Unger on Contemporary Styles of Legal Analysis

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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 20th century and still retains an influence today.1 According to Unger, the influence of the reasoned elaboration of law diminished in the early 21st century and two legal analytic approaches that Unger identifies as ‘retro doctrinalism’ and ‘shrunken Benthamism’ have filled the space of contemporary legal thought.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

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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 the 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

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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.’\(^{11}\) 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.\(^{12}\) 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 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.’\(^{13}\) Finally, the practice of RLA is 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 justify most of that larger body of

\(^{11}\) 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}.

\(^{12}\) Analogical reasoning as a form of legal analysis is discussed further below at 22 -24.

\(^{13}\) Unger, above n 2, 177.
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

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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.\textsuperscript{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 20\textsuperscript{th} 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.\textsuperscript{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 20\textsuperscript{th} 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

\textsuperscript{15} Ibid 40.
\textsuperscript{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}

\textsuperscript{21} Waldron, above n 9, 517.
\textsuperscript{22} Unger, above n 2, 63.
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.\(^{29}\)

\(^{29}\) 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.\textsuperscript{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.’\textsuperscript{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.’\textsuperscript{33}

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

\textsuperscript{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.

\textsuperscript{32} Ibid 171.

\textsuperscript{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.
\(^{35}\) Ibid 173.
\(^{36}\) 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.\textsuperscript{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’\textsuperscript{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’\textsuperscript{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

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

\textsuperscript{39} Ibid 175.

\textsuperscript{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.’\(^4^1\) 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.\(^4^2\)

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.’\(^4^3\) 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.’\(^4^4\)


\(^{4^2}\) Unger, above n 2, 176.

\(^{4^3}\) Ibid.

\(^{4^4}\) 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.\(^{50}\) 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.’\(^{51}\) 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\(^{th}\) century legal science. For the 19\(^{th}\) 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.’\(^{52}\) Therefore,

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\(^{52}\) 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

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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 to 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.62 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.63

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.64

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 21\(^{st}\) century. These two relatively new approaches to legal analysis that Unger terms ‘retro doctrinalism’ and ‘shrunkent 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.

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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.\footnote{Ibid.}

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’.\footnote{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.} 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.\footnote{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 (2018) J. JURIS. 232}
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.74

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.75

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.

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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.\(^{77}\)

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 *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\(^{st}\) 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

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\(^{77}\) 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.

(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.\(^\text{78}\)

\(^{78}\) Unger’s attempt to reunite jurisprudence and social theory is discussed in Ligertwood, above n 57, Chapter V.