This edition may be cited as


followed by the page number
About the Typeface

The Journal Jurisprudence is typeset in Garamond 12 and the footnotes are set in Garamond 10. The typeface was named for Claude Garamond (c. 1480 - 1561) and are based on the work of Jean Jannon. By 1540, Garamond became a popular choice in the books of the French imperial court, particularly under King Francis I. Garamond was said to be based on the handwriting of Angelo Vergecio, a librarian to the King. The italics of Garamond are credited to Robert Grandjon, an assistant to Claude Garamond. The font was re-popularised in the art deco era and became a mainstay on twentieth-century publication. In the 1970s, the font was redesigned by the International Typeface Corporation, which forms the basis of the variant of Garamond used in this Journal.
TABLE OF CONTENTS

Call For Papers Page 201

Subscription Information Page 203

Unger on Contemporary Styles of Legal Analysis Page 204

Mr Julian Ligertwood
Lecturer
Victoria University

An Analysis of St. Thomas Aquinas’s Position on the Relationship Between Justice and Legality Page 238

Mr Kenny Chng
Assistant Professor of Law
Singapore Management University
CALL FOR PAPERS

The field of jurisprudence lies at the nexus of law and politics, the practical and the philosophical. By understanding the theoretical foundations of law, jurisprudence can inform us of the place of legal structures within larger philosophical frameworks. In its inaugural edition, The Journal Jurisprudence received many creative and telling answers to the question, “What is Law?” For the second edition, the editors challenged the scholarly and lay communities to inquire into intersection between jurisprudence and economics.

With the backing of our diverse and disparate community, The Journal Jurisprudence has now evolved into a distinct format. We will no longer be setting a question for each issue, but instead designing issues around the articles we received. Therefore, we invite scholars, lawyers, judges, philosophers and lay people to tackle any and all of the great questions of law. Knowing that ideas come in all forms, papers can be of any length, although emphasis is placed on readability by lay audiences.

Papers may engage with case studies, intellectual arguments or any other method that answers philosophical questions applicable to the law. Importantly, articles will be selected based upon quality and the readability of works by non-specialists. The intent of the Journal is to involve non-scholars in the important debates of legal philosophy.

The Journal also welcomes and encourages submissions of articles typically not found in law journals, including opinionated or personalised insights into the philosophy of law and its applications to practical situations.

Jurisprudence is published four times per year, to coincide with the four terms of the legal year, in an attractive paperback and electronic edition.
Each author who submits to this volume will be provided with a complimentary copy of the journal.

**Length:** Any length is acceptable, although readability to non-specialist is key.


**Submission:** You must submit electronically in Microsoft Word format to editor@jurisprudence.com.au. Extraneous formatting is discouraged.

Correspondence can also be sent to this address. If you are considering submitting an article, you are invited to contact the editor to discuss ideas before authoring a work.
SUBSCRIPTION INFORMATION

The Journal is published four times per year in an attractive softcover book. Subscription to the Journal can be achieved by two methods:

1) Single issues can be purchased on amazon.com. Our publishers, the Elias Clark Group, set a retail price for each edition, typically AU$40. However, due to their agreement with amazon.com, the price may vary for retail customers.

2) A subscription to the Journal can be purchased for AU$150 per year, or AU$280 for two years. This price includes postage throughout the world. Payment can be made by international bank cheque, but not a personal cheque, to:

   The Journal Jurisprudence,
   C/o The Elias Clark Group
   GPO Box 5001
   Melbourne, Victoria, Australia.

Alternatively, the Journal is available online at www.jurisprudence.com.au and can be read there free of charge.
Unger on Contemporary Styles of Legal Analysis

Mr Julian Ligertwood
Lecturer
Victoria University

Prominent legal and social theorist, Roberto Unger argues in his work that a generalizing and rationalizing style of legal analysis that Unger calls the ‘reasoned elaboration of law’ became the dominant, ‘canonical’ form of legal analysis in western legal cultures in the later half of the 20\textsuperscript{th} century and still retains an influence today.\textsuperscript{1} According to Unger, the influence of the reasoned elaboration of law diminished in the early 21\textsuperscript{st} century and two legal analytic approaches that Unger identifies as ‘retro doctrinalism’ and ‘shrunken Benthamism’ have filled the space of contemporary legal thought.\textsuperscript{2} These two relatively new legal analytical approaches are discussed in the final part of this chapter along with a much older analytic practice. But first, the analytic approach to law identified by Unger as ‘reasoned elaboration’ or ‘RLA’ is discussed, followed by a critique of that approach.

The Reasoned Elaboration of Law

For Unger a major continuing methodological influence in legal thought is the attempt to use public law:

especially constitutional law, the law of supranational organisations such as the European Union, and the international law of human rights – as both the ultimate

\textsuperscript{1} See: Roberto Unger, What Should Legal Analysis Become? (Verso, 1996), 34 -40.
constraint on political struggle and the highest expression of our political ideals. Its characteristic product is the development of public law doctrine as the instrument of a high handed and high minded minimalism: the defence of fundamental rights as minimums that all political forces must respect.³

The preferred method of this approach, Unger argues, is a ‘transcendental formalism’ which requires a twofold defence and development of a system of rights. An assumption of this method is that it can be defended or validated by ‘constitutional documents, understandings and traditions’, but the other transcendental assumption is that these constitutional documents, understandings and traditions define and uphold the presupposed rights of a free society or a democratic state. On this view, it is the responsibility of the jurist to take care of these fundamental rights.⁴

Unger points out that the ‘chief home’ of this high handed and high minded minimalism, particularly in the United States, has been Constitutional Law, the field of law in which both doctrinal formalism (in the 19th century) and reasoned elaboration (in the 20th century) ‘showed their most aggressive face’. That is, for Unger, the method of reasoned elaboration found support in this older, minimalist approach to constitutional law, both practices sharing the following characteristics:

The attempt to put the best face on the established institutional regime, the disposition to treat it as the definitive template for the advancement of our ideals and the fulfilment of our interests, and the premise that a higher reason was to be found in what history had already produced, if only one brought to the task the right conceptual equipment. It was as if the method of reasoned elaboration simply

---

³ Ibid 33.
⁴ Ibid.
generalised attitudes that had long been ascendant in dealing with the Constitution.\(^5\)

Reasoned elaboration or ‘rationalising legal analysis’ as Unger has referred to this analytic practice\(^6\), is then succinctly defined by Unger as *the retrospective rationalisation of law in the language of impersonal policy and principle*. Unger expands on the method of rationalising legal analysis in the following terms:

Rationalizing legal analysis is a way of representing extended pieces of law as expressions, albeit flawed expressions, of connected sets of policies and principles. It is a self-consciously purposive mode of discourse, recognizing that imputed purpose shapes the interpretive development of law. Its primary distinction, however, is to see policies of collective welfare and principles of moral and political right as the proper content of these guiding purposes. The generalizing and idealizing discourse of policy and principle interprets law by making sense of it as a purposive social enterprise that reaches toward comprehensive schemes of welfare and right. Through rational reconstruction, entering cumulatively and deeply into the content of law, we come to understand pieces of law as fragments of an intelligible plan of social life.\(^7\)

For Unger, rationalising legal analysis (herein ‘RLA’) can be seen to have four main characteristics. First, legal analysis is *purposive*, that is, it assumes that we can only interpret the law by first ascribing a purpose to it. Thus Unger claims that the practitioner of RLA takes this raw material and searches for elements that may plausibly be represented as social or moral ideals, separating them ‘from the dross of self-dealing’ with which they are commingled. The ideals discovered are not thought of as corresponding to the intentions

---

\(^5\) Ibid 36.
\(^6\) Unger, above n 2.
\(^7\) Ibid 36.
of the lawmakers. The lawmakers' intentions are sufficiently represented by the melange of motives referred to a moment ago. The aim of the analysis is to put a good face on this messy legal reality so as to guide its future development, not flatter its producers.8

Ascribing purpose to the legal materials is necessary, according to the rationalising legal analyst because it is no longer credible, or at least it would be highly controversial today, to view legal analysis as a ‘naïve positivist’ would, that is, as the mere application of the literal or plain meaning of words without regard to ideals latent in a particular piece of law.9 Through the practice of RLA, by attributing purpose to a piece of law, the interpretation of that particular piece of law can then be explained in the face of disagreement. Even where there is little or no disagreement as to the meaning or application of a piece of law to a particular case (a situation described by Hart as an easy case) the proponent of RLA will tacitly attribute purpose to the piece of law, however the purpose will only become explicit in the face of controversy over the proper or best interpretation of a piece of law.10

The second major characteristic assumption of RLA is that legal analysis is contextual, that is, legal analysis occurs within the context of the norms and attitudes of the particular community. For Unger, the ascription of purpose takes place on the basis of the engagement of the interpreters in a community of discourse that is also a form of life. This engagement then takes place on two levels. First at the level of the professional tradition, the legal experts versed in a legal doctrinal discourse. These experts act as insiders, as active participants in the development of the discourse of RLA. Unger therefore sees the jurist as acting within a collective discourse that develops in historical time and prevails over the

9 Both originalists and textualists can be regarded as ascribing purpose to law in that they ascribe the purpose consistent with what is regarded as either the original or plain meaning of the relevant law.
10 Presumably the originalist or textualist would deny that there is any tacit ascription of purpose in such cases.
individual mind acting within the experience of biographical time. The second level of contextual engagement is engagement at the level of the form of social life, in real society, in real history. As Unger puts it, ‘Just as a theologian always speaks with regard to a particular religion, a particular community faith, so a jurist always speaks with regard to a particular legal system or legal tradition and the real societies with which it is connected.’\textsuperscript{11} As a result of this contextual engagement in the community discourse and the form of social life, Unger suggests that legal analysis becomes a radically different enterprise to that of social science, which does not adopt this internal perspective.

These first two assumptions of RLA, that legal analysis is both purposive and contextual are consonant with the traditional common law practice of analogical reasoning.\textsuperscript{12} It is in the next two aspects of the method of RLA that it distinguishes itself from analogical reasoning and it is these following characteristics of RLA that are problematic for Unger. The third characteristic assumption of RLA is that legal analysis is \textit{generalising}, which means that while particular acts of interpretation may be localised or episodic, the ambition of the practice over time is to make sense of the law as a whole. Therefore any policy or principle, in order to be endorsed or legitimated through the practice of RLA, must be seen to converge or cohere with a larger set of policies and principles. The set of policies and principles that constitute the law are supposed to represent a ‘flawed, fragmentary approximation to an ‘intelligible form of social life.’\textsuperscript{13} Finally, the practice of RLA is \textit{idealising} so that any policy or principle articulated by the legal analyst must not only provide an explanation of how a piece of law coheres with most of the larger body of law, but according to RLA the legal analyst must then be able to \textit{justify} most of that larger body of

\begin{thebibliography}{9}
\bibitem{11} Roberto Unger, ‘Legal Thought Now (Spring, 2016), Lecture 3’ on Roberto Mangabeira Unger: Lectures and Courses \url{http://www.robertounger.com/en/2017/01/18/legal-thought-now-spring-2016}.
\bibitem{12} Analogical reasoning as a form of legal analysis is discussed further below at 22 -24.
\bibitem{13} Unger, above n 2, 177.
\end{thebibliography}
law. This idealising characteristic of RLA takes the characteristic form of the use of the vocabulary of impersonal policy and principle.

