On the Road to Radical Reform: A Critical Review of Unger's Politics

Richard F. Devlin
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Abstract
Two aims drive this essay. The first is to provide the reader with an accessible, yet relatively comprehensive, introduction to Roberto Mangabeira Unger’s social and legal theory. The second aim is to evaluate the strengths and weaknesses of Unger’s most recent scholarship and to make some suggestions as to where he goes awry. In particular, the author draws several parallels between the Ungerian enterprise and that of some feminists. The central motivation of the essay is to keep the critical conversation between male radicals and feminists open. To this end, the author posits the possibility of mutually beneficial contributions.

Keywords
Unger, Roberto Mangabeira; Feminist jurisprudence; Sociological jurisprudence

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ON THE ROAD TO RADICAL REFORM: A CRITICAL REVIEW OF UNGER'S POLITICS

BY RICHARD F. DEVLIN*

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I. INTRODUCTION

Two basic purposes underlie this review. The first is an attempt to provide an accessible, yet reasonably comprehensive, introduction to the social and legal theory of Roberto Mangabeira Unger, particularly as it is developed in his recently published three volume series Politics: A Work in Constructive Social Theory. The second purpose is to evaluate both the strengths and weaknesses of the Ungerian enterprise and, more particularly, to indicate where, in my opinion, he has gone wrong. In pursuing the latter, I will draw upon the contributions of recent feminist social theory.2

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2 A caveat must be introduced at the outset. I am very conscious of the dangers involved in a process in which a man discusses feminism. What follows, I hope, is neither masculinist ventriloquism nor imperial scholarship. Richard Delgado describes the latter as white (or, in this case, male) analysis that is built upon "factual ignorance or naivete, ... failure of empathy, and inability to share values, desires and perspectives of the population whose rights are under consideration." See "The Imperial Scholar: Reflections on a Review of Civil Rights Literature" (1984) 132 U. Pa. L. Rev. 561 at 568. In the light of these concerns, let me cautiously say that what is said in this paper is not said as a feminist because I am not
To achieve these aims, the essay is divided into six subsections. In Part II, I will attempt to provide a political and philosophical backdrop for Unger's work in order to indicate the nature of the problem that he and others – feminists, for example – are attempting to come to terms with. This I call the Paradox of the Twilightenment. In Part III, I provide a self-contained overview of each of the three books that make up Politics. Part IV outlines some political and philosophical points of intersection between Unger and elements of the feminist enterprise and suggests the viability of a fruitful interchange. On this foundation, Part V provides several examples of the way in which critical theory à la Unger may be of some utility for feminist reconstruction. Part VI, on the other hand, identifies, from a feminist perspective, some of the very serious weaknesses of Unger's theory as developed in Politics and makes some suggestions as to how they might be remedied. The conclusion returns to a brief discussion of why it may be worthwhile facilitating an exchange between feminist and Ungerian social theory.

II. A STATEMENT OF THE PROBLEM: A SNAPSHOT OF THE TWILIGHTENMENT

A. The Paradox of Freedom Embedded in Domination

Our post-industrial, patriarchal condition disconcerts because it disempowers. Many of us are disempowered because our society has been unable to resolve the tension between freedom and equality on the one hand, and domination and subordination on the other, in a manner that allows all of us to fulfill our potentials as human beings. Put differently, a fundamental problem with contemporary society is that some people's freedom is the cause of sure if it is possible – or desirable – for a man to be feminist. Yet at the same time, I do believe that it is legitimate for men to enter into conversations with feminists, and that such conversations can be for their mutual benefit. For a further discussion of this issue, see "Nomos and Thanatos (Part A). The Killing Fields: Modern Law and Legal Theory" (1989) 12 Dal L.J. 297 and "Nomos and Thanatos (Part B). Feminism as Jurisgenerative Transformation or Resistance Through Partial Incorporation?" (1990) 13 Dal. L.J. (forthcoming) [hereinafter Nomos and Thanatos (Part B)].
other people’s subordination. This I call the Paradox of the Twilightenment.

