningless abstraction or unwarranted parochialism.”⁸² With this one can and should be brisk. The charge could only be established by someone who participates in specific discussions of particular goods, particular requirements of practical reasonableness, and particular *determinations* of those goods and requirements in the commitments of an individual life-plan or the institutional structures and practices and legal rules and principles of a given community. Unger, for the most part, omits to engage in such discussions; his discussion of the current rules and principles of Contract does not encourage confidence in his claim that there is no middle ground between meaningless abstraction and unwarranted parochialism.

Finally, and I think most near to his own heart, is the contention that the “doctrine” of objective human goods

79. *Ibid.*, p. 239.

80. *Ibid.*, p. 77.

81. See citations and commentary in Finnis, *Fundamentals of Ethics*, pp. 20-5.

82. Unger, *Knowledge and Politics*, p. 239; also p. 77.

denies any significance to choice other than the passive acceptance or rejection of independent truths. Our experience of moral judgment, however, seems to be one of at least contributing to shape the ends we pursue. A conception that puts this fact aside disregards the significance of choice as an expression of personality.⁸³

Unger, in other words, treats the claim that there are objective human goods and moral requirements as the claim that we can "kn[o]w the moral good with certainty, and underst[an]d all its implications and requirements perfectly,"⁸⁴ to the extent that we do not need any individual choice of obligation-creating commitments or vocations, or any social mechanism of "impartial adjudication," of authoritative *determinatio*.

I have tried in this article to show how far this distorts our human situation as that situation is understood in the social theory of Aristotle and, say, Aquinas. That social theory remains still to be refined and elaborated, but methodologically it is far sounder than the criticisms which Unger and his fellows have brought against it. And its explicitly moral and political normative theory is sounder by far than the criticisms they have brought against social practices that are still best accounted for by its principles of theoretical method and of practical reasoning and choice.

83. *Ibid.*, p. 77.

84. *Ibid.*, p. 93.