

Book Note

Legal Analysis and the Perversions of Theory

What Should Legal Analysis Become? By Roberto Mangabeira Unger. London and New York: Verso, 1996. Pp. 198. \$17.00.

When Justice Holmes warned his contemporaries that the Fourteenth Amendment “does not enact Mr. Herbert Spencer’s Social Statics,”¹ he was chiding the Court for reading laissez-faire economics into the Constitution, and his comment reflected two anxieties that recur perennially in American legal thought. His comment indicated, first, a methodological worry about the difficulties inherent in interpreting the law “correctly,” an issue that has been addressed explicitly by theorists such as Ronald Dworkin, H.L.A. Hart, Karl Llewellyn, and Cass R. Sunstein.² Holmes’s comment also reflected political concern about the legitimacy of interpretations that extend beyond the meanings voiced by the People.³ Naturally, in a democratic nation such as ours, which views itself as governed by written laws rather than powerful people, these two issues are intimately linked. Together, they help frame the question: How should we interpret the law?

In *What Should Legal Analysis Become?*, Roberto Mangabeira Unger sets forth his mature view on this question. Unger maintains that modern practices of legal interpretation have become dominated by what he calls “rationalizing legal analysis” (p. 38), a form of analysis under which judges interpret independent fragments of the law as expressing a coherent, general system of

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1. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

2. See RONALD DWORKIN, *LAW’S EMPIRE* 313–99 (1986); H.L.A. HART, *THE CONCEPT OF LAW* 124–54, 263–76 (2d ed. 1994); Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV L. REV. 405 (1989).

3. In the last few decades, this latter problem has received heightened attention, mostly from conservatives disturbed by the specter of judicial activism. Justice Byron White and Robert H. Bork, for example, have likened the Supreme Court’s substantive due process and First Amendment jurisprudences, respectively, to acts of “Lochnerizing.” See *Moore v. City of East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND L.J. 1 (1971). Some liberals have also addressed these issues. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 3–33 (1991).

purposes (p. 36). In the critical portions of his book, Unger argues that we should abandon this practice for two main reasons. First, he claims that the practice allows judges to impute general “policies of collective welfare and principles of moral and political right” into their readings of the law (p. 36), thereby suppressing vital elements of our democratic compromises (p. 40) and transferring the power to determine the basic terms of social life from the People to an elite class of legal technicians (p. 72). Second, Unger claims that the practice fetishizes our present institutional arrangements (p. 39), thus frustrating the sorts of innovations that would give genuine meaning to the People’s legal mandates (p. 39).

In the more constructive portions of his book, Unger contends that we should replace rationalizing legal analysis with a rather different practice. According to this practice, we should begin by “mapping” the highly pluralistic institutions and ideals embodied in the law through a practice of context-bound analogical reasoning (p. 130). We should then “criticize” our institutions by imagining variants that might better enact these newly “mapped” purposes, and by presenting each option to a highly mobilized citizenry for approval (pp. 130–31, 182). Rather than beginning with one set of coherent purposes and ascribing it to the law as a whole, however, mapping and criticism should proceed as a cyclical procedure that rejects general theoretical requirements and replaces them with a more detailed understanding of the law’s many, open-ended aims (pp. 130–31). Unger thus believes that legal analysis should become a conversation between legal technicians and the larger civic body. This conversation should not only inform the citizenry about its legal present, but also invite a process of ongoing institutional revision, by articulating alternative ways to enact those legislative commitments in the future (p. 130).

As shown below, Unger’s constructive work is inconsistent with his negative criticisms because his affirmative work depends on two general conceptions, one of democracy and one of human nature. Given the strength of his criticisms, Unger’s entire work thus provides us with a useful moral about the dangers inherent in interpreting the law through the lens of theory.

Before launching into Unger’s arguments, however, an initial problem must be eliminated. Unger claims he is not a “radical indeterminist”—that is, he is not one who believes judges can interpret democratic expressions in any way they want without diverging from the original text (pp. 120–21). Unger also claims he is making his suggestions in the name of capturing, rather than altering, the democratic voice (pp. 114, 129). Yet if we accept Unger’s picture of legal analysis as an institutional practice that translates expressions of rights into rules designed to ensure their effective enjoyment (p. 26), and if we assume that the People have knowingly voiced their will against this practice of translation, then altering this practice would seem to skew that voice.

The linchpin in Unger’s argument can in fact be viewed as a response to just this problem. Although Unger is not a radical indeterminist, he does

believe that expressions of rights and principles *underdetermine* the institutions that would ensure their effective enjoyment (pp. 28–29), thus leaving open the possibility that alternative institutions might fulfill this role. He argues, therefore, that while we might *identify* our relevant rights through ordinary legislative or constitutional processes, the “second step” in interpreting and implementing them must be to choose from among these alternative expressions (p. 29). Viewed from this vantage point, rationalizing legal analysis will appear to take this second step by eliding it: In deciding between institutions, rationalizing legal analysis consistently opts for our present ones and then uses a system of tax-and-transfer to compensate for the ways our rights are thereby burdened. By contrast, Unger’s proposal will appear to take the underdetermination of rights seriously: He suggests that we imagine and experiment with alternative institutional expressions of our rights to find out which one enforces them best. Unger thus views rationalizing legal analysis and his own proposal as two alternative and potentially viable practices for translating the same rights into institutions for enforcement. On Unger’s view, it is only institutional fetishism that keeps us from seeing this fact (p. 29).