Those of us who inhabit the rich Euro-yanqui societies confront an existential paradox: when we compare our cultural situation with those of the Third World and of communist societies, it appears that in relation to the bench-marks of freedom and domination we are ahead all the way. However, when we begin to seriously reflect upon our everyday realities, the finer textures of our intimate and civic relations, a discomforting feeling of unfulfillment begins to emerge. When we critically evaluate our interpersonal relations, whether in the realms of employment or our more vulnerable connections, it becomes apparent that domination and subordination, hierarchy and dependence, privilege and inequality are more pervasive than we might want to admit, and are, perhaps, even constitutive. Moreover, when we examine our political lives it seems that, in the main, our participation is minimal and our impact marginal. Freedom, although much touted, is seldom seen. It is more closely related to our ability as consumers to purchase, than it is to effective democratic participation in the polity.

Thus, the normalcy of our societies, although superficially attractive when compared to what else appears to be available, is on closer inspection profoundly disturbing. It obscures the pervasiveness of domination, subordination, inequality, and harm through an ideology of freedom — an apologetic ideology that rationalizes domination, rather than challenging it. Several of the pieces I am currently working on are attempts to interrogate these connections between domination and subordination and to raise the possibility of theory and practice that could be otherwise to make freedom and domination, not only antithetical, but also incompatible.

B. Theses of the Enlightenment

Protest about the impoverished state of our contemporary context, although necessary, is an inadequate foundation for social transformation. As feminism demonstrates, consciousness is not changed circumstances. The experiential disillusionment is only one facet of problems that run much deeper, problems which, I think, can be traced to the politico-philosophical roots of western, liberal
democratic society. I want to suggest that three interrelated ideas which inspired the project of the Enlightenment have contributed to our failure to uncouple domination and freedom. The project of progressive actors must be to transcend these pervasive ideas, to demonstrate how the noble dream of the Enlightenment has become the nightmare of the Twilightenment, and to work towards a vision for the reconstruction of the nature and relations of human interactions.

The three central ideas that are integral to the project of the Enlightenment are: (1) the priority of the right over the good, with the correlative underemphasis on construction of desirable societies; (2) an excessive concern with the autonomy of the individual, at the expense of her constitutive connections with others; and (3) a correlative of the former two, a relativism or scepticism about how we could live better lives, both individually and together.

C. The Three "D's"

The scepticism sponsored by the Enlightenment has had the deleterious effect of what might be called the three "D's": distraction, despondence, and disempowerment. By distraction, I mean the seemingly irrepressible dynamic for those of us who live in technologically sophisticated societies to adapt, invent, and consume gadgetry that, in and of itself or as a medium for some other vicarious activity, will allow us to continue our collectively self-imposed myopia. Distraction contributes to the cult of self-fulfillment, thereby inducing political impotence. Despondence is interconnected with distraction in so far as the latter suggests the limits of the good life and the pacification of our capacity to be socially involved. It goes beyond distraction in that it is a consequence of a resignation to our apparent puniness in relation to the great world events. The fatalistic tendencies of such a stance result in what might be called the political can't. Disempowerment is the politico-psychological consequence of distraction and despondence. It is a feeling of political irrelevance or marginality,

a denial of our creative abilities as human beings, an unjustifiable surrender to the fallacy that the actual is the inevitable.

To summarize, the foregoing discussion of the three tenets of the Enlightenment, in combination with the three "D's," provides us with a snapshot of what some call "the post-modern condition." It is what I call the Twilightenment with its fundamental contradiction: the embeddedness of domination in freedom.

III. POLITICS

All is not gloom and doom, however. I do believe that there is still space for reconstruction and an escape from the Twilightenment. I find traces of this hope in both feminism and critical theory. In this review, I want to focus my thoughts through a critical overview of Unger's most recent three volumes, but filtered through the critical prism of feminist analysis.

Unger is important for at least two reasons. Although he is a law professor at Harvard, his scholarship and activities have had an impact far beyond the legal community. Since 1975 he has published seven books, some of which when reviewed have been


5 A second caveat concerning feminism must be identified. Although I use the terms feminism and feminist, I am of course aware that there are many feminisms and feminists and that they can not be reduced to a unified essentialist group. Indeed, one of the biggest debates with feminism -- at least of the academic variety -- is the question of whether there is a series of commonalities between all feminists, in spite of their differences, or whether feminism, because of its consciousness of difference, is better understood as a radical pluralism. See, generally, the last several issues of Signs. Having said that, I do think that at the present historical moment there are a series of themes that are common to many feminists, and it is upon these that I draw: see S. Farganis, The Social Reconstruction of the Feminine Character (Totowa, N.J.: Rowman & Littlefield, 1986).