To engage in the practice of RLA the legal analyst must not be an outsider critic of the legal system as assumed by Bentham’s censorial jurisprudence, but must act as an insider participant in this reiterative practice of RLA. As Unger puts it, “The repeated practice of policy oriented and principle based analysis should, so the most ambitious and influential views of the practice teach, lead to ever higher standards of generality, coherence, clarity and the rational representation of law.” Thus the practice of RLA strives through a cumulative approach for a higher account of the law so that all of the law can be seen as moving towards intelligible, comprehensive schemes of the various areas of social life such as the market economy, free civil society or political democracy. These ideal representations then provide the source of the ideas that are expressed in the language of impersonal policy and principle, that is, they are seen to already exist to some extent in the legal materials, the analyst is not permitted to make them up. However, neither are they present in a ‘single, unambiguous form’:

Rationalizing legal analysis works by putting a good face indeed the best possible face on as much of law as it can, and therefore also on the institutional arrangements that take in law their detailed and distinctive form. It must restrict anomaly, for what cannot be reconciled with the schemes of policy and principle must eventually be rejected as mistaken. For the jurist to reject too much of the received understanding of law as mistaken, expanding the revisionary power of legal analysis, would be to upset the delicate balance between the claim to discover principles and policies already there and the willingness to impose them upon

---

14 Ibid 37. Without ever explicitly mentioning legal theorists who clearly endorse the practice of RLA, Unger nevertheless refers to schools of legal theory - legal process, law and economics and theories of right which provide the ‘operational ideologies’ for the practice of RLA.
imperfect legal materials. It would be to conspire in the runaway usurpation of democratic power. Thus, deviations and contradictions become intellectual and political threats rather than intellectual and political opportunities, materials for alternative constructions.¹⁵

The legal analysis must, according to the method of reasoned elaboration, not only recognise the ideal elements embedded in law but also improve their received understanding. The underlying ideal conceptions of policy and principle are developed by the practitioner of RLA at the same time as pieces of law that provide an insufficient fit are rejected, and thereby the body of law is seen to be improved by the practitioner of RLA.

It is important here to again clarify the claim made by Unger which is that his account of RLA describes an influential style of legal analysis in the later part of the 20th century and into the 21st. The claim is not that RLA is the only discourse that exists within the space of contemporary legal thought. Indeed, Unger admits that the legal consciousness is messy and confused; the product of at least three historical ‘moments’ in the history of legal thought.¹⁶ But Unger does argue persuasively in my view that RLA represents the most influential legal discourse at least in the later part of the 20th century and that this ‘canonical’ style of legal analysis gained hegemony in legal thought and culture at that time precisely because of the apparent lack of reflective criticism of the discourse itself.

According to Unger, the discourse of RLA was repeatedly regarded by jurists in this historical period as necessary or natural, or at least as instrumental to achieve certain political purposes. Law was rarely viewed by jurists as the contingent product of historical events, or as a practice that can be understood within a broader historical context and, if

¹⁵ Ibid 40.
¹⁶ See: Unger, above n 2, 41 – 51.
necessary, transformed.\textsuperscript{17} In discussing the hegemony of RLA, Unger borrows from Antonio Gramsci’s notion of hegemony, ‘that the most effective kind of domination takes place when both the dominant and dominated classes believe that the existing order, with perhaps some marginal changes, is satisfactory, or at least represents the most anyone could expect, because things pretty much have to be the way that they are.’\textsuperscript{18} Unger argues that RLA achieved its dominance not because the legal and political elites necessarily believed in the practice itself, but because they realised that it can serve the political goal of preserving the social status quo and therefore the interests of the propertied classes.

As Waldron put it, ‘traditional legal scholars proceed very, very cautiously in their reconstructive work...They take care not to attempt any radical transformation of the ideals they discern and do not propose anything much more than the minimum reforms that are required to make rational sense of the current regime of rules and doctrines.’\textsuperscript{19} That is, mainstream legal scholars and judges are aware that:

No society, not even the United States, will allow a vanguard of lawyers and judges to reconstruct its institutions little by little under the transparent disguise of interpreting the law. The mass of working people may be asleep. The educated and propertied classes are not. They will not allow their fate to be determined by a closed cadre of priestly reformers lacking in self-restraint. They will put these reformers in their place, substituting for them successors who no longer need to be put in their place.\textsuperscript{20}

\textsuperscript{17} So Unger’s theoretical project, which takes a contextual, historicist approach to legal thought, differs to much of traditional legal theory, see XX, (PhD Thesis, 2018), Chapter V.
\textsuperscript{19} Waldron, above n 9, 517.
\textsuperscript{20} Unger, above n 2, 31 – 32.
In the view of both Unger and Waldron then, whilst legal scholars have been on a ‘rather short political leash’, mainstream legal analysis has ‘taken that leash, sanctified it, and made it into a method’ such that reforms must not be proposed, nor critical analysis proceed except on a scale and at a pace that is amenable to the institutional competence and the political legitimacy of courts in a modern society.\textsuperscript{21} Thus for both, institutional conservatism and an orientation towards courts and judges are problematic consequences of this legal analytic approach, however, as Unger clearly explains, it is also the \textit{method} of RLA itself that is problematic in several ways.

\textbf{Critique of Reasoned Elaboration}

\textbf{Upholding a Regime of Rights?}

In order to provide a critique of the method of reasoned elaboration, one approach that Unger takes is to address a common defence made by practitioners of reasoned elaboration. One of the most common ways proponents of the reasoned elaboration of law defend the practice is to insist ‘that the integrity of a regime of rights or of the rule of law requires an approach similar to RLA. On this view, ‘the principle-based and policy-oriented style of legal doctrine is the indispensable antidote to arbitrariness in legal reasoning.’\textsuperscript{22} In examining the idea that upholding a regime of rights requires an objectivist, rationalizing discourse such as RLA or the high minded minimalism described by Unger, he asks the question, ‘What exactly is the regime of rights, or its reverse side, the rule of law?’ He answers as follows:

\begin{quote}
The rule of law exists when powerholders remain bound by general rules, even if these are rules established by the powerholders themselves. For them to be bound means, in part, that the rules must be interpreted, applied, and enforced in ways
\end{quote}

\begin{footnotesize}
\textsuperscript{21} Waldron, above n 9, 517.
\textsuperscript{22} Unger, above n 2, 63.
\end{footnotesize}
that can be publicly understood. The reasons for decision must not turn on case-by-case judgements of strategic interests bearing no general and reasonable relation to the rules. The consequences of an interpretation may be relevant to its persuasiveness, but only so long as they draw weight and meaning from impersonal goals of welfare or right.\textsuperscript{23}

Unger’s synopsis of the ‘rights based’ justification for RLA is that the rule of law conceived in terms of upholding a regime of rights requires RLA, or something very much like it, as the public method for the understanding of law and for its development through justified application. The justification essentially says that RLA provides an antidote to the arbitrariness of legal analysis conceived in terms of interest group pluralism or analogical reasoning. The view that the reasoned elaboration of law represents an antidote to arbitrariness in law and law making then requires the assumption that there is a significant overlap between what Unger describes as the prospective and retrospective genealogies of law. These two genealogies are essentially the prospective genealogy of law as conflict and compromise, that is, interest group pluralism and the retrospective genealogy of the reasoned elaboration of law. But as Unger asks, ‘On what assumptions could these prospective and retrospective genealogies substantially coincide in their results?’ In order for there to be such an overlap:

We must suppose that the lawmaking forces are not as distinct and opposed as they think they are...They must provide an evolutionary logic, moving law over time in the direction of a plan that we can, after the fact, redescribe in the language of developing and consistent ideal conceptions. From the dark battlefield, where ignorant armies clash, comes the rational plan .... The intersection of the prospective and the retrospective genealogies of law depends upon the belief in an

\textsuperscript{23} Ibid, 64.
immanent evolutionary rationality, practical or moral, commanding the
development of law and dwarfing the apparent antagonism of the lawmakers.\textsuperscript{24}

And although the contrast between the prospective and the retrospective genealogies of
law may apply less clearly to judge-made law, such as the Anglo-American common law,
than to the interpretation of legislation, the contrast still exists. That is, ‘to the extent we
see judges and judicial decisions, in a system of judge-made law, as agents of contentious,
factional interests and visions, the problem of the two genealogies reappears.’\textsuperscript{25} These
assumptions that Unger sets out in the above paragraph that would enable a substantial
overlap between the two genealogies have become ‘literally unbelievable’ within
contemporary social thought. As Unger says, ‘We hardly need take a very controversial
stand in the disputes of contemporary social theory to recognize that the related ideas of
a short list of possible institutional systems and of a predetermined evolutionary sequence
of stages of institutional development have both taken a beating.’\textsuperscript{26} And even if these now
defunct ideas in social theory were true, they would have the effect of weakening the
significance of what it means to live in a democracy since as Unger puts it, ‘A hidden
rational plan, retrospectively manifest in the development of law, empties both individual
and collective self-determination of much of their power. It turns them into the
unconscious instruments for affirming a higher, providential necessity.’\textsuperscript{27}

Despite these criticisms, it remains the view of many jurists, whether practicing lawyers or
within the academy, that the law ought to look different to these people, from how it may
look to a citizen, an historian, or a social scientist.\textsuperscript{28} Unger believes therefore that

\textsuperscript{24} Ibid 69.
\textsuperscript{25} Ibid 70.
\textsuperscript{26} Ibid.
\textsuperscript{27} Ibid 72.
\textsuperscript{28} Even Waldron who calls for a ‘democratic jurisprudence’ is equivocal on this issue. See Waldron, above,
n 9, 528 -9.
contemporary jurisprudence continues to carry with it two ‘dirty little secrets’. The first is a ‘right wing Hegelian view of social and legal history’, and the second is what Unger describes as a ‘discomfort with democracy: the worship of historical triumph and the fear of popular action.’ In the following forceful passage Unger discusses how jurisprudence’s discomfort with democracy shows up in almost every area of legal practice:

In the ceaseless identification of restraints upon majority rule, rather than of restraints upon the power of dominant minorities, as the overriding responsibility of judges and jurists; in the consequent hypertrophy of countermajoritarian practices and arrangements; in the opposition to all institutional reforms, particularly those designed to heighten the level of popular political engagement, as threats to a regime of rights; in the equation of the rights of property with the rights of dissent; in the effort to obtain from judges, under the cover of improving interpretation, the advances popular politics fail to deliver; in the abandonment of institutional reconstruction to rare and magical moments of national refoundation; in the single-minded focus upon the higher judges and their selection as the most important part of democratic politics; in an ideal of deliberative democracy as most acceptable when closest in style to a polite conversation among gentlemen in an eighteenth-century drawing room; and, occasionally, in the explicit treatment of party government as a subsidiary, last-ditch source of legal evolution, to be tolerated when none of the more refined modes of legal resolution applies. Fear and loathing of the people always threaten to become the ruling passions of this legal culture.30

29 Unger, above n 2, 72.
30 Ibid. Unger was referring to US legal culture but the point would remain accurate today regarding most western democracies.
But beyond the ‘literally unbelievable’ social theoretical assumptions and the antidemocratic influence, Unger further points out that the idea that the reasoned elaboration of law can provide an antidote to arbitrariness in legal reasoning is absurd given that it itself contains ‘overlapping and complementary forms of arbitrariness’ some of which are discussed in the following sections.\(^{31}\)

**The Method of RLA**

For Unger, the method of RLA is to ‘deflate’ rationalism and ‘inflate’ historicism thereby ‘splitting the difference’ between these two philosophical approaches. By ‘rationalism’ Unger is referring to ‘the idea that we can have a basis for the justification and criticism of forms of social life, and that we develop this basis through deliberation, which generates criteria of judgement cutting across our traditions, cultures, and societies.’ And by ‘historicism’ Unger is referring to ‘the idea that we have *no* standards of judgement with an authority transcending particular, historically located forms of life and universes of discourse.’\(^{32}\) For Unger the problems with RLA discussed in this section ‘turn out to illustrate the fundamental weakness in this larger philosophical campaign to deflate rationalism and to inflate historicism, and to find the imaginary middle point between them.’\(^{33}\)

Unger describes the predicament of the modern rationalist as problematic which in turn requires a ‘deflation’ of the rationalist approach:

\(^{31}\) Ibid. One objection that the RLA adherent might make to this line of argument is that the effect of the element of arbitrariness inherent in the practice of RLA is smaller than the ‘homely uncertainties of context-bound and open ended analogical reasoning.’ Unger argues however that the element of discretion in rationalizing legal analysis is both ‘less transparent and more ambitious’ than it is within the discourse of analogical reasoning.