To provide support for his particular proposal, Unger then spends the middle third of his book arguing that rationalizing legal analysis is sustained only by four misguided developments. Unger points, first, to a prejudice concerning the alleged incoherence and opacity of analogical reasoning (pp. 59–63). To counter this prejudice, Unger notes that analogical reasoning is a practice that has garnered widespread use throughout legal history, is more entrenched in tangible human concerns than rationalizing legal analysis, and boasts its own internal standards of rigor (pp. 61–62). Unger then points to the notion that the rule of law requires us to elaborate a coherent system of policy and purpose to avoid arbitrariness and illegitimacy in our interpretations (pp. 63–78). Against this, Unger notes that every practice of legal analysis leaves room for discretion (p. 65), and that practitioners of rationalizing legal analysis must choose how much to revise the law in light of its alleged ideal purposes (p. 68) and must choose which general purposes to ascribe to the law (p. 77).

Next, Unger shows how rationalizing legal analysis gains support from a third project, which he calls “pessimistic progressive reformism” (p. 82). This project rejects institutional revision as the proper vehicle for democratic reform and presumes that the only way to reach our democratic goals is to leave our institutions in place and then compensate for them on the basis of ideals imputed to the law (pp. 82–83). Unger argues, however, that in attempting “to moderate disadvantage and exclusion, [this form of analysis fails because it is] prevented by its method and vision from identifying or addressing the sources of these evils in the arrangements of society” (p. 82). Finally, Unger points to an obsession with judges and adjudication as the primary locus of legal analysis (pp. 106–10). To help temper this obsession, Unger explains that the Judiciary is linked only contingently with the task of legal interpretation (p.

111). Unger argues, moreover, that this link may arrest democracy's development because the Judiciary's nondemocratic posture keeps it from engaging in the more revolutionary forms of legal analysis (p. 112).

In the final third of his book, Unger illustrates his proposal by mapping and criticizing our present social democratic institutions. In the process, Unger presents us with three alternatives: the "extended social democracy," which radicalizes the institutions of liberal individualism and the private sphere (pp. 138-48); the "radical polyarchy," which places primary power in a loose-knit confederation of local communities (pp. 148-63); and the "mobilizational democracy," which institutionalizes consistent, broadened political activity by all citizens in the civic body (pp. 163-70). Unger thereby exemplifies his recommendation that legal analysis should be "recast . . . as institutional imagination" (p. 3). But should it be recast in this manner?

The central defect in Unger's proposal derives from the fact that it would require us to engage in a system of continuous institutional revision. This requirement would, in turn, force our citizenry to remain highly politicized at every point in time. To avoid his own criticism that we act illegitimately when we project general theories over the democratic will, Unger must therefore show that the People either need or desire this ongoing activity, and that it is not just a requirement of his theory. When Unger's proposal is examined in detail, however, it reveals itself to rest on two distinct theoretical conceptions: one of democracy and one of human nature. By substituting these conceptions for the democratic will, Unger presents a proposal that is ultimately another instance of the "problem" he depicts in the critical portions of his work.

Thus Unger's requirement of continuous institutional revision relies, first, on a prior notion of democracy. Unger argues that his requirement rests on democratic grounds because democracy is nothing more than the attempt to wed institutions that allow for material progress with ones that allow for individual emancipation, a task that will require institutional change (pp. 6-7, 11, 129-30). This view, however, reflects a general conception of democracy's purpose, and our democratic expressions seem to reveal a far more varied set of goals concerning institutional change than Unger's description would suggest. In some instances, for example, many of us would agree that a populace has used the law simply to resist institutional change. The Defense of Marriage Act provides a recent and clear—if also frightening—example of this first phenomenon.⁴ Similarly, in other instances, many would agree that the law expresses a clear commitment to a discrete instance, rather than an ongoing process, of institutional change.⁵ Finally, in a third set of instances,

4. See Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C.A. § 7, 28 U.S.C. § 1738(c) (West 1996)).

5. Particularly good examples of this phenomenon can be found in the periodic reform acts that restructure institutions like bankruptcy or the federal judiciary. See, e.g., Pub. L. No. 98-353, 98 Stat. 333 (1984) (amending scattered sections of 11 U.S.C.) (bankruptcy revisions); Pub. L. No. 95-598, 92 Stat.

many would agree that the law invites a more continuous form of populist revision of one or another institution.⁶ From a democratic perspective, it is absolutely crucial that our forms of legal interpretation distinguish between these three sorts of cases. Only with these distinctions in place can the People express their perennial desire to divert their attention away from some areas of institutional revision and toward their more private conceptions of the good.

In fact, in the theory and practice of the Constitution, American democracy appears to refute positively Unger's idea that the People would always want continuous populist revision. The Federalists, for example, believed that governments leaving everything up to revision "have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths."⁷ This thought has been echoed in John Rawls's idea that we need a public apparatus to generate agreement on constitutional essentials and principles to govern the basic structure of our society, in part to allow us to develop our more private conceptions of the good in a stable and harmonious atmosphere.⁸ When constitutional theorists such as Bruce Ackerman have taken up this strand of thought, they have argued that obstacles to continuous revision in the constitutional sphere actually aid, rather than impede, the project of democratic self-government.⁹ If these thinkers are correct in their assessments, then it is a mark of genuine freedom and stability in a democratic society when the political realm is insufficiently turbulent to wrench citizens away from their more private pursuits. And if they are wrong, the People are always free simply to repeal the Constitution. Although Unger believes that American constitutionalism does nothing more than slow down the progress of democracy (pp. 164–65), the fact that thoroughgoing constitutional repeal has never been a live option shows that our democracy has consistently thought otherwise.

Once Unger's requirement is divested of its underpinnings in democratic thought, it appears to be motivated by a second general conception, this time of human nature. Specifically, Unger states at several places in his book that

2549 (1978) (bankruptcy revisions) (amending scattered sections of 11 U.S.C.); The Judiciary Act of 1875, 18 Stat. 470 (amending various sections of 28 U.S.C.) (judiciary revisions).

6. The organic statutes that create regulatory agencies provide prime examples of this last phenomenon, insofar as they generate institutions that encourage continuous populist participation at the rulemaking or regulatory phases of their operation. Section 553 of the Administrative Procedure Act explicitly requires that agencies provide notice of proposed rules by publishing "either the[ir] terms or substance and [the] issues involved," and that agencies "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments." 5 U.S.C. § 553 (1994)

7. THE FEDERALIST NO. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961)

8. See JOHN RAWLS, POLITICAL LIBERALISM 47–48 (1993)

9. See Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1035 (1984); see also Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1121 (1995) (arguing that concept of democratic self-government requires civic body to articulate cross-temporal commitments). But see Lawrence Lessig, *Plastics: Unger and Ackerman on Transformation*, 98 YALE L.J. 1173 (1989) (arguing that distinctions between Unger and Ackerman are semantic)

human nature partakes of an inherent “duality” in that we always are, yet are always something more than, our institutional contexts (pp. 5, 127, 185). Unger seems to mean that even if we find ourselves in a given interpretive context, which sets limits on how our words will be taken, there will still be an indefinite amount of flexibility to what we can use this context to express. This surplus is often used to express a desire not only for institutional revision, however, but also for institutional stability. In motivating his position, Unger must therefore draw on a different conception of duality, one that dates back to his early work in *Passion*.¹⁰ According to this view, the inherent “duality” of human nature contains a desire for something that is “inexpressible” within our present interpretive context and that therefore calls for its revision. Modern developments in linguistic philosophy provide good reason to believe that this view is ultimately unintelligible, however.¹¹ The problem arises because, as stated above, this account stipulates a will that is inexpressible within our present interpretive context. Given this stipulation, Unger’s inexpressible will cannot be called—or better, cannot be expressed as—a “will for institutional revision” (or anything else for that matter), at least insofar as those terms are understood within our present context. The thoughtful reader will therefore want to find a middle ground between rationalizing legal analysis’s insistence on complete institutional rigidity and Unger’s on incessant transformation.

When viewed as a whole, Unger’s book provides us with an important moral. The book’s critical portions show quite adeptly that we need not advert to general theories or consistent systems of policy and purpose to understand the law or to apply it coherently. In fact, Unger’s critical work shows that when we do advert to theory, we often repress valuable parts of our democratic compromises. To the degree that Unger’s constructive proposal rests on similarly general conceptions of democracy and human nature in deriving the requirements of ongoing mobilization and institutional revision, his theory generates a similar democratic loss. This irony shows that “mapping and criticism” would be a cleaner, more legitimate, and more analytically sound proposal if it were divested of these theoretical requirements. Unger’s book will thus leave the next generation of legal scholars with not only a lesson but a question. It will teach them about the problems that occur when we impute general theories into the law, and it will do so in a way that simultaneously shows them just how easy it is to be lured into that net. For that very reason, it will force them to ask: At the end of the day, is it possible—or even desirable—to engage in, to elaborate, and to transmit to future generations a mode of legal analysis that escapes the perverting lens of theory?

—Robin Bradley Kar

10. ROBERTO MANGABEIRA UNGER, *PASSION* (1984).

11. The insight that forms the basis for the argument in this paragraph is derived from the philosophy of later Wittgenstein and from the ordinary language philosophers more generally. See generally LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 88–103 (G.E.M. Anscombe trans., 2d ed. 1958).