compared – favourably and unfavourably – with Kant, Hegel, and Marx. At the age of thirty-nine, he may well have established himself as one of the most important thinkers of the late twentieth century. Secondly, Unger has aligned himself with and has been pivotal to the emergence of the Critical Legal Studies Movement. Crits get a lot of bad press as nihilists, trashers, and jurisprudential anarchists who can critique but do little to suggest how things might be improved. To some extent that is true. Unger, however, goes beyond critique. The three volumes reviewed in this essay are his most coherent efforts to date. The subtitle to Politics is: "A Work in Constructive Social Theory." And I think they have much to offer.

A. Social Theory: Its Situation and its Task

Social Theory is, perhaps, the most inaccessible of the three volumes, at least for lawyers. However, I want to emphasize at the outset that the difficulty should not be identified as the predictable scholarly ruminations and philosophical flights of fantasy of a nameless academic at an elite university. Rather, the source of the unfamiliarity is to be located in the enormity of the enterprise upon which Unger embarks. By drawing on his own prehistory, his acknowledged failure to have a progressive impact upon Brazilian politics in the mid 1980s, Unger attempts to come to terms with the question of why contemporary ideas and ideology (for example, Marxism) fail to provide the requisite inspiration and motivation – not to mention feasible strategies – for transformative political praxis. He argues that such an inquiry, if serious, requires a sweeping critical reflection upon, not only the politics of the late twentieth century, for that would only scratch the surface, but also our received epistemological traditions. For Unger, knowledge and politics are mutually constitutive. The viability of a transgressive politics that can serve as an alternative to both liberalism and communism is dependent upon a reconceptualization of knowledge. As he suggests, we must work towards "another way of seeing and

_Conditions of Economic and Military Success_ (Cambridge: Cambridge University Press, 1987) [hereinafter _Plasticity_].
talking. Thus, the difficulty of his work is explained by the essential nature of the enterprise.

Primarily, *Social Theory* is a critical analysis of the methodologies, paradigms, practices, and, most importantly, the deeply embedded assumptions of contemporary social theory. Unger's overarching thesis is that conventional wisdom and knowledge are structurally disempowering. He proceeds to found this claim on the argument that over the last several centuries our greatest thinkers and social movements have all operated, explicitly or implicitly, on an assumption of what he variously calls "inevitability," "naturalism," or "necessitarianism." That is, they tend to see science, human nature, and our social, economic, and political relations as having certain characteristics that are fixed, immutable, or permanent. The reason why such a viewpoint is disempowering is that it suggests that there is a certain natural order that is preordained and unchallengeable and therefore immune from human intervention. The consequence is "intellectual entropy, ... social stagnation," "frozen politics," and a "perpetuation of the conditions of hierarchy ... dependence and domination."

Unger provides a variety of examples of the repressive impact of necessitarianism on natural science (cosmology and natural

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7 *Social Theory*, supra, note 6 at 130.

8 Alexandra Dobrowolsky has suggested to me a second reason why Unger's work may appear difficult, a reason that relates more to the reader than the author. Referring to feminist literary criticism, Dobrowolsky suggests that we tend to read in one of two different modes: as "text-rubbers" or as "data-gatherers." Our style of reading, in this view, tends to be functionally specific effecting an intellectual division of labour between the recreational/pleasurable and the labourial/instrumental. We tend to use one or the other depending on the context and the subject matter. They are functionally dichotomous. For some readers, it may be that the interpretive problem with Unger is that his style of writing requires both text-rubbing and data-gathering simultaneously, an ability we find difficult to develop, especially for lawyers who are deliberately trained to generate data and eliminate verbiage. For a further discussion of the importance of language, see *False Necessity*, supra, note 3 at 430-32.

9 In particular, he identifies three "great secular doctrines of emancipation: liberalism, socialism and communism." See *Social Theory*, supra, note 6 at 1.


history), positivist and empiricist social science, economics, epistemology, and historiography. However, perhaps surprising to some, he expends his greatest efforts on Marxist theory and communist practice. He posits that the reason why traditional communism has failed is because of Marxism's deep structural, necessitarian belief in economic determinism, that is, the credo that human emancipation will be achieved after the revolution necessitated by the economic polarization inherent in capitalism. From Unger's perspective, the problem with this analysis is fourfold.