\(^{32}\) Ibid 171.

\(^{33}\) Ibid.
The characteristic modern form of this rationalism seeks to identify a type of social organization that remains neutral with respect to the life projects of individuals and the outlooks of particular groups. We can also redefine this modern rationalism affirmatively as the effort to infer a blueprint of social organization from the abstract idea of voluntary society; that is to say, from the idea of a chosen association among free and equal individuals. This modern rationalism seems at every point either to remain too indeterminate to provide the guidance it promises, or to become determinate only by abandoning the neutrality it claims.34

Modern rationalists also have to deal with the challenge from the experience of ‘the churning up, the recombination, and the reinvention of forms of social life, making us ever more aware of the extent to which ideal conceptions have roots in historically located practical arrangements.’35 For Unger, the same churning and recombination ‘undermine the claim of any particular version of a market economy or a representative democracy to embody a reliable version of the idea of voluntary society.’36 Although modern rationalists attempt to suppress the actual social experience, at the same time they perceive the need to ‘deflate’ the claims of rationalism to bring its claims more into line with the lived experience of social churning up, recombination and reinvention. An example of the ‘deflation’ of rationalism in the history of legal thought is the move away from 19th century legal formalism in favour of RLA itself, which replaced the distinction between pre-political and political law, with a weaker, or softer, distinction between law as factional fighting on the one hand, and law as embodying a public morality or public interest on the other.37

34 Ibid 172.
36 Ibid.
37 Ibid 174.
The second part of the campaign to split the difference between rationalism and historicism is then to ‘inflate’ historicism. Again, by historicism, Unger is referring to ‘the idea that we have no external standards of judgement that can transcend a particular, cultural historical context. In other words, according to historicism there are no criteria of judgment that ‘cut across traditions or cultures’. That is, for the historicist, there is no higher order rationality. For Unger, the contemporary form of historicism is both conservative and ironic, and uses the assumption that there is no rational, grounded justification for a particular society as a justification to re-engage in the established tradition in a passive and ironic way.\(^{38}\) The established tradition then provides not only the horizon of justification and criticism, but also somehow provides a ‘source of insight into a trans-historical moral order’\(^{39}\). The claims of historicism have thereby been inflated, in the same way that the claims of rationalism have been ‘deflated’ in order to provide a more persuasive means of justification.

Unger provides two examples from political and legal culture of the inflation of historicism. The first is the treatment of existing legal and political institutions in contemporary Western democracies, particularly by people who Unger terms ‘conservative reformists’, as somehow ‘deserving special respect as a source of moral and political guidance’\(^{40}\) not simply out of loyalty to those institutions and traditions but because they are supposedly the impartial embodiment of our society’s collective ideals and interests. That is, for the conservative reformist, existing institutions can somehow provide an insight into a trans-historical moral order. A second example of the inflation of historicism in contemporary legal culture can be found in the relatively recent turn in legal theory to what is commonly referred to as interpretivism. Rather than seeing the relationship

\(^{38}\) Unger’s account of the contemporary historicism appears to have in mind the views of liberal theorists such as Rawls, Rorty and Dworkin.

\(^{39}\) Ibid 175.

\(^{40}\) Ibid.
between the legal analyst and his materials as uncontroversial as perhaps would the 19th century doctrinal formalist, the interpretivist recognises that the problem of interpretation plagues the field of law and legal thought. Thus, the interpretivist realises that the common culture ‘fails to exist in a unitary form. It remains anchored in the conflicting outlooks of particular classes and communities.’ Unger argues that rather than accepting and finding value in the consequences of cultural pluralism and fragmentation, interpretivists instead inflate historicism to deny such consequences and attempt to single out those parts of a culture that are somehow more authoritative or more impartial.

However, for Unger ‘the most important and detailed example in contemporary culture of the campaign to split the difference between rationalism and historicism is…rationalizing legal analysis itself.’ The rationalist part of RLA suggests that we can rationally reconstruct the law as the expression of a rational, intelligible and defensible plan of social life. The historicist part of RLA suggests that each legal tradition takes place within a specific historical context and that the specific social, economic and political circumstances need to be taken into account while rationally reconstructing the law. So RLA lends a special authority to law as the ‘rough approximation’ of a free civil society, free market economy and representative democracy. Therefore if we adopt the approach of RLA, of splitting the difference between rationalism and historicism, then law conceived as the current set of institutional and practices is ‘more than a tradition’, and provides ‘more than a context’, and with RLA it has the ‘practical and conceptual means with which to evade and correct its own particularity.’

---

42 Unger, above n 2, 176.
43 Ibid.
44 Ibid 178.
I have already discussed above the problem of the two genealogies of law. That is, the implausibility of the assumption that the prospective genealogy of law as conflict and compromise on the one hand, and the retrospective genealogy of RLA on the other can substantially coincide. As Unger puts it:

If the law really is the product of such factional fighting, and if democratic politics are in earnest and do not operate as the unconscious or unwitting instrument of pre-set practical or moral imperatives, we cannot reasonably expect the law to display any such cohesive functional or ideal plan. At best it may contain, in varying proportions, the beginnings and residues of many such plans.\(^{45}\)

In making such implausible assumptions, Unger argues that practitioners and defenders of RLA are engaged in a practice of deception, manipulation and vanguardism. But although Unger strongly condemns the practice of RLA and the assumptions implicit in the practice, he also believes that RLA is only a special case of a broader philosophical campaign to split the difference between rationalism and historicism, and that it is this broader intellectual and cultural situation that ‘disarms us imaginatively’ in the criticism of the institutions and practices of society.\(^{46}\)

To understand why the essential method of the reasoned elaboration of law as Unger describes it, that is, the attempt to ‘to split the difference between rationalism and historicism’ is so implausible, it is useful to examine Unger’s critique of formalism and objectivism that he provided in his work, *The Critical legal Studies Movement* because the method of reasoned elaboration is consistent with Unger’s descriptions of both ‘formalism’ and ‘objectivism’.

\(^{45}\) Ibid.
\(^{46}\) Ibid 7.
For Unger a formalist approach to legal analysis supposes that each area of law and doctrine relies on ‘some picture of the forms of human association that are right and realistic in the areas of social life with which it deals.’ And without such a guiding vision, legal reasoning would collapse into ordinary analogical reasoning. However the criticism of such formalism is that, ‘no matter what the content of this background theory, it is, if taken seriously and pursued to its ultimate conclusions, unlikely to prove compatible with a broad range of received understandings.’

Doctrinal formalism must adopt therefore, the dubious assumption that the two genealogies of law, both prospective and retrospective substantially coincide, an assumption criticised in the previous section. The critique of objectivism then builds on the critique of formalism. It essentially says that formalism relies on a background theory or scheme of human association to justify the applicable policy or principle which must itself be objective, in the sense that it refers to an objective or ‘real’ structure of society. However, as Unger points out the idea of a system of social types with a built in legal or institutional content has been discredited on two levels. At a legal historical level, the attempt to provide a general theory of contract or property or constitutional law has instead revealed that there is in fact no in built structure of a market economy or a democratic state. Similarly an examination of contemporary law and doctrine reveals that there is no single unequivocal version of democracy or the market.

Unger reveals how supposedly objective schemes of social ordering assumed by reasoned elaboration instead contain fundamental contradictions. He argues that while contemporary legal doctrine distinguishes at least three spheres of social life: the state, the family and the market, ‘legal disputes and broader political debates illustrate how the boundaries between these spheres are contingent and permanently subject to

---

47 Unger, above n 3, 87.
48 Ibid.
49 Ibid 83 -94. See also Nicos Stavropoulos, Objectivity in Law (1996, Oxford University Press).
renegotiation.\textsuperscript{50} Hugh Collins provides two examples. One is a series of cases that have blurred the boundary between the family and the market. In these cases the general principle that family and friend do not intend to contract as they do not operate within the market economy has been undermined by the counter principle that informal arrangements between relatives can establish certain property rights. The second example is of courts applying public law principles of natural justice and freedom of speech in the context of employment law, an area of law traditionally governed by market based principles. The problem for the courts has been how to justify the delineation of these conflicting spheres of social life. Unger’s critique shows that there is no limit internal to law and legal doctrine so the limits have to come from elsewhere.

One prominent criticism of Unger’s critique of formalism and objectivism has been to argue that ‘he mistakes minor practical disagreements about how best to reconcile basic principles of the legal system for fundamental disputes about the basic framework of social life.’\textsuperscript{51} However Unger responds to this criticism by asserting that it presupposes an objective scheme of human association underlying the existing legal system that cannot be challenged or changed. Fundamentally then Unger argues that the method of reasoned elaboration of law, the attempt to split the difference between rationalism and historicism represents a ‘watered down’ version of 19\textsuperscript{th} century legal science. For the 19\textsuperscript{th} century jurist each sphere of social life had an inbuilt, objective legal content discoverable by reason. This view in turn represented a watered down version of the conservative doctrines that preceded modern social theory. These conservative doctrines ‘pretended to discover a canonical form of social life and personality that could never be fundamentally remade and reimagined, even though it might undergo corruption and regeneration.’\textsuperscript{52}

\textsuperscript{52} Unger, above n 3, 93.
for Unger, reasoned elaboration represents the continuation, rather than a break, with 19th century doctrinal formalism and conservative pre-modern social theory.

**Disconcerting Practical Effects**

In addition to the methodological problems with reasoned elaboration (or RLA) discussed above, Unger also identifies several disconcerting practical effects of the reasoned elaboration of law. The first the plight of the contemporary legal academic writing a review article:

Such an article typically presents an extended part of legal rule and doctrine as the expression of a connected set of policies and principles. It criticizes part of that received body of rule and doctrine as inadequate to the achievement of the ascribed ideal purposes. It concludes with a proposal for law reform resulting in a more defensible and comprehensive equilibrium between the detailed legal material and the ideal conceptions intended to make sense of that material.\(^{53}\)

Unger poses the reasonable question, why should the reform stop at one point rather than another? One answer perhaps is that practical political feasibility requires that ‘most of the institutional background must, as a practical matter, be held constant at any given time’ and ‘proposals for institutional tinkering’ should be kept to a minimum. In addition, ‘given that the author is speaking in the impersonal voice of the quasi-judge or the quasi-bureaucrat, the reform proposals should never seem too sectarian.’ So Unger sees RLA as being shaped by ‘implicit, unjustified constraints’ that remain largely unchallenged and unexplored. And through conforming to these constraints, the legal analyst often acquires

\(^{53}\) Unger, above n 2, 49. The corollary in legal practice might be the lawyer thinking up a challenging legal argument in an appellate case.
a ‘sense of relative arbitrariness, of confusion between normative justification and practical strategy.’

It is not only the legal academic who, standing in the place of the judge, experiences this sense of arbitrariness and confusion. It is also judges themselves who experience these disconcerting effects in the attempt to assign legal rights to litigants. As Unger explains:

The judge must revise received legal understandings, from time to time, but if he revises too many of them, or revises a few of them too radically, and if in so doing he challenges and changes some part of the institutional order defined in law, he transgresses the boundaries of the role assigned to him by rationalizing legal analysis. What keeps him within these boundaries? The happy assurance that most of the received body of law and legal understanding at any given time can in fact be represented as the expression of connected policies and principles? If so, how could such a harmony between the prospective history of law as a history of conflicts among groups, interests, and visions and the retrospective rationalization of law as an intelligible scheme of policy and principle ever occur? Or is the restraint of revisionary power by the judge something that comes from an independent set of standards about what judges may appropriately do? If so, from where do these standards come?

This claim that the proper method and function of adjudication is controversial and probably impossible to settle by way of theory is not a novel claim but a claim that is adhered to by many in the tradition of pragmatic jurists that can be traced to a movement

54 Ibid 50.
55 Ibid.
broadly defined as legal realism. A third example of the disconcerting practical effects of RLA can then be seen in what has come to be known in American law as the problem of complex enforcement and structural injunctions. Unger describes this alternative adjudicative practice of complex enforcement as follows:

The method is the effort to advance more deeply into the causal background of social life than traditional adjudication would countenance, reshaping the arrangements found to be most immediately and powerfully responsible for the questioned evil. Thus, the remedy may require a court to intervene in a school, a prison, a school system, or a voting district, and to reform and administer the organization over a period of time. Complex enforcement will demand a more intimate and sustained combination of prescriptive argument and causal inquiry than has been characteristic of lawyers’ reasoning.

As with the practice of RLA, the basic problem with the theory and practice of complex enforcement is the difficulty of making sense of the limits of the practice. Rather than the practice of complex enforcement having natural limits then, Unger argues that the practical limits are imposed by the political interests of the educated and propertied classes that ‘will not allow their fate to be determined by a closed cadre of priestly reformers lacking in self-restraint’. So the practical restrictions on the procedural task of complex enforcement is ultimately a result of the perceived unsuitability of the courts to carry out this important work to execute the mandate of substantive law. Unger thus presents this strange situation in contemporary law whereby although complex enforcement would appear to be ‘a

---

56 For an account of Unger’s realistic, deflationary approach to adjudication see Julian Ligertwood, ‘The Legal Thought of Roberto Unger: Contemporary Significance, Problems and Possibilities’ (PhD Thesis, forthcoming), Chapter IV.
58 Unger, above n 2, 31-32.
59 Ibid.
necessary procedural complement, not a casual afterthought’, to contemporary law, ‘no branch of present-day presidential or parliamentary regimes seems well equipped, by reason of political legitimacy or practical capability, to do it.’\textsuperscript{60}

Unger believes that complex enforcement shows how ‘fidelity to law and to its imputed ideals may drive, unwittingly and on a small scale, into the institutional experiments that we have refused straightforwardly to imagine and to achieve. It also demonstrates how our failure to take the second step disorients and inhibits our small-time reconstructive work.’\textsuperscript{61}

For Unger, the problem of complex enforcement clearly illustrates the discrepancy between the rationalisation of the substantive law through RLA and the de-rationalisation of the institutions and practices that are responsible for implementing the ideals of substantive law. So that when the judiciary has attempted to realise the ideals of substantive law in detail through complex enforcement, it is clear that there is nothing determinative within the content of substantive law that defines the limits of such an attempt. It provides an excellent practical example of the defeasibility of legal rights, that is, even if it is possible to clearly define a legal right, there are many different ways that these rights can be effectively enjoyed, or carried out, but this is not a problem that proponents of reasoned elaboration are concerned with.

A final disconcerting practical effect of reasoned elaboration is that it does not appear to provide a basis for effective political action. This effect of reasoned elaboration and other formal styles of legal analysis might explain the dilemma facing the socially progressive lawyer who, on the one hand would like to be able to use her skills qua lawyer to effect real social change, but having internalised RLA feels constrained by the limits of the practice. Indeed, for Unger the ‘central defect of rationalizing legal analysis as political

\textsuperscript{60} Ibid.
\textsuperscript{61} Ibid.
action lies in its failure to reach the deeper sources of disadvantage and exclusion in the institutions and practices of society. This is manifest in several characteristic deficiencies of RLA: the initiating role assigned to the collective, shamefaced Bonapartism of the jurists, who hand down legal benefits from on high to people in their capacities as isolated victims rather than channelling them through the forward-looking devices of group organization; the emphasis upon the components of the experience of subjugation that are least immediately and transparently linked to the institutional structure of society such as discrimination motivated by the physical characteristics of different groups; the selective blindness to connections among the different sources of disadvantage and among the disadvantages of different groups; the uncritical attitude toward the institutional context in which we are to realize programmatic aims such as decentralization and devolution of power.

The effect of these practical deficiencies is to limit the political imagination and therefore limit the practical possibilities for social transformation:

As political imagination, rationalizing legal analysis suffers from the impulse to suppress and to freeze the internal relation between institutions or practices and interests or ideals. It works by bestowing an idealizing image upon the practices and the institutions defined in law, and finds in the retrospective improvement of law the excuse for this uplift. The consequence is to leave unexpressed, unexplored, and unresolved the internal instability characteristic of programmatic positions in modern law and politics: the tension between recognized interests or professed ideals and their established institutional vehicles.

---

62 Ibid.
63 Ibid.
64 Ibid 106.
While the conventional view of legal analysis may be that it is necessarily distinct to, and much more limited in scope than openly political action, for Unger and many critical legal theorists there is nothing about the nature of law or legal analysis (other than perhaps self interest) that requires limiting legal thought according to the assumptions of reasoned elaboration and thereby restricting the possibilities for practical transformation of society.65

In the author’s view, Unger has provided a clear, insightful and persuasive critique of the method of the reasoned elaboration of law (or RLA) as outlined above, both in terms of various conceptual problems and disconcerting practical effects. Indeed many critical legal theorists and mainstream legal scholars would accept that such a critique of the reasoned elaboration of law is largely convincing.66 One could argue therefore that Unger is really only providing a description of a well known and well worn critique of a once dominant style of legal analysis. However in considering the contemporary significance of Unger’s legal thought, this criticism ignores both the clarity and persuasiveness of Unger’s critique in the face of the continuing influence that the reasoned elaboration of law maintains on legal thought. For this reason alone the critique of the reasoned elaboration of law that Unger provides in his work remains significant. But additionally, Unger has identified two styles of legal analysis that have supplemented and to an extent replaced reasoned elaboration as influential styles of legal analysis in the 21st century. These two relatively new approaches to legal analysis that Unger terms ‘retro doctrinalism’ and ‘shrunken Benthamism’, together with reasoned elaboration and analogical reasoning complete Unger’s schematic representation of the ‘messy and confused’ analytic practice of law today.

65 Some of the implications of this idea are discussed in Ligertwood, above n 57, Chapter IV.
Contemporary Legal Analytic Approaches

Although the reasoned elaboration of law may have gained acceptance as the canonical style of legal analysis in western legal cultures in the later part of the 20th century, any methodological consensus that formed around reasoned elaboration has since been dispelled due in no small part to the work of the critical legal studies movement of which Unger was a founding and influential member. So while reasoned elaboration appears to maintain a significant influence on contemporary legal thought, there are at least three other distinctive styles of legal analysis identified by Unger which, when taken together with reasoned elaboration, provide a useful representation of the current analytical practice of law. One approach Unger calls ‘retro doctrinalism’ the second, ‘analogical reasoning’ in the common law and the third, ‘shrunken Benthamism’. I address each of these approaches in turn below.

Retro doctrinalism sought to ‘recover and develop’ legal doctrine as it was understood before it suffered the attacks of anti-doctrinal scepticism in the 20th century, including the attacks of the critical legal studies movement and Unger himself. Retro doctrinalism ‘had an undisguised affinity to the typological conception informing 19th century legal science’. Its home was private law although it could also be extended to public law by merging into the transcendental formalist approach to basic rights. Despite the dubious assumptions of retro doctrinalism discussed below, Unger argues that it managed to become an influential legal analytic practice in the 21st century due to at least three historical circumstances. One circumstance was the relative stability of private law in the 20th century which emboldened many to view private law as ‘the expression of a rational order of economic and social relations’. A second circumstance was the combined loss of faith in the method of reasoned elaboration, with a common misunderstanding of 19th century legal science.

67 Unger, above n 3, 37 – 41.
Retro-doctrinalism was able to embrace the typological approach; without the attempt to uncover ‘the inherent content of each type of economic, political and social organisations’ it was able to work on a smaller and more fragmentary scale in broadly the same direction, for example, the law of property was represented by retro doctrinalists as a law about things in a (rational) market economy. A third condition favouring retro doctrinalism according to Unger was the broader intellectual setting which was essentially bereft of structural thought and structural ambition. In such a climate, retro doctrinalism was a way of retreating from the more ‘extravagant ambitions’ of reasoned elaboration, while continuing to do the doctrinal work of the jurist.

Unger provides a plausible explanation of how retro doctrinalism came to be seen as a viable legal analytic practice. However, the methodological problems discussed above in relation to reasoned elaboration apply even more straightforwardly to retro doctrinalism. Although this new doctrinal practice rejected the ‘logic of social types’ assumed by 19th century legal science at a theoretical level, by assuming that the rational market is synonymous with existing legal institutions and practices, the effect of this new legal analytic practice was the same as that of 19th century legal science: to naturalise or objectivise the existing institutional arrangements. Unger’s critique of formalism and objectivism therefore applies as much to retro doctrinalism just as it does to 19th century doctrinal formalism, and to 20th century reasoned elaboration. In addition to the methodological problems with these doctrinal practices, for Unger the ‘rationalising spell’ cast by these doctrinal practices inhibits the possibility of social change through law. It is for this reason that Unger believes it crucial to critique and then reject such traditional approaches to legal doctrine, including the new version.

Within the adjudicative setting there remains however, a much older and, in Unger’s view, a much more robust juristic method than either reasoned elaboration or retro doctrinalism. That approach is analogical reasoning in the common law tradition. Analogical reasoning
is the contextual and purposive mode of analysis familiar to common lawyers in particular, which differs from reasoned elaboration and doctrinal formalism in that it refuses ‘to climb up the ladder of abstraction, generalization and system’. As discussed above, the practice of rationalising legal analysis according to Unger is marked by four major characteristics: it is contextual, purposive, generalising and idealising. Analogical reasoning on the other hand eschews the idea that legal analysis should generalise and idealise the law, it therefore rejects the idea of legal analysis as the retrospective rationalisation of law in the language of impersonal policy and principle.

Unger describes the practice of analogical reasoning in detail and thereby distinguishes the practice from both reasoned elaboration and doctrinal formalism. The practice of analogy has three attributes. First, it involves a ‘recurrent dialectic between the ascription of purpose and the classification of circumstance’. As such ‘there is no sensible way of comparing or distinguishing situations to the end of rule governance apart from purposive judgments. An analogical comparison is not inherently in the facts, it is a way of advancing certain interests.’ Second, the guiding interests or purposes drawn upon by the analogist are open ended. The guiding interests or purposes do not form a closed list, nor do they form a hierarchy of higher and lower order propositions by which one necessarily trumps another. Rather, the guiding interests or purposes ‘reflect the variety, renewal and disorder of real human concerns.’ For Unger the impossibility of hierarchically ordering of the interests and purposes relevant to analogical reasoning is a consequence of ‘the refusal to subordinate social experience to schematic containment.’ We can see then that like the interest group pluralism model of legal analysis, analogical reasoning differs in important ways from the other doctrinal practices, particularly in its assumptions about agency and institutional change.

---

69 Ibid.
The third attribute of analogical reasoning, an extension of the second attribute, is that it is non-cumulative:

its repeated practice over time does not turn it, little by little, into a system of hierarchically ordered, more abstract and more concrete propositions, because the guiding interests or purposes themselves do not move toward a system of axioms and inferences. As convergence and simplification take hold in some fields, divergence and complexity increase in others.70

So unlike the doctrinal approaches discussed above, the practice of analogical reasoning within say, an adjudicative setting is a practice that is not distinct from, but continuous with ordinary methods of moral and political reasoning, although it is bounded by a starting point in legal materials and ‘made self-conscious by the determination to articulate the aims of an endeavour that is both collective and coercive’.71 Given these attributes of analogical reasoning, Unger queries the presumption made by proponents of reasoned elaboration or retro doctrinalism that such formal modes of analysis carry more rational authority than analogical reasoning since:

The family of prudential and analogical practices is more widespread in historical experience and more entrenched in human concerns than is any more abstract or deductive mode of moral, political, and legal reasoning. Even in the world history of legal doctrine, analogical and glossatorial forms of reasoning have exercised far more influence, over more sustained periods, than the principle-seeking abstractions of systematic or rationalistic jurists.72

70 Ibid.
71 Ibid. Analogical reasoning can therefore be seen as ‘realistic’ or ‘pragmatic’ and can be distinguished from a formalist approach to justification which assumes that the list of human interests and purposes is theoretically closed. See Ligertwood, above n 57, Chapter IV for further discussion of analogical reasoning in the judicial setting.
72 Ibid. Unger goes on to argue that the subordination of analogy to RLA is even more puzzling given ‘that an analogical style of thinking has served as the vehicle for the single most influential conception in the
The remaining contemporary legal analytic approach identified by Unger which he argues also maintains an influence on legal thought and culture in the 21st century is what he calls ‘shrunken Benthamitism’. This approach views law instrumentally as a ‘set of tools for the marginal adjustment of incentives and constraints on human behaviour’ encompassing the law and economics school in the United States and other approaches that purport to apply scientific studies ‘of mind, brain and behaviour’ to support their analyses of law and policy.\textsuperscript{73}

Unger points out that similar to Bentham, these behaviourist approaches, rely on normative assumptions about appropriate, or ‘benificent’ social ends such that incentives or disincentives can be designed accordingly. These approaches to law also resemble Bentham in their ‘consequentialism’ and their impatience with the jurist’s doctrinal understanding of law along the lines of either reasoned elaboration or retro doctrinalism discussed above. As such, shrunken Benthamism is at least consistent with the prospective genealogy of law discussed above; a view of law that Unger has described elsewhere as ‘interest group pluralism’, that is, law expressed in the vocabulary of interests and interest groups. On this view, each piece of law is conceived as the product of conflict and compromise, an armistice amongst opposing factional interests, and the law is then a statement of winners and losers in the particular political struggle. So this fourth legal analytical approach identified by Unger resembles Bentham in several ways, however, in other respects it is ‘nothing like the real thing.’ While Bentham’s censorial jurisprudence was radical in its proposals for legal reform, the contemporary ‘shrunken Benthamism’ that Unger describes ‘contemplated no major change in human experience’ and ‘implied no substantial alteration in the institutional regime.’ Unger writes that, ‘the little Benthams

\textsuperscript{73}Ibid 41 - 42.
presented themselves as experts deploying methods well established in the economics and psychology of their time to achieve goals that were episodically but never systematically contentious.footnote{Dyzenhaus also argues for a neo Benthamite revival in legal theory, see David Dyzenhaus ‘The Genealogy of Legal Positivism’ (2004) 24 Oxford Journal of Legal Studies 39.}

To understand why, it is useful to examine how the economic analysis of law differs from Bentham’s hedonic utilitarian approach. Bentham’s utilitarianism relied on the moral or normative assumption that ‘utility’ was a moral good and that disutility was a moral harm and so law, for example, could be evaluated on the basis of a quantifiable measure of utility. Bentham’s censorial jurisprudence was then based on the simple idea that law ought to maximize subjective pleasure and minimise subjective pain. Economic analysis on the other hand does not rely on a calculus of subjective pleasure and pain, but rather on a calculus of objective behaviours. As West argues, from the mid 20th century, (post marginalist) economic theory sought ‘objective proxies for human well being so that Bentham’s hedonic utilitarianism came to be replaced by objective cost benefit analysis. A problem with this shift from the hedonic goals of utilitarians to the objective quantification of preferences within a market economy is that human pain and pleasure is ‘relegated to the immeasurable and unquantifiable - that which cannot be reckoned’ since according to the new economic theory, what cannot be quantified or measured does not exist.footnote{Robin West, Normative jurisprudence: An Introduction (Cambridge University Press, 2011), 101.}

There are also important political implications that result from the shift from utilitarianism to modern economic analyses. One is that the costs and benefits calculus of economic theory applies to corporations just as much as to individuals or groups of individuals. As West argues, ‘if the point of law is to minimise costs and to maximise benefits, then corporations and the importance of their bottom lines are conceptually on a par with human beings.’ As a result economic theory is bound to be more politically regressive than...
traditional utilitarian calculi. The other important political implication of adopting an economic analysis of law is that it blurs the powerful and distinctively utilitarian argument for equality as a guiding norm for redistributive policy. For the hedonic utilitarian, each dollar has more subjective value for the poor person viz a viz the wealthy person. By rejecting the logic of such a subjective comparison, the modern economist is able to also reject the moral case for wealth redistribution. So for both West and Unger these economic, and purportedly objectivist, scientific analyses of law that Unger labels ‘shrunken Benthamism’, rather than representing a 21st century censorial jurisprudence that might provide an external, normative basis to critique and reform law, instead compliment conventional doctrinal approaches in casting an institutionally conservative, rationalising spell over legal thought.

*       *       *

In this article I have outlined Unger’s explanation and critique of several influential contemporary styles of legal analysis which, in my view and in the view of others, is largely persuasive.76 As Jeremy Waldron argues, the continued acquiescence in reasoned elaboration and conventional doctrinal approaches to law belies a certain ‘discomfort with democracy’ such that:

we have failed to evolve for ourselves a genuinely democratic philosophy of law; that is, we have failed to develop ways of thinking in jurisprudence that are appropriate to law understood as the creation and property of a free and democratic people. Surely, Unger says, "common law after democracy and within democracy must mean something different, and develop in a different way, from a common law outside and before democracy"- but one would never know this,

76 See, e.g. Waldron, above n 9; Collins above n 51.
he says, from reading the jurisprudence that is actually written in this "democratic" society.\textsuperscript{77}

This is a serious charge which would seem to require a fundamental reconsideration of the contemporary styles of legal analysis identified by Unger and those aspects of traditional jurisprudence that support them. If the critique of contemporary legal thought discussed in this article is accepted then it is only analogical reasoning within adjudication, and law as conflict and compromise outside adjudication that remain acceptable contemporary legal analytic approaches. And the implications of Unger’s critique of contemporary styles of legal analysis are not simply academic. As Unger points out in the new addition of \textit{The Critical Legal Studies Movement}, the problem is real in that retro-doctrinalism and shrunken Benthamism have supplemented reasoned elaboration to some extent as popular modes of legal discourse, so that it seems that formalist and objectivist ideas about law continue to re emerge within the 21\textsuperscript{st} century legal thought and culture. This fact underscores the contemporary significance of Unger’s critical jurisprudence, and the continuing need to examine his critique of legal thought particularly within legal education.

For Unger a major problem with objectivity and formalism is that they evade the structure of society and are another example of what Unger calls ‘necessitarian’ social theory. In the context of legal and social thought, the continued influence of these ideas severs ‘the link between the insight into the actual and the imagination of the possible’. In a world where such ideas are fast becoming less credible, objectivist approaches to law therefore seem to represent a kind of hypocritical instrumentalism supporting the institutional status quo. But unlike many within the critical legal studies movement, Unger is keenly aware that it is not possible to replace something with nothing, no matter how convincing a critique of contemporary legal thought might be. Unger’s normative jurisprudential project that

\textsuperscript{77} Ibid. Whilst the focus of Waldron and Unger’s critique is the legal system of the United States, it can be applied to a greater or lesser extent to other western democracies.

\textit{(2018) J. JURIS. 236}
includes an alternative conception of legal analysis is therefore crucial to addressing the problems with these contemporary approaches to legal analysis identified by Unger, and the ‘antidemocratic superstition’ that some of these legal analytical approaches mask. For Unger, legal thought should not be an idealisation of the current discourse of judges and lawyers, but rather it ought to be about engagement with the existing and adjacent possible institutional and ideological structures of society. In Unger’s view and the view of the author, it is therefore paramount that contemporary jurisprudence rejects any vestiges of objectivism and formalism and instead re-engages with structural and normative ideas about society, and in particular with ideas from social theory.  

78 Unger’s attempt to reunite jurisprudence and social theory is discussed in Ligertwood, above n 57, Chapter V.
An Analysis of St. Thomas Aquinas’s Position on the Relationship Between Justice and Legality

Mr Kenny Chng
Assistant Professor of Law
Singapore Management University

I INTRODUCTION

St. Thomas Aquinas, the Angelic Doctor, was renowned for his genius. His masterful exposition of Christian theology, drawing upon Aristotle’s philosophy to form a solid intellectual foundation for Christian ideas, has formed the core of the Catholic Church’s teaching for almost a thousand years. Beyond Christianity, Aquinas has also exerted a major influence on legal philosophy. As the foremost expositor of natural law theory, natural law theorists to the present age owe a great debt to Aquinas’s discussion of law in his Treatise On Law. However, one aspect of Aquinas’s legacy has generated an inordinate amount of contention – his view of the relationship between justice and legality. Is an unjust law a law at all? Modern natural law theorists taking contradictory positions all claim to be faithful to Aquinas’s ideas on the matter. Some, taking a view that has been described as “strong natural law theory”, argue that Aquinas believed that the injustice of a law renders it legally invalid. Others, taking the position of “weak natural law theory”, argue that Aquinas perceived an unjust law as legally defective but still a law in a secondary sense. Even legal positivists, the traditional opponents of natural law theory, have proposed interpretations of Aquinas’s thoughts on the matter. They cannot all be correct.

This paper is directed at investigating what really Aquinas’s position was on the relationship between justice and legality. It will do so by taking a detailed look at Aquinas’s Treatise
On Law, the broader context of the *Summa Theologiae* (“the *Summa*”) within which the Treatise is situated, and Aquinas’s methodological and definitional approaches. The outline of the paper is as follows. First, it will describe the different positions that modern natural law theorists have taken on the relationship between justice and legality, with a view to identifying the key conceptual differences between strong and weak natural law theory. Second, it will briefly describe how Aquinas’s thought on this issue has been interpreted by modern legal theorists, to illustrate the extent of disagreement between interpreters of Aquinas. Third, it will provide an overview of Aquinas’s arc of argument in his Treatise On Law, to provide context for the subsequent deep-dive into Aquinas’s thought. Fourth, the paper will formulate a set of questions to be resolved, corresponding to the key conceptual differences between strong and weak natural law theory, and will then evaluate Aquinas’s text, context, and methodology to determine how Aquinas’s thought bears on these questions.

**II Natural Law Positions On The Relationship Between Justice And Legality**

While natural law theorists have offered a variety of interpretations of the relationship between justice and legality over the ages, two main schools of thought have crystallized – theorists have termed these schools “strong natural law theory” and “weak natural law theory”.¹ The focus of this section will be to identify the key differences between these two schools of thought as a foundation for the subsequent analysis of Aquinas’s thought.

It will be useful to first set out the common ground between both schools of thought, before articulating their differences. All natural law theorists affirm that law’s legality

---

depends in some way on its moral content. Put another way, in the natural law view, the substantive justice of a law has an impact on its legality. Different natural law theorists have different views on the degree of this impact, but all natural law theorists unanimously affirm the existence of such an impact. This affirmation sets natural law theory apart from legal positivism. Legal positivists, in contrast, affirm that the legality of law is independent of its moral content — the issues of law’s morality and its legality are distinct analytical inquiries, and one can achieve a comprehensive and accurate account of law without reference to its moral content.

The key difference between strong and weak natural law theory lies in their conception of the precise impact of morality on legality. The strong natural law view interprets the morality of law as an “existence condition” for law, akin to how having three sides is a necessary requirement for a triangle. Just as a shape comprising more than three sides cannot be a triangle, the character of legality cannot be possessed by a manifestly unjust norm. As argued by Gustav Radbruch, a manifestly unjust law is not a law at all. A law, despite being validly passed by a legitimate law-making authority, is not a law at all if it surpasses an extreme level of injustice. Thus, a law that is substantively unjust is not just morally or legally defective — it cannot properly be called a law at all. Since unjust laws are not laws at all, on this view, they cannot possess any obligatory force.

---

4 Raz, above n 2, 17-22.
It should be noted at this juncture that some influential legal positivists, such as John Austin, have cast the position of natural law theory on the relationship between morality and legality as an extreme version of strong natural law theory – that all promulgated laws are necessarily moral.\(^9\) This conception of strong natural law theory is certainly not one that strong natural law theorists hold themselves, for good reason – such a proposition is easily disproven as an empirical matter. Strong natural law theorists do accept that legitimate law-making authorities can promulgate rules which are unjust, as an empirical fact about their law-making power.\(^10\) However, strong natural law theorists would hold that even if validly promulgated, these unjust rules are not laws.\(^11\)

Weak natural law theorists, on the other hand, interpret the morality of law as a “defectiveness condition” of law.\(^12\) In other words, the injustice of a law makes the law defective \textit{as a law}.\(^13\) This should be carefully distinguished from the view that the injustice of a law makes a law \textit{morally} defective – this would be a decidedly uninteresting proposition which cannot be meaningfully distinguished from the legal positivist position.\(^14\) Rather, the weak natural law position is that the injustice of a law makes a law \textit{legally} defective. Thus, in contrast with the strong natural law position, morality does not spell a necessary existence condition for a law, but goes toward whether a law is one in the fullest sense, or is merely a law in a secondary sense of the term. On this view, it is possible to identify true legal propositions in a legal system without regard to morality, by considering whether they have been “authoritatively issued” and whether they are “socially efficacious”.\(^15\) But if one


\(^{10}\) West, above n 9, 834; Alexy, above n 3, 327.

\(^{11}\) Alexy, above n 3, 328.

\(^{12}\) Crowe, above n 5, 114-115.

\(^{13}\) Murphy, above n 1, 136.

\(^{14}\) Priel, above n 6; Murphy, above n 1, 131.

\(^{15}\) Alexy, above n 3, 328.
seeks to evaluate whether these propositions are indeed laws in the full sense, the justice of these laws must be taken into account. As a matter of law’s obligatory power, the weak natural law view holds that unjust laws do lose obligatory force – they do not “bind in conscience”. However, in contrast to the strong natural law view, since these laws remain laws in a secondary sense, they are still capable of engendering obligatory force, albeit in a weaker sense. They can engender what John Finnis describes as legal-moral obligations, which are based on a recognition that an overall system of social ordering through law promotes security and stability, and thus can be a basis for a collateral moral obligation to obey an unjust law.

With the positions thus laid out, four key differences between the strong and weak natural law positions can be identified.

First, the two positions take a different definitional approach to law. The strong natural law position sees a definition of law as the specification of a set of conditions that must be fulfilled – failing any of which, the precept in question is not a law at all. The weak natural law position applies the central case method in its definition of law. It sees the criteria for a definition of law as a set of conditions which specify what law is in the fullest sense – and if certain conditions are not met, the precept in question can still be validly described as a law, but in a less central sense.

16 Richards, above n 8, 1275.
19 Note that the application of the central case method is not unique to natural law theorists. H. L. A. Hart applied it to great effect as well – see H. L. A. Hart, The Concept of Law (Oxford University Press, 3rd ed, 2012) 1-17.
Second, as a consequence of their different definitional approaches to law, the two positions take a different view of the relationship between justice and legality. The strong natural law position views justice as a necessary condition for a norm to be a law, the absence of which means that a norm is not a law at all. In contrast, the weak natural law position views the justice of a law as a benchmark for determining whether it is a law in the focal sense. An unjust law remains a law, but is one in a less central sense.

Third, the two positions take different views on the effect of injustice on a law’s obligatory force. The strong natural law position views injustice as removing all obligatory power from a putative law – if an unjust law loses legal character altogether, it cannot possess any obligatory power as a law. The weak natural law position, in contrast, accepts that an unjust law can nevertheless still engender collateral moral obligations as a valid law in a legal system providing a means of social ordering.

Fourth, the strong natural law position views the positing of a law – i.e. the promulgation of a law by legitimate law-making authority – as a necessary but insufficient condition for a precept to be identified as a law. In contrast, the weak natural law position views positing as a necessary and sufficient condition for a precept to be identified as a law, such that there can be true legal propositions which are immoral.\(^{20}\)

### III Competing Interpretations of Aquinas

Was Aquinas a strong or weak natural law theorist? There is no express answer to this question that can be found in his writings, for the simple fact that these theoretical categories did not exist in his time. As such, theorists since Aquinas have offered competing interpretations of Aquinas on the relationship between legality and justice.

In modern legal philosophy, one of the most notable legal theorists to propose a position on the relationship between justice and legality was Sir William Blackstone. Although he did not explicitly claim to develop Aquinas's ideas, he drew heavily upon Grotius's thinking on natural law, who was in turn inspired by Aquinas. Blackstone is particularly worthy of mention here, since Blackstone's formulation on the question of the legality of unjust laws has been the subject of much attention by subsequent thinkers. Indeed, Blackstone is commonly perceived as the first modern proponent of the strong natural law position, because of his well-known argument that “no human laws are of any validity” if contrary to the natural law.\(^{21}\) It is this statement that has attracted much ridicule and criticism from legal philosophers after Blackstone, primarily for the accusation that he elided descriptive and normative aspects in his account of law.\(^{22}\)

It is worth noting, however, that although Blackstone was heavily criticized for affirming a strong natural law position, it is by no means so unequivocal that he did indeed take the position that his critics charged him to have taken. Just a couple of pages from Blackstone's infamous assertion that human laws contrary to the natural law are of no validity, Blackstone argued that human laws which transgress natural law and divine law ought not to be obeyed – in his words, we are “bound to transgress” them.\(^{23}\) This argument suggests that Blackstone himself, so sharply criticized for taking the view that unjust laws are no law at all, certainly comprehended that unjust laws remained laws in some sense and were thus laws which could be transgressed.

Despite the fact that Blackstone’s view of the relationship between justice and legality was not unequivocally the strong natural law one, leading legal positivists such as Jeremy


\(^{22}\) For example, see Jeremy Bentham, *A Fragment on Government* (London, 1776) ix-xxv.

\(^{23}\) Blackstone, above n 21, 43.
Bentham, Austin, and H. L. A. Hart all attributed the strong natural law position to Aquinas and Blackstone.\textsuperscript{24} They characterized the natural law position as the strong natural law one, and criticized natural law theory on that basis. Austin criticized Blackstone in famously strong language: “to say that human laws which conflict with the divine law are not binding, that is to say, are not laws, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals.”\textsuperscript{25} It is worth noting that these legal positivists often go further to interpret the natural law position on justice and legality as the claim identified in the preceding section as an extreme version of strong natural law theory – the view that unjust laws are never promulgated and enforced.\textsuperscript{26}

Leading modern natural law theorists are unified in their efforts to correct the misperception that natural law theory is necessarily associated with this extreme version of strong natural law. However, modern natural law theorists remain divided on their interpretation of Aquinas’s precise position on the relationship between justice and legality. Robert Alexy and Radbruch view the strong natural law position as the one most faithful to Aquinas’s legacy.\textsuperscript{27} But Finnis and Robert George, proponents of the weak natural law position, disagree. As Finnis argues: “if we examine the writings of Thomas Aquinas – perhaps the greatest of natural law seminal thinkers – we cannot find a single passage in which he declares without qualification that unjust law is not a law at all.”\textsuperscript{28} Finnis takes the position that the “unjust law is not a law” maxim is either “flatly self-contradictory” or is a “dramatization” of Aquinas’s real point – which Finnis took to be


\textsuperscript{25} Kretzmann, above n 24, 101; Damich, above n 24, 79.

\textsuperscript{26} Kretzmann, above n 24, 101, 104.

\textsuperscript{27} Alexy, above n 3, 327; Radbruch, above n 7.

\textsuperscript{28} Damich, above n 24.
that an unjust law is not law in the focal sense, and is merely a law in a secondary sense.\textsuperscript{29} In a similar vein, George argues that legal positivists have misunderstood Aquinas, and suggests that Aquinas, as a weak natural law theorist, would in fact have affirmed Hart’s descriptive methodology and fleshed it out further by substantiating the specific inquiry within the internal point of view that Hart proposed.\textsuperscript{30} Natural law theorists such as Finnis and George seek to shift the focus of natural law theory away from the question of the effect of injustice on laws towards articulating a full justificatory account of law – an enterprise which they argue is more faithful to Aquinas’s intent than a narrow focus on the relationship between justice and legality.\textsuperscript{31}

This survey of competing interpretations illustrates that there have been significant variations in interpretations of Aquinas by modern legal theorists on the relationship between justice and legality. Beyond illustrating this point, however, this survey reveals an interesting picture about interpretations of Aquinas. The theorist to whom the strong natural law position has been most commonly attributed arguably did not take such a position at all – Blackstone. The theorists who are the most adamant in their characterizations of natural law theory as necessitating the strong natural law position are the legal positivists – no friends of Aquinas by any measure. These theorists, in their zeal to attack natural law theory, have even linked natural law theory to an extreme version of strong natural law theory – in other words, the least defensible and easily-attacked formulation.\textsuperscript{32} This, of course, does not settle the issue, since some modern natural law theorists have mounted a serious defense of the strong natural law position.\textsuperscript{33} However,

\textsuperscript{30} George, above n 17, 241.
\textsuperscript{32} Kretzmann, above n 24.
\textsuperscript{33} For example, Alexy, above n 3.
one might be justifiably cautious of an interpretation of Aquinas’s position most commonly advocated by his opponents.

**IV Overview of Aquinas’s Treatise On Law**

With the context thus set, it is time to turn to Aquinas’s own words on the matter.

In order to obtain a clearer understanding of Aquinas’s intentions, it is useful to first understand the context of Aquinas’s arguments in his Treatise On Law. The Treatise was not intended to be a standalone work on legal philosophy. Rather, it was situated within a broader magisterial work focused on theology – the *Summa*. Specifically, the Treatise was situated within the section of the *Summa* on moral theology, as part of an exposition of the external influences on human acts or decision-making.\(^{34}\) Thus, his Treatise was not limited to human law, and covers a variety of different laws that bear on human action.\(^{35}\)

The outline of his arguments in the Treatise is as follows. Aquinas made his arguments about law over a span of eight questions in the *Summa*, running from QQ. 90-97. He began the Treatise by proposing a four-part definition of law in Q. 90 – a law is (1) a certain dictate of reason (2) for the common good, (3) made by him who has the care of the community, and (4) promulgated.\(^{36}\) He moved on in Q. 91 to apply this definition to four different types of law that have a bearing on human action and decision-making – eternal law, natural law, divine law, and human law.\(^{37}\) In Q. 92, he focused on the effect of law generally on human acts – one of his key areas of concern, given the situation of the Treatise in the moral theology section of the *Summa*. In QQ. 93-94, he sought to elucidate

---

\(^{34}\) Aquinas, above n 17, [067]-[068].


\(^{36}\) Aquinas, above n 17, Q. 90 a. 4 corpus.

\(^{37}\) Aquinas, above n 17, Q. 91.
the features of the eternal law and natural law respectively. He dedicated QQ. 95-97 to a
discussion of human law. In Q. 95, he examined human law as a concept in relation to the
other types of law he had proposed – is human law useful, in view of the existence of the
other types of law? And how does one derive human law from the natural law? In Q. 96,
he considered the power of human law – what should human law look like? What is the
nature of its obligatory power? Finally, in Q. 97, he discussed the principles that govern
change in human law.

V Aquinas’s Position On The Relationship Between Justice And

Legality

A Methodology

To determine Aquinas’s position on the relationship between justice and legality, I
formulated four questions, corresponding to the key differences between the strong and
weak natural law positions that I highlighted in Section II. Determining how Aquinas’s
thought resolves these questions can help one to determine whether Aquinas was a strong
or weak natural law theorist.

The questions I sought to answer as I studied Aquinas’s thought are as follows. First, was
Aquinas’s definitional approach to law characterized by the provision of necessary
conditions that must all be fulfilled, or by the use of a central case method? Second, did
Aquinas view injustice as rendering a law legally invalid, or merely legally defective? Third,
did Aquinas view the effect of injustice on law as rendering it entirely non-obligatory, or
as still capable of engendering obligations in a limited sense? Fourth, did Aquinas view the
valid positing of a law as a necessary and sufficient condition for the identification of true
legal propositions, or as a necessary but insufficient condition? To resolve these questions,
the main focus of my inquiry was the text of Aquinas’s Treatise On Law. My study was
not limited to the Treatise, however – in order to obtain a better understanding of
Aquinas’s intentions and arguments in the Treatise, I also considered the broader context of the *Summa* within which the Treatise is situated, as well as Aquinas’s methodological and definitional approaches.

**B Whether Aquinas Defined Law Via Necessary Conditions Method Or Central Case Method**

First, we will explore Aquinas’s methodological approaches to determine if they shed light on his definitional approach to law.

To discern Aquinas’s definitional approach to *law*, it is instructive to consider the methodological approaches that Aquinas would have taken to the enterprise of *definition* as a general matter. As a thinker heavily influenced by Aristotle’s philosophy, Aquinas’s approach to definition was shaped by Aristotle’s Doctrine of the Four Causes.\(^{38}\) In brief, the objective of this approach was to *explain* a concept, not to provide an analytical tool to demarcate its boundaries and determine what lies within and without.\(^{39}\) Applied to a concept such as law, the Doctrine would be primarily directed at *explaining* what law is, rather than determining how one can *identify* laws.\(^{40}\) The Doctrine of the Four Causes seeks to explain a concept by elucidating its various causes: its Formal Cause, Final Cause, Material Cause, and Efficient Cause. The word “cause” in the Doctrine is used in a broader sense than in contemporary usage – here, it refers to “any factor that is necessary to bring about an effect through an intrinsic relationship to that effect”.\(^{41}\)


\(^{39}\) Henle, above n 38, 161-162.

\(^{40}\) This is not to say that Aquinas’s approach had nothing to say to the question of the identification of law. Rather, knowledge of Aquinas’s definitional approach merely illustrates that Aquinas’s first objective was explanatory – but this approach did supply Aquinas with the contours of the central case of law, which is relevant to the question of identification. See Henle, above n 38, 161.

\(^{41}\) Aquinas, above n 17, [182].
“that out of which or in which the effect is produced”.\textsuperscript{42} The Efficient Cause is “the cause that contributes to the effect by activity.”\textsuperscript{43} The Final Cause is “the cause that contributes to the effect by being desired”\textsuperscript{44} – in modern parlance, this may be described as the purpose of the effect. The Formal Cause “contributes to the effect by being in it and making it to be the kind of thing it is.”\textsuperscript{45} One will observe that Aquinas’s four-part definition of law corresponds to the Four Causes.\textsuperscript{46} Law’s Formal Cause is reason. Its Final Cause is the common good. Its Efficient Cause is promulgation by the one who has the care of the community. Its Material Cause is the “community or human acts within society”.\textsuperscript{47}

For present purposes, the key point to note from this discussion of Aquinas’s definitional method is that in the explanation of law through the Doctrine of the Four Causes, morality relates to law’s Final Cause. And in Aquinas’s account, a defective expression of the Final Cause does not mean that the entire effect in question ceases to exist – the effect’s \textit{existence} is a separate inquiry from the effect’s Final Cause. The effect’s \textit{existence} is defined by its Efficient Cause. An understanding of an effect’s Final Cause, in contrast, goes towards a fuller \textit{explanation} of the nature of law – its central case. Aquinas’s definition of law is thus shaped by his metaphysics – that one cannot understanding something \textit{fully} without also knowing its end.\textsuperscript{48} This lends weight to the proposition that Aquinas’s definitional approach was not the necessary conditions method, but was instead directed at achieving full understanding of a concept – a method closely aligned with the central case method.

As an additional point on Aquinas’s methodological inclinations, one might add that a distinctive mark of Scholastic philosophy was the art of distinguishing, and that Aquinas

\textsuperscript{42} Ibid [189].
\textsuperscript{43} Ibid [193].
\textsuperscript{44} Ibid [196].
\textsuperscript{45} Ibid [200].
\textsuperscript{46} Ibid [210].
\textsuperscript{47} Ibid [210].
\textsuperscript{48} Brewbaker, above n 35, 588.
was the Scholastic philosopher *par excellence*.49 The methodological technique of drawing careful distinctions between concepts has been described as “a standard part of Scholastic method.”50 Indeed, Aquinas himself frequently began his discussion of concepts by stating that a particular concept can have the same property in two ways, and then carefully distinguishing both ways to erase contradictions and clarify that both ways can be equally true.51 For example, in the context of law, Aquinas used this method to explain that human laws can be derived from the natural law in two ways – direct deduction and *determinatio* – in order to avoid the troublesome proposition that all human laws are the same everywhere, a proposition that would otherwise have seemed to follow from his earlier propositions that all human laws are derived from natural law, and that the natural law is the same for everyone.52 Aquinas also specifically applied this technique to the question of unjust laws, which we will discuss in more detail in the subsequent sections. At this point, it is sufficient to note that in view of Aquinas’s skill at Scholastic methodology, it would have been most unlikely for him to have perceived injustice as taking a norm out of the category of law entirely – it would have been much more in character with his Scholastic mind to characterize unjust laws as remaining a species of law but in a distinct sense from the central case.

As a final point on Aquinas’s methodological inclinations, it is significant to note that he was well-acquainted with Aristotle’s concepts of univocity and equivocity.53 Univocity describes concepts which have both the same name and meaning. Equivocity describes concepts which have the same name but which may have different meanings, depending on the context in which the concept is used.54 In this framework, a concept described by

---

49 Damich, above n 24, 93.
50 Aquinas, above n 17, [059].
51 Aquinas, above n 17, [059].
52 Aquinas, above n 17, [063], Q. 95 a. 2.
53 Damich, above n 24, 85.
the same word has a *central* or *focal* meaning, yet the same word can be used to describe concepts which are related to that central meaning but in a less central way.\(^{55}\) Aquinas’s familiarity with these analytical devices suggests that his definitional approach would be shaped by these concepts – and a central case definitional approach matches the use of these devices much more closely than would a necessary conditions approach.

Second, observing Aquinas’s approach to ethics can shed light on how his definitional approach to law should be interpreted. In Aquinas’s definition of virtue, he was careful to distinguish between perfect virtue and virtues in the restricted sense. In brief, Aquinas held that people acquired perfect virtue only if they performed good acts imbued with the divine gift of charity – it is only such acts which are properly directed to “the ultimate end” of mankind.\(^ {56}\) Good acts which are directed only at natural ends lead men to acquire virtues as well, but only in a restricted sense.\(^ {57}\) In a similar vein, Aquinas argued that human acts are good insofar as they possess moral perfection in being, and are morally bad to the extent that they are deficient in their being, falling short of the perfection they ought to have.\(^ {58}\) Indeed, Aquinas’s discussion of ethics is replete with uses of the central case definitional approach, and it stands to reason that he would apply a similar definitional approach to law, which he saw as a field situated within the domain of ethics.\(^ {59}\)

Third, Aquinas’s discussion of law in the Treatise itself clearly evinces an application of the central case method. In Q. 90 a. 2, where he discussed, as part of his definition of law, whether law is necessarily ordered to the common good, he analogized the relationship between the common good and law to the relationship between heat and fire. Fire, described as the “hottest of all things”, is the central cause of heat – and other bodies are

\(^{55}\) Finnis, above n 54, 96.
\(^{57}\) Ibid.
hot only “insofar as they have a share of fire”.\textsuperscript{60} In an analogous fashion, any precept “lacks the nature of law except insofar as it is ordered to the Common Good.”\textsuperscript{61} Aquinas elaborated upon this point in Q. 92 a. 1 – laws not perfectly ordered toward the common good are laws \textit{secundum quid}, i.e. laws in a certain respect, while laws properly ordered to the common good are laws \textit{simpliciter}, i.e. laws in the central sense.\textsuperscript{62}

Given that Aquinas incorporated the common good as part of his definition of law, these passages should shape our interpretation of the definition of law he offered in Q. 90 a. 4. Since Aquinas expressly conceived the relationship between the common good and law as governed by the central case method, this lends weight to Kretzmann’s argument that Aquinas’s definition of law has both evaluative and non-evaluative components.\textsuperscript{63} In Kretzmann’s view, the non-evaluative components of Aquinas’s definition, e.g. the requirement of promulgation by one who has care of the community, are necessary and sufficient conditions for something to be identified as a law in a \textit{technical} sense\textsuperscript{64} – they form the Efficient Cause of law, in Aquinas’s terminology. However, the evaluative components of Aquinas’s definition of law – for example, the requirement of being ordered to the common good – do not perform the same function, and are intended to explain the \textit{central} case of law.\textsuperscript{65}

In sum, there is a strong argument to be made for the proposition that Aquinas’s definitional approach, insofar as the justice of laws is concerned, was characterized by the central case method. As an aside, it is a touch ironic to note that despite the attacks of modern legal positivists on natural law theory, Aquinas, the father of natural law theory,

\textsuperscript{60} Aquinas, above n 17, Q. 90 a. 2. corpus.
\textsuperscript{61} Ibid Q. 90 a. 2. corpus.
\textsuperscript{62} Ibid Q. 91 a. 1. corpus.
\textsuperscript{63} Kretzmann, above n 24, 112.
\textsuperscript{64} Ibid.
\textsuperscript{65} Ibid.
adopted a definitional approach to law that was actually rather akin to Hart’s own approach to defining the concept of law. For present purposes, the key point is that Aquinas’s use of the central case method suggests that Aquinas was more aligned with the weak natural law position than the strong natural law position. Aquinas did not view his definition of law as setting out a set of necessary and sufficient conditions that must all be met for a certain precept to be a law – rather, it was intended to be a full explanatory account of the central case of law.

C Whether Aquinas Viewed Injustice As Rendering A Law Legally Invalid Or Legally Defective

Moving from Aquinas’s definition of law to Aquinas’s discussion of unjust and tyrannical laws, we see Aquinas applying the central case method consistently. Even when Aquinas seemed the most vehement in declaring that unjust laws were not laws, he was generally careful to acknowledge that such laws were still laws in a limited sense.

For example, in Q. 92 a. 1, Aquinas took on the subject of tyrannical laws. He affirmed that “a tyrannical law, since it is not in accord with reason, is not a law in the full sense; rather, it is a perversion of law”. Taken in isolation, this statement may be taken to suggest that tyrannical laws are not laws – in support of the strong natural law position. But in the very next line, Aquinas was careful to note that such laws still have “something of the nature of law”. Similarly, in Q. 92 a. 3, Aquinas stated that since an unjust law deviates from reason, it “does not have the nature of law but rather of a sort of violence”. Yet, once again, he carefully reiterated immediately that “even an unjust law retains some

---

66 Hart, above n 19, 1-17.
67 Schaeffer, above n 24, 378; Kretzmann, above n 24, 114.
68 Aquinas, above n 17, Q. 92 a. 1 rep. 4.
69 Aquinas, above n 17, Q. 92 a. 1 rep. 4.
70 Ibid Q. 93 a. 3 rep. 2.
semblance of the nature of law, since it was made by one in power and in this respect it is derived from the Eternal Law”.

As Kretzmann argues, it is thus clear that Aquinas did not mean that laws which do not accord with right reason are not laws at all – rather, “an irrational law is not a law unconditionally because it falls short of at least one of the moral conditions essential to full-fledged law, but it is a law in a certain respect because it satisfies the formal conditions sufficient to establish it technically as a law.” As such, in Kretzmann’s view, legal positivists accusing Aquinas of taking the strong natural law position, or even the extreme version of strong natural law, “are barking up trees Aquinas never considered climbing.”

However, these passages do not resolve the matter. There are other passages in the Treatise which can be taken to support the strong natural law position. Indeed, the strongest case for the strong natural law position can be found in Q. 95 a. 2 and a. 4. In these articles, Aquinas described unjust laws in terms that did not incorporate the “law simpliciter” language, and did not offer a subsequent affirmation of the legality of these laws. In Q. 95 a. 2, Aquinas quoted St. Augustine’s famous maxim, “That which is not just seems to be no law at all”, and went on to state that a law which “conflicts with the law of nature” is not a law, “but rather a perversion of law.” In a similar vein, in Q. 95 a. 4, Aquinas argued that a tyranny is “totally corrupt and therefore has no law.”

In view of Aquinas’s statements in these passages, how should one interpret Aquinas’s overall position on the relationship between justice and legality? It is suggested that there is no contradiction in Aquinas’s thought. His statements in Q. 95 a. 2 and a. 4, even when

71 Ibid Q. 93 a. 3 rep. 2.
72 Kretzmann, above n 24, 115.
73 Ibid 116.
74 Aquinas, above n 17, Q. 95 a. 2 corpus.
75 Ibid Q. 95 a. 4 corpus.
taken in isolation, are actually inconclusive on the matter of whether injustice removes legal validity entirely from a law. Indeed, these statements can be read consistently with the position that injustice renders a law legally defective, but does not strip it of legality. Thus, Aquinas’s statements in these passages may potentially be read to support the strong natural law thesis, but crucially, they do not necessitate it – and in view of his careful qualifications of the effect of irrationality on law in Q. 92, the more consistent interpretation of his statements in Q. 95 a. 2 and a. 4 is the weak natural law one.

Another argument that may be raised to support the proposition that Aquinas thought that an unjust law would be invalid as law, rather than merely legally defective, rests on the fact that Aquinas’s quote of Augustine in Q. 95 a. 2 omitted the words “to me” that were in the original wording – Augustine’s original sentence was “that which is not just does not seem to me to be no law at all”.\(^76\) Taken in isolation, the omission of the words “to me” may be interpreted as suggesting that Aquinas intended to convey in stronger terms than Augustine that an unjust law was indeed not a law at all, as an expression of his confidence in the proposition.\(^77\) However, while the fact of omission may be conceded to be true, this suggestion rests on a rather weak inference of Aquinas’s intent, and is difficult to square with Aquinas’s express affirmations of the limited legality of unjust laws elsewhere in the Treatise.

In sum, the better interpretation of Aquinas is that he viewed injustice as rendering a law legally defective, but not entirely legally invalid.

**D Whether Aquinas Viewed Injustice As Rendering A Law Entirely Non-Obligatory**

\(^76\) Kretzmann, above n 24, 100-101.

\(^77\) Kretzmann, above n 24, 101.
Turning our attention to Aquinas’s view on the effect of injustice on law’s obligatory force, it becomes quickly apparent that this was the real focus of Aquinas’s discussion of unjust laws. Aquinas was much more interested in the effect of injustice on law’s *obligatory force*, rather than its impact on legal *validity*. In Q. 96 a. 4, Aquinas described just laws as having “the power of binding in conscience”. On the other hand, unjust laws, reiterated again here to be “acts of violence rather than laws”, “do not bind in conscience”. The reiteration of Augustine’s maxim in this context suggests that Aquinas, in declaring that unjust laws are “acts of violence”, intended to convey the point that an unjust law loses *obligatory force*. This interpretation of Aquinas’s intent is in keeping with the situation of the Treatise within the moral theology section of the *Summa* – Aquinas’s arguments are better interpreted as directed first and foremost towards the effect of law on human actions and decision-making, rather than as analytical propositions about the concept of law.\(^78\) His account was not intended to be a jurisprudential account in the vein of modern legal philosophy, but an ethical-theological one.\(^79\) If Aquinas did not view injustice as primarily directed towards the issue of legal validity, this weighs heavily against the strong natural law view, which draws a robust connection between justice and legality.

In further support of the weak natural law view, Aquinas did not perceive injustice as rendering a precept entirely devoid of obligatory force. Indeed, in Q. 96 a. 4 itself, Aquinas was careful to note that one might be obliged to obey an unjust law “in order to avoid scandal or disturbances”. This suggests a more nuanced conception of the effect of injustice on law than is admitted by the strong natural law position – instead of a precept’s injustice rendering it entirely void of legal character, such that it loses all obligatory power, Aquinas accepted that the injustice of a law *does* lead it to lose obligatory force in the central


\(^{79}\) Brewbaker, above n 35, 601.
sense, but that the law can nevertheless oblige obedience in a secondary sense, to the extent that obedience to the law is required to prevent scandal and disorder in the legal system. Thus, Aquinas’s thought is closely related to Finnis’s concept of collateral moral obligations, and is better aligned with the weak natural law position.

E Whether Aquinas Viewed Valid Positing As A Necessary And Sufficient Condition To Identify True Legal Propositions

The final object of our inquiry is to determine whether Aquinas viewed the valid positing of a law as a necessary and sufficient condition for a precept to be a true legal proposition, or as a necessary but insufficient condition. At first glance, this may seem a strange inquiry to undertake in this context – the answer to this question would seem more directly related to resolving whether Aquinas is a legal positivist or a natural law theorist. However, this inquiry is relevant here, since the weak natural law position is indeed in agreement with the legal positivist position that one can identify a true legal proposition solely as a matter of social fact and pedigree, and that true legal propositions can be manifestly unjust.80 The strong natural law position would disagree with these points – thus, this inquiry is one that can distinguish a weak natural law position from a strong natural law one. This is not to say, however, that the weak natural law position is identical to the legal positivist one. The preceding sections should have made sufficiently clear that weak natural law theory affirms that morality is necessary to give a full account of law in the focal sense, which is a claim that legal positivists would not accept.

There are numerous indications in the Treatise On Law that Aquinas viewed the valid positing of a law as a necessary and sufficient condition for the identification of a true legal proposition. In Q. 91 a. 3, Aquinas accepted upfront that there are human laws which do not cohere perfectly with right reason – “human laws cannot have that infallibility that the

---

80 Finnis, above n 20, 6-7.
demonstrated conclusions of the sciences have.\textsuperscript{81} Recall that one of the elements of Aquinas’s definition of law is that laws are a “dictate of reason”. In view of this, Aquinas’s acceptance that there are human laws which do not cohere perfectly with right reason would make no sense if Aquinas thought that irrational laws were not laws at all – Aquinas clearly thought that laws can be validly identified independent of their coherence with right reason, thus allowing them to be characterized as irrational laws in the first place.

In addition, in a passage that has already been highlighted above, Aquinas in Q. 92 a. 1 argued that laws not perfectly directed at the common good are laws secundum quid, while laws properly ordered to the common good are laws simpliciter.\textsuperscript{82} His recognition of the fact that laws falling short of perfect ordering towards the common good are nevertheless laws suggests that Aquinas believed that valid positing is indeed enough to make something a true legal proposition.

Finally, Aquinas argued in Q. 97 a. 1 that human laws can and should change, as part of a natural progression of human reason to move from imperfection to perfection. Accordingly, human laws should change to adapt themselves better to the conditions of men as these conditions evolve.\textsuperscript{83} He cited Augustine’s example of laws concerning the appointment of government officials – if the electorate is sober-minded and right-thinking, a law allowing them to select government officials is a good one, but if the people degenerate into corruption and poor judgment, the law can justifiably be changed to reserve the right of selection to “a few good men”.\textsuperscript{84} Through his argument, Aquinas demonstrated a clear-eyed awareness that certain promulgated laws may not perfectly further the common good, and yet were still true legal propositions – indeed, if such

\begin{footnotesize}
\begin{enumerate}
\item Aquinas, above n 17, Q. 91 a. 3 rep. 3
\item Ibid Q. 92 a. 1 corpus.
\item Ibid Q. 97 a. 1 corpus.
\item Ibid Q. 97 a. 1 corpus.
\end{enumerate}
\end{footnotesize}
precepts were not laws at all in Aquinas’s mind, it would have been nonsensical for Aquinas to discuss the question of whether laws can and should change. The idea that Aquinas clearly recognized that unjust laws nevertheless possess some sense of legality by virtue of being positive law is bolstered by his argument in Q. 97 a. 2. There, he argued that while the injustice of a law is a good reason to change a law, this law-changing prerogative should be exercised with prudence – changes in law diminish the binding power of law, and laws should thus only change when “the damage done thereby to the common welfare is compensated by some other benefit”.

As such, the weight of evidence leans strongly in favor of the view that Aquinas thought, in alignment with the weak natural law position, that true legal propositions can be identified validly as a matter of social fact.

VI Conclusion

In sum, Aquinas’s positions on the four questions I sought to answer by studying his work and his methodological techniques are as follows. Aquinas’s definitional approach to law was characterized by the central case method. He viewed injustice as rendering a law legally defective, rather than legally invalid. His discussion of the effect of injustice on law was focused on discerning its effect on law’s obligatory power, and he took the position that even an unjust law was capable of engendering legal obligations in a limited sense. Finally, Aquinas viewed the valid positing of a law as a necessary and sufficient condition for the identification of true legal propositions.

The picture of Aquinas’s thought that emerges from this inquiry is clear. Although often cited in support of the strong natural law position, a careful reading of Aquinas reveals

---

85 Ibid Q. 97 a. 2 corpus.
that his thinking was much more closely aligned with that of the weak natural law position. The text of the Treatise On Law, the broader context of the *Summa*, and Aquinas’s methodological approaches all point unanimously to this conclusion. While a strong natural law interpretation of some of Aquinas’s statements is certainly *plausible*, the key difficulty is that these interpretations are not *necessitated* by Aquinas’s text. To hold Aquinas to the strong natural law position, one would have to blind oneself to all the other textual and contextual factors that point in the other direction.

As such, it is suggested that the more justifiable interpretation of Aquinas is that he took the weak natural law position on the relationship between justice and legality, and that weak natural law theorists have a stronger claim to Aquinas’s legacy than strong natural law theorists. It should be noted that this conclusion does not bear on the question of which position is the *better* one as a matter of internal coherence and normative desirability. That question, however, is a topic for another occasion.