


7-1-1977

Law in Modern Society: Toward a Criticism of Social Theory. By Roberto Mangabeira Unger.

Richard D. Schwartz
Syracuse University

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>

 Part of the [Legal History Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

Richard D. Schwartz, *Law in Modern Society: Toward a Criticism of Social Theory*. By Roberto Mangabeira Unger., 26 Buff. L. Rev. 489 (1977).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol26/iss3/3>

This Book Review is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

BOOK REVIEW

LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY. By ROBERTO MANGABEIRA UNGER. New York, New York: The Free Press 1976, ix + 309 pp. \$12.95.

RICHARD D. SCHWARTZ *

This book represents a major effort by an extremely capable scholar, Professor Roberto Unger of Harvard Law School, to analyze the present situation and future prospects of law in modern society. In developing his position, Unger demonstrates impressive familiarity with a wide variety of theoretical writings in political philosophy and related fields. He also makes good use of an assortment of descriptive materials from several ancient cultural traditions: Chinese in particular as well as Japanese, Hindu, Muslim, Judaic, and Greco-Roman. In analyzing modern legal systems, he traces the development of German law from the late-feudal *Ständestaat* through the Weimar period and adds some comparative comments concerning law in Czarist Russia, England, and the contemporary United States. Although none of these legal traditions can be treated in full detail within a book of ordinary length, they are used, often quite effectively, to illustrate and argue for the perspective forcefully advanced by the author.

A brief statement of that perspective is in order here. Unger seeks to discern the social circumstances in which certain kinds of law arise and flourish. He distinguishes three ideal types or analytical categories of law: customary, bureaucratic, and "legal order." Customary law, common to an entire society, is not associated with a political entity and is "made of implicit standards of conduct rather than of formulated rules."¹ Contrary to customary law, bureaucratic and legal-order law are both "public" (governmental) and "positive" (formally articulated). Legal-order law differs from bureaucratic law, however, in "its attachment to the aims of gen-

* Ernest I. White, Professor of Law, Syracuse University. A.B., Yale University, 1947; Ph.D., Yale University, 1952.

1. R. UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 50 (1976).

erality in legislation and of uniformity in adjudication. . . . Administration must be separated from legislation to insure generality; adjudication must be distinguished from administration to safeguard uniformity."² Because of the latter characteristic, legal-order law tends to be administered by courts.

Unger's argument is that legal-order law develops under a very special set of circumstances and that it requires equally special conditions if it is to survive. The absence of those conditions in our society leads him to describe a decline, and to forecast a fall, of legal order in the kind of society in which we live. While this projection is admittedly speculative, Unger reaches it through an interesting and enlightening analysis of historical and comparative materials.

Before getting to this analysis, Professor Unger issues an appealing call for intellectual boldness. He believes that the times require a major intellectual revolution which will usher in a new era of thought, not only about law but also concerning our entire perception of self and society. While his views on these matters are described in greater detail in an earlier (1975) volume, *Knowledge and Politics*, he reiterates this belief in the first chapter of the current book. What is needed, he says, is the courage to shake off the epigonic spell cast upon contemporary scholars by our impressive intellectual forebears, the liberal philosophers and the social theorists. We will then be better able to draw upon their insights, remedy their errors, and construct a system of thought capable of predicting and explaining, if not also guiding, a new order of society as it emerges from the ruins of liberalism. These are ambitious projections. Although Unger falls short of what he promises, his work raises and illustrates some extremely important issues.

I.

Law as it has developed in western Europe, says Professor Unger, is the product of two distinctive conditions. The first was social structural: the bourgeoisie and the princes joined in using law as an instrument for limiting and destroying the power of feudal nobles. The second was a system of belief: that one supreme, transcendent God bespoke the reality of a moral order which must be reflected in universalistic, general laws.

The absence of these conditions in other societies, such as

2. *Id.* at 53-54.

ancient China, inhibited the development of a genuine legal order. There were, to be sure, important differences in Chinese thought between the advocates of bureaucratic power (the Legalists) and the Confucian codifiers of custom, but neither favored a system of law comparable to the objective, generalized, and organizationally autonomous system which emerged, both in theory and in practice, in the West. Other legal systems of Asia also failed to develop autonomous, general legal orders—for reasons which are traced by Unger to various distinctive combinations of social structures and religious belief systems.

Legal development in the West turns out, however, to be an unstable compound, doomed to early decay. For one thing, the splintering of liberal society into diverse interest groups tends to force the legal system toward decisions on behalf of special interests, particularly welfare and corporate, which will not be denied. Decisions favorable to such groups are increasingly justified in terms of “functional” decisionmaking, which measures justice in terms of consequence rather than in accordance with universalistic, neutral principles. As a result of such decisions and the ideology underlying them, law suffers a decline in authority, comes to be viewed as a resource, and is subject to increasing depredations until it finally loses its capability as an instrument for guiding the moral order. Assisting in this tendency is the increasing growth and significance of administrative agencies which signal the further decline of court-administered law.

These developments are viewed by Unger as inevitable, given the nature of modern, “postliberal” society and culture. Contemporary society, with its fractionalization of statuses, requires that we play a wide variety of roles in which interaction with strangers becomes commonplace. The aggregate consequence of such interactions is to destroy the line, found in traditional and feudal societies, between insiders and strangers. Under these circumstances community cannot survive. Its decline means, however, that the individual is deprived of those fundamental satisfactions and effective social controls which in traditional societies support and govern social life. While law can provide regulation of the relations between groups, it cannot substitute for the moral stability provided by community. As individualization proceeds, there are growing attempts by some to use the law to secure privilege and by others to attain equality. Efforts made to satisfy those de-

mands deprive law of its principled stance and with it its authority as an objective arbiter. As law becomes ever more heavily burdened, it delivers less, until finally its failures become widely manifest.

II.

Unger projects two possible outcomes for law beyond modern society. The first of these represents in some sense a return to earlier forms, which Unger describes as the "closed circle":

We have seen how, in Western legal history, bureaucratic law, with its public and positive rules builds upon customary practices, and how this bureaucratic law is in turn partly superseded by the rule of law, with its commitment to the generality and autonomy of legal norms. The welfare trend in postliberal society moves the rule of law ideal back in the direction of bureaucratic law by undermining the social and ideological bases of that ideal. The corporatist tendency and the communitarian aspirations that follow it begin to subvert bureaucratic law itself. Thus, they prepare the way for the return to the custom of each group as the fundamental and almost exclusive instrument of social order.³

This closing of the circle would mean, according to Unger, the endangering or even the destruction of individual freedom and a probable "relapse into the logic of tribalism."⁴

By contrast, the decay of modern law might, in Unger's view, lead to new progress if its present tendencies could be reversed. For this upward "spiral" to occur, however, Unger believes that a transformation is needed in the social structure and in the manner in which its members relate to and understand society.

Unless people regain the sense that the practices of society represent some sort of natural order instead of a set of arbitrary choices, they cannot hope to escape from the dilemma of unjustified power.⁵

This goal can be achieved only if each person is free to enter the diverse groups of the society and "to participate in the decisions

3. *Id.* at 238.

4. *Id.* at 238-39.

5. *Id.* at 240.

that shape life in each of the associations to which he belongs."⁶ That still leaves the problem of ordering relations between groups. On this point, Unger proposes an obscure solution:

First, it would be necessary for the subversion of inequality to proceed to such a point that people would be entitled to place greater confidence in collective choices as expressions of a shared human nature or of the intrinsic demands of social order rather than as a product of the interests of dominant groups. Second, it would be indispensable that this experience of increasing equality also make possible an ever more universal consensus about the immanent order of social life and thus help refine further the understanding of what equality means.⁷

III.

The last formulation troubles me, especially since it outlines the crucial direction of Unger's pathway to Utopia. As I read him, he hopes that people will experience the "subversion of inequality" to such an extent that they will believe in collective choice as a sound way of expressing "human nature," "the intrinsic demands of social order," and "the immanent order of social life." This is a prescription which leaves me with several doubts.

First, one may question Unger's assertion that law in western society is decreasingly seen as legitimate because it is, in part, increasingly serving special interests. Such a statement concerning historic trends, unsupported by systematic data, is always suspect, since it so often betokens little more than nostalgia for the "good old days." Unger should adduce, if possible, more substantial evidence than he has given to demonstrate both the decline of objective law and the withdrawal of trust which that change has supposedly produced. A careful look at the past, in American if not in all western societies, might well reveal that neither the 19th century nor any preceding century saw the legal order closely approximating Unger's ideal type of legal order. Whether the degree of approximation was appreciably closer a century ago, for example, than at present is not at all self-evident.

I would suppose that such historical study would reveal that

6. *Id.* at 239.

7. *Id.* at 240.

the western legal order has always contained an admixture of formal and functional elements. Llewellyn,⁸ for instance, found these two styles alternating over time in American judicial history, the grand (functional) manner being replaced by formal style after the Civil War and then reviving in the middle of the twentieth century. Other commentators⁹ have found formal and functional elements closely intertwined at every period of judicial history. If, as seems probable, neither principle suffices as a basis of judicial decision, one would expect to find elements of each at any time. By focusing exclusively on the presence of functional concerns, the unwary historian might easily be led to conclude that this type of decisionmaking was assuming increasing influence, to the point at which it would threaten to destroy the formal, neutral aspects of the system. Unger fails to consider that the two principles may coexist in a salutary, mutually supportive relationship to each other and believes instead that the functional principle is destroying the formal one and, with it, the legal order. At best, this conclusion is not proven.

Second, even if a formal legal order, rather than a mixed system, be accepted as the ideal, Unger seems unduly alarmed by departures from the pure form. Some gap between ideal and actual is to be expected as characteristic of every social group. We know that human beings, bound together in societies, regularly specify normative systems which are not achieved in reality. Sorokin pointed out in *Social and Cultural Dynamics*¹⁰ that the extremes of what he called "idealistic" and "sensate" phases represented unstable states, provoking pendulum-like swings in society. Ideal patterns of culture, such as those described by Ruth Benedict,¹¹ have proved upon ethnographic examination to be far from the actual behavior. Is it proper, then, for Unger to argue for, or to predict, a rejection of our legal order on the ground that the society fails in some degree to meet its ideals in practice? Such a position could be sustained, I believe, only if his projected new society promises a better ideal than ours or a close approximation to the current ideal.

My third problem is that the new ideal which Unger favors

8. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

9. *E.g.*, B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1960).

10. P. SOROKIN, *SOCIAL AND CULTURAL DYNAMICS* (1937).

11. R. BENEDICT, *PATTERNS OF CULTURE* (1961).

is extremely vague. He calls for agreement concerning "human nature [and] the intrinsic demands of the social order." If we have learned anything from the anthropologists it is that "human nature" is enormously variable. Societies arrive by the process of cultural evolution at widely differing conceptions of human nature and achieve, through socialization of their members, personality patterns which approximate those conceptions. In a complex society such as ours—with its variations associated with occupation, ethnicity, stratum, region, and urbanization—the problem of diversity may not readily be overcome by the mere call for homogeneity. Would Unger favor greater uniformity of culture and how would that be reconciled with the principles of freedom? If he desires greater homogeneity, which of many possible patterns would he support?

His solution seems to depend on a method by which he proposes to move toward the ideal society. A prerequisite for this supposed progress is, as noted above, for people to experience "the subversion of inequality." On this fourth point, one would welcome much more careful specification. How is equality to be defined: in terms of the allocation of material or other values, in terms of opportunity or achievement, in terms of all inequality or only certain selected types? Is Unger proposing the elimination of inequality or only its partial subversion? If total elimination is envisioned, could a society survive without some degree of inequality? A respectable body of opinion in social science asserts the universality of some degree of inequality and argues the functional necessity of it. That view ought at least to be confronted by one who seriously proposes to critique the fundamental assumptions of social theory.

My fifth concern is that the "subversion of inequality" lends itself ironically to the opposite result. Is it not fair to ask whether, however noble the intention, Unger's prescription might prove to be but another road to some form of totalitarianism? Does it not call to mind the process by which workers, peasants, and soldiers formed into soviets where they fully participated in making decisions and where their increasing confidence in the "subversion of inequality" led them to accept the dictatorship of the proletariat as the immanent order of society? The pursuit of so negatively defined an ideal carries with it the danger that a society, once freed of its old ideology and social structure will find it necessary

to rebuild along lines of a viable principle of social order. While the experience of subverting inequality may serve to destroy the symbols of the old order, it does not simultaneously guarantee the nature of the new society. Unger asserts that a new society growing out of the ruins of liberalism might be very bad or very good: "a City of Pigs" or "the Heavenly City."¹² But he gives us little description of the latter and even less reason to suppose that it could emerge if we were to follow the "subversion of inequality" route.

It is interesting that, despite his impressive familiarity with social history, Unger provides us no historic examples of the kind of transformation which he hopes will serve to radically reconstitute post-liberal society. One might have considered a number of possibilities. The rise of Islam, for example, or the early period of Christianity might well have been instructive. Each of them was a charismatic movement which stressed simplicity of life style and the equality of all under a transcendent God. Both religions, to be sure, later followed a historic course in which power came to be hierarchically structured, with wealth and privilege highly concentrated. Nevertheless, each of these social movements seems to have accomplished during its first centuries an appreciable gain in equality and to have provided an ideology which has served later reformers with justifications for the equalitarian principle. If so, Unger might have used such cases to support his view that a charismatic equalitarian movement could lead to a favorable transformation of postliberal society. Perhaps in work to come the author will address issues of this kind.

This reviewer doubts that historic evidence will provide trustworthy support for Unger's spiral staircase. As Max Weber¹³ points out, charismatic movements characteristically quickly give way to formally rational authority systems in a process which Weber describes as the "routinization of charisma." The nature of these transformations varies widely, depending on the historic circumstances. One might surmise from recent history, however, that social complexity heightens the probability that charismatic equalitarian movements lead to totalitarian routinizations. The examples of early Islam and primitive Christianity occurred in societies whose members could adhere to relatively simple, uniform patterns

12. R. UNGER, *supra* note 1, at 242.

13. M. WEBER, *WIRTSCHAFT UND GESELLSCHAFT* (Part I) (1925).

of life without threatening to disorganize the society. By contrast, urbanized *gesellschaftliche*¹⁴ societies require a very complicated organization, the absence of which can quickly lead to painful dysfunctional consequences. The easiest and most likely societal response, under conditions of disorganization, may well be the imposition and acceptance of a strongly bureaucratic state organization to coordinate the widest possible range of activities. In this regard, the Nazi coordination or *Gleichschaltung* was structurally comparable to the organization and planning activities of the Communist Party in the Soviet Union. In each of those cases, the charismatic experience of "subversion of inequality" respectively in the unity of the *Volk* or the solidarity of the proletariat did not inhibit, and may have strengthened, the movement toward totalitarian government in Germany and Russia.¹⁵

When he speaks of subversion of inequality, Unger might, of course, have in mind a wholly different process than the ones referred to above. If so, it would be desirable for him to distinguish his prescriptions from other modern utopias, many of which have sounded similarly idealistic but which have been associated in practice with some deplorable outcomes. He might claim that his would be conceptually different from all the rest. He appears to favor, for example, an intellectual-emotional synthesis quite different from the prevailing mode of Western rationality. He would also recommend that participating communities replace the large-scale bureaucratic structures which now dominate our social landscape. But the new mode is vague enough so that it affords little confidence as to what it would be, what consequences it would have, or how we might arrive at it.

IV.

For all of these reasons, one might ask whether Unger has not prematurely turned away from our legal order. Might it not, with proper analysis, development, and support help to develop community consensus and moral order within an open, free, and differentiated society?

Unger does not believe that our present legal order can con-

14. F. TÖNNIES, *GEMEINSCHAFT UND GESELLSCHAFT* (1887).

15. While such an outcome cannot, of course, be clearly predicted, the danger seems sufficient to warrant a caution. That Unger himself would manifestly abhor such results unfortunately provides insufficient reassurance against their occurrence.

tribute much along these lines, without being coercive. And coerciveness will, in his view, impair the development of spontaneous altruism.

[T]he central question of politics becomes how to pursue the goals of equity and solidarity without jeopardizing the power of self-transcendence by which mankind is enlightened and ennobled.

The cost of this power is the pain of hypocrisy. Though the law may be framed to teach men sympathy, all that may be hoped for in the short run is to force them, within wider or narrower bounds, to act as if they were sympathetic. Does it not degrade the moral sentiments thus to treat them as objects of compulsion and display? And is not the consequence of this policy to create a society that appears to be what it has not yet, and perhaps never can, become?¹⁶

On this matter, I believe that Unger's idealism leads him astray, by causing him to abandon what seems to me our best chance for a good society in the real world. With all of its deficiencies, the legal order may provide a good instrument for helping to build a socially accepted moral order, preserving freedom, and generating consensus. Such an order would not require saintly altruism, but merely an acceptance of the legitimacy of a process by which diverse interests gain representation in the process of policy formulation, provided those policies are implemented (i.e., administered and adjudicated) efficiently, disinterestedly, and justly.

Our polity is set up to promote the conflict of ideas and policies—with the understanding that the resultant decisions will more nearly optimize the interests of the population. Merited criticism has of course been directed against the process on grounds that some groups are excluded from fair representation of their interests. But at this time, we see in all parts of our political, administrative, and judicial system increasing efforts to insure fuller representation of the poor, combined with genuine efforts by citizen groups to organize their efforts to allay their relative disadvantages. Is it not fair to suggest that more, rather than less, effort at opening and using our political system is the very experience which can best serve Unger's objective of "subverting inequality"?¹⁷ Apart from such efforts, it is difficult to know what

16. R. UNGER, *supra* note 1, at 215.

17. Not that all inequality must be subverted; all societies have some of it and every known society—tribal, feudal, collective, or liberal—must face the strain between equality and privilege.

other experience would satisfactorily provide for a genuine and enduring reduction of inequality.

V.

Despite all of these concerns, or perhaps because of them, I consider Unger's book well worth a serious reading. He has properly focused on the moral order of society as the crucial topic. Apart from a cultural system which provides common understandings and mutual respect, the liberal vision of society is in trouble. The legal system cannot unaided provide the glue to hold the society together.

I differ from Unger in my belief that our political-legal institutions can potentially play a crucial role—as they sometimes have in the past—in contributing to the evolution of moral order. If this is to be successfully accomplished, however, we have a long way to go. We need to understand, far better than we now do, the interrelation between the other institutions of society and the legal order. How can the limited influence of law be most effectively used to encourage the emergence of a moral order throughout the society? What law does directly in this regard may be less significant than what it does indirectly, as Willard Hurst has so well pointed out.¹⁸ We also need to understand, far better than we now do, what law can accomplish by staying out of things. If legal policy is explicitly to assume so complex and general a mission, it must necessarily be better informed concerning the norms and structures of all of our institutions; it must be apprised of the consequences of possible legal policy for the life situations of those who are affected by the actions of law-government; it should be aware of interactive effects of legal policy in the interrelations of institutions; and it must become informed through sound theory and relevant comparative-historical research of the alternative processes by which the moral order of societies develop. Such information, properly the responsibility of legal scholars and social scientists, must be made available to our citizens as they join in the activities, conflictful and consensual, which can make law an increasingly effective instrument for the conscious development of a democratic, liberal, moral order.

18. J.W. HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* (1960).

Professor Unger's book helps to reveal the importance of these relationships and to jolt people into thinking about them. Perhaps his strong critique of society and the legal order will alert its defenders to reappraise the magnitude of their task. If so, this book may well have contributed to the falsification of its own somber forebodings.