Firstly, Marx's central concept — capitalism — is conceptually flawed, being simultaneously over and under inclusive. It explains both too little and too much of world history. Secondly, the Marxian analysis of an inexorable, discrete, and lawlike sequence of modes of production (each with their own supposedly unique set of internal laws) is descriptively inaccurate and explanatorily deficient. Thirdly, the Marxist faith in revolution is misplaced, desperate, and disempowering, for it is dependent upon "government shattering events like war and occupation,"¹³ unlikely scenarios for the rich North Atlantic societies. Fourthly, and perhaps most importantly, these theoretical errors have had disastrous practical consequences in that the belief in economically determined inevitability, with its assumption of an incorrigible typecast script, tends to render irrelevant the political and imaginative significance of human agency. Thus, for Unger, knowledge is political to its core in so far as its unquestioned assumptions — in this case historical materialism's deeply embedded necessitarian premise that "there is a pre-established plot to social and historical life"¹⁴ — have a dramatic impact upon the issues identified, the questions asked, the methodologies invoked, the answers sought, and the practices generated.

Unger is quick to point out, though, that the rejection of "necessitarian illusions" does not inevitably result in "nihilistic

¹³ Ibid. at 164.
¹⁴ Ibid. at 136.
impotence"¹⁵ or "intellectual or political abdication."¹⁶ To the contrary, he argues that by means of this critique we can begin to unpack the parameters and possibilities of a reconstructive agenda.¹⁷ Politics is a "polemic with a constructive point."¹⁸ For example, although he is extremely critical of the necessitarian impulses of "a dead man's doctrines,"¹⁹ he also recognizes that there already exists within Marx's enterprise "the beginnings of an antidote,"²⁰ the rudiments of political and epistemological reconstruction:

Marx stated the relation between enlightenment and emancipation from false necessity in the most powerful and uncompromising way. The social world was not a natural order, but a domain of collective struggle, constraint, and acceptance. The material relations of society were real relationships of domination and dependence among people. The whole structure of society was the expression of temporary constraints and particular contests rather than part of the inherent nature of things. Economic growth, which had once required oppression, would soon make it superfluous. The role of social thought, as an accomplice of emancipatory social practice, was to demystify society and to reveal it to itself.²¹

Where Marx and Marxists had gone wrong was to turn historical materialism into a positivistic science, thereby unconsciously deradicalizing its emancipatory potential.

The primary purpose therefore of the first volume of Politics is to strive towards the evocation and articulation of an alternative conception of knowledge and politics. Unger argues that naturalism is, in fact, a hangover from the pre-modern – the ancient and/or feudalistic – worlds with their notions of status, closure, foundationalism, and essentialism. Modernism, however, rejects such a static and scripted viewpoint of the world and adopts as its central

¹⁵ Ibid. at 137.
¹⁶ Ibid. at 149.
¹⁷ Unger does recognize that there are certain social critics, for example Foucault, who would agree with much of his critique, but who would equally virulently reject his reconstructive agenda as a capitulation to metatheory. Though he does not trash these "ultra-theorists," he does accuse them of "unrestrained negativism." Ibid. at 165-70, 150.
¹⁸ Ibid. at 200.
¹⁹ Ibid. at 99.
²⁰ Ibid. at 229.
²¹ Ibid. at 138.
theme the challengeability of all assumptions and the constructed and non-permanent nature of social interaction. The difference can be schematized as follows:

<table>
<thead>
<tr>
<th>Pre-modern social theory</th>
<th>Modern social theory</th>
</tr>
</thead>
<tbody>
<tr>
<td>necessitarianism</td>
<td>anti-necessitarianism</td>
</tr>
<tr>
<td>natural</td>
<td>constructed</td>
</tr>
<tr>
<td>essential</td>
<td>artificial</td>
</tr>
<tr>
<td>permanent</td>
<td>contingent</td>
</tr>
<tr>
<td>settled</td>
<td>unsettled</td>
</tr>
<tr>
<td>inevitability</td>
<td>plasticity</td>
</tr>
<tr>
<td>closure</td>
<td>openness</td>
</tr>
<tr>
<td>finite</td>
<td>infinite</td>
</tr>
<tr>
<td>apolitical/non-contestable</td>
<td>it's all politics/it's all up for grabs</td>
</tr>
<tr>
<td>disempowerment</td>
<td>empowerment</td>
</tr>
</tbody>
</table>

However, we must be careful not to understand the foregoing schematization as a mere exercise in reversal and inversion, the simple replacement or elimination of historical necessity by historical contingency. That would be to commit the fatal error of "denying the reality of constraint," and thereby succumbing to the myopia of naive voluntarism. Rather, what is contemplated is a reconceptualization of both necessitarianism and contingency and their mutual relationship, a consciousness that the distinction is relative, not absolute – a continuum and not a dichotomy. The distinction is therefore still important, but now for very different reasons. I will return to this point in the next section where I

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22 In fact, in this volume Unger goes further to develop the outline of an alternative explanatory social theory, one that recognizes the distinction between "formative contexts and formed routines," but one which, at the same time, denies any necessary permanence to the former and posits that the distinction between contexts and routines is relative, not absolute. See ibid. at 151-52. For the purposes of this review, I think it is appropriate to reserve a discussion of these ideas to the next section where he develops these thoughts in much greater detail.

23 Ibid. at 173.

24 Unger makes this point most explicitly through his discussions of natural science. Ibid., c. 7.
discuss his theory of "formative contexts and formed routines." To summarize, Unger sees himself as the archmodernist, a latter-day crusader who, through his espousal of contextualism, wants to take "the idea of society as artifact to the hilt" and thereby to emancipate us from the shackles of "false necessity."

Supplementing and driving the first two themes of Social Theory—the critique of the naturalistic predicament of contemporary social theory and the evocation of a contextual anti-necessitarian alternative—there is a third motivating theme, what Unger describes as the "radical project." Here, Unger’s aspiration is that we become "the architects and critics, rather than the puppets, of the social worlds in which we live." It is tailored to enable us "to seek out our individual and collective empowerment through the progressive dissolution of rigid social division and hierarchy and stereotyped social roles."

In a previous work, Passion, Unger traced out a theory of human nature that runs parallel to many of the themes in Politics. In that work, Unger argued that we are not passive automatons of our contexts, that our genius and specificity as human beings is to be located in our "negative capability," that is, our ability to revise and/or transcend every constraining context that is foisted upon us. The history of humankind is the history of breach of context. The problem with contexts is that they have a propensity to ossify. They tend to take on a logic and dynamic of their own which, in turn, conflates the actual with the possible. This process of rigidification conflicts with and attempts to imprison our negative capability. Worse still, the stasis induced by the solidification of contexts

25 See section III.B, infra at 655ff.
26 Unger also makes the important point that a modern social theory must be a contextual social theory, one that recognizes the partiality of its own context, one that is conscious of its own transience. As I will suggest later, this viewpoint may cause him more problems than he recognizes. See also, M. Minow, "Partial Justice: Law and Minorities" (1988) [unpublished manuscript].
27 Social Theory, supra, note 6 at 1.
28 Ibid. at 156.
29 Ibid. at 93.
30 Supra, note 6.
becomes identified as the natural order by those who exercise power and privilege. It is therefore utilized to reinforce and legitimize conditions of inequality, hierarchy, and subordination. An anti-necessitarian social theory is designed to undercut the political and philosophical feasibility of such preservative apologetics, so that everything — including our interpretive assumptions — is "up for grabs." The Ungerian aspiration is that each and every one of us may have the possibility "to live as the originals as [we] all feel [ourselves] to be" and achieve our aspirations free from the constraints of illegitimate hierarchy. This Unger calls "empowerment through disentrenchment."32

Thus, Unger's ambition, as traced out in the first volume of Politics, is large: to interrogate, transcend, and replace one conception of the world with another. Moreover, the articulation of a radical, anti-necessitarian explanatory social theory is designed to go "hand in hand"33 with a more important project: the outline of a post-Marxist34 programme for social reconstruction. This programme, which is outlined in the second volume, is designed to nullify the traditional liberal accusation of deconstructive nihilism, by offering a realizable "vision of alternative institutional forms"35 that can transcend the achievements, such as they are, of liberalism, communism, and social democracy. Theory and practice, knowledge and politics remain at the core of the Ungerian agenda, for as he argues time and again, "it is all politics."36

31 Ibid. at 214.
32 False Necessity, supra, note 3 at 249.
33 Social Theory, supra, note 6 at 6.
34 It is also post-liberal and post-social democratic.
35 Social Theory, supra, note 6 at 6.
36 Unger elaborates on what he means by this in a footnote:
Throughout this book and its constructive sequel I use the term "politics" in both a narrower and a broader sense. The narrower sense is the conflict over the mastery and uses of governmental power. The broader sense is the conflict over the terms of our practical and passionate relations to one another and over all the resources and assumptions that may influence these terms. Preeminent among these assumptions are the institutional arrangements and imaginative preconceptions that compose a social framework, context or structure. Governmental politics is only a special case of politics in this larger sense. In a theory that carries to extremes the view of society as artifact,
B. False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy

This six hundred and fifty page book provides us with the core of Unger's reconstructive agenda. It begins with a rehearsal of the ideas of the first, more theoretical volume—this time describing it as a "proto-theory"—and then proceeds to concretize and elaborate through an impressive panoply of historical examples. This volume has two parts: one analytic and explanatory of societies of the past and present; the other programmatic and suggestive of the future. Between them they are designed to ensure that we do not fall prey to "the hallucinatory identification of the actual with the necessary."38

1. Explanatory: determinism vs. formative contexts

In the explanatory part, Unger provides us with an account of the patterns of social interaction that is not dependent upon theories of necessitarianism. Rather, in order to provide a "corrective to a contrived sense of natural progression,"39 he argues that we can only fully understand our past and our present if we see them through what he calls a theory of "formative context." He defines formative contexts as "the basic institutional arrangements and imaginative preconceptions that circumscribe our routine practical or imaginative activities and conflicts and that resist their destabilizing effects."40 The reason why we would want to comprehend the significance of

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37 False Necessity, supra, note 3 at 32.
38 Ibid. at 291.
39 Ibid. at 214.
40 Ibid. at 6-7.
Formative contexts is because of their interconnection with the power order of any society. Formative contexts underpin both the possibility and the processes of politics because they provide certain groups with "a privileged measure of control over the means of society making: mastery over capital and productive labor, access to governmental power, and familiarity with the discourses by which we reimagine society and govern nature."\textsuperscript{41}

Through a discussion of the Ancient City State Republics, agrarian-bureaucratic empires, world history, his native Brazil of the 1980s, and, most elaborately, the post-war cycles of reform and retrenchment of both western and communist societies, Unger argues that each can only be explained if we see them as a unique combination of peculiar social forces, none of which can be reduced to one determinative, overarching, totalistic, ahistorical imperative. Thus, for example, he is critical of liberalism in that it assumes that there is a necessary connection between private property, a free market, freedom of the individual, democracy, and equality. I will return to this example below.

We must be very careful not to misunderstand Unger's claims about his theory of formative contexts. His argument is not simply a reversal of the argument that everything is immutable and inevitable. The theory of formative contexts recognizes that there are constraining structures that circumscribe our lived routines,\textsuperscript{42} but it also recognizes that no context is total and that the difference between contexts and routine is relative, not absolute. His ambition is to change the very meaning of contexts, not just their content, but also their character, to disconnect them from their essentialist assumptions, to diminish their "imprisoning quality," and to make them more open to transience than fixity:

\begin{quote}
We can never resolve the tension between the need to accept a context and the inadequacy of all particular contexts. We can nevertheless diminish this tension by our success at inventing contexts that give us the instruments and opportunities of their own
\end{quote}

\textsuperscript{41} Ibid. at 33.

\textsuperscript{42} Indeed, elsewhere he appears to accept the appropriateness of contexts when he discusses what he calls "the paradox of contextuality: our need to settle down to a particular context and our inability to accept any context in particular as fully satisfactory." Ibid. at 342.
revision and that thereby help us diminish the contrast between context-preserving routine and context-transforming struggle.\footnote{Ibid. at 32.}

Therefore, Unger is not calling for the elimination of contexts,\footnote{He identifies such a position with "negativistic, existentialist creed" and ultra-theory. \textit{Ibid.} at 98.} for that would be utopian. Rather, he is attempting to conceive of "constraint without deep structure"\footnote{\textit{Ibid.} at 170.} and to provide us with a "scale of revisability"\footnote{\textit{Ibid.} at 35.} that can allow us to evaluate the different structures according to the extent to which they provide for their own remaking and their consequential openness to human empowerment:

Formative contexts differ not only in content but in character: that is to say, in their relative degree of entrenchment or immunity to disturbance. The more entrenched they are, the sharper become the contrasts they establish and uphold between routine and transformation and the steeper, more rigid, and more influential the social divisions and hierarchies to which they give rise. Formative contexts enjoy degrees of existence. This variation matters: the disentrenchment of formative contexts is bound up with many of our most basic efforts at individual and collective empowerment.\footnote{\textit{Ibid.} at 61.}

Consequently, in the Ungerian scheme of things, the institutions and ideologies of liberal bourgeois democracies are more preferable than those of European absolutist monarchies because they are more open to self-revision. By exactly the same measure – i.e., the "scale of revisability" – his unfolding project of empowered democracy is preferable to liberal bourgeois democracies in so far as the latter still bear the mark of naturalism.\footnote{\textit{Ibid.} at 280. Unger provides a variation of this thesis in a later, parallel argument. In the course of a discussion on the rigidity of differing social hierarchies, he suggests that "class hierarchy is not the sole exemplary form of social hierarchy" and indeed that the caste and the estate are even more ensconced. \textit{Ibid.} at 306-7.}

Unger concretizes these rather abstract reflections on the nature of formative contexts through a discussion of some of the institutional components of the formative context of western democracies. He argues that there are four basic institutional elements of the formative context of late twentieth century western
democracies: the work-organization complex, the private-rights complex, the governmental-organization complex, and the occupational-structure complex. Together these interrelated complexes coalesce into a sort of matrix that sets the terrain and parameters of social interaction, not only institutionally, but also imaginatively. They become a presupposed backdrop that sets the scene for our mutual interaction. Thus, for example, the work-organization complex generates an assumption that the appropriate mode of labour relations is one that accepts a rigid dichotomy between "task-definition" and "task-execution." In this view, directors control and determine the fortune of a commercial enterprise, while the employees merely fulfill their appointed tasks. This is widely

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49 Ibid. at 69-79. Note, however, that Unger is careful to point out that this list is not exclusive and that, in particular, it does not include any of the imaginative components of a formative context. Ibid. at 68-69. Later he posits that:
The core idea is that a formative context includes, together with major institutional settlements, a moral geography of social life: a conception of how people can and should deal with one another in the different fields of social practice. Sometimes, this scheme of social life consists in a single, overpowering model of sociability, meant to be repeated as a theme and variations throughout social life. In other cultures, by contrast, the authoritative scheme of human association assumes the form of distinct models of sociability, each set in contrast to the others. Thus, the most influential preconceptions about sociability prevailing in the contemporary North Atlantic democracies assign radically different standards of human association to government, family life, and economic activity.

Ibid. at 101-2.

50 For example:
In the contemporary Western democracies the social framework includes legal rules that use property rights as the instrument of economic decentralization, constitutional arrangements that provide for representation while discouraging militancy, and a style of business organization that starkly contrasts task-defining and task-executing activities. In the industrial democracies the formative structure of social life also incorporates a series of models of human association that are expected to be realized in different areas of social existence: a model of private community applying to the life of family and friendship, a model of democratic organization guiding the activities of governments and political parties, and a model of private contract combined with impersonal technical hierarchy addressing the prosaic realm of work and exchange.

Social Theory, supra, note 6 at 3.
The reader may at this point detect a possible contradiction. In the previous footnote, I indicated that Unger seemed to say that he was not dealing with the imaginative elements of a formative context. Now, however, he appears to be saying that institutions have imaginative repercussions. I will return to this point below to suggest that this lack of fit results from a structural dichotomy in his work that, unfortunately, reproduces the public/private dichotomy, a flaw that costs his critical credentials severely.
understood to be natural, the inevitable method of achieving economic efficiency. Of course, there may be vibrant debates as to the extent of directorial responsibility or workers' rights, but all of this takes place within the usually unchallenged assumption that the ultimate control of the enterprise rests with the owners. Or again, in relation to the private-rights complex, we tend to model all our conceptions of rights on the paradigm of property conceived of as permanent, nearly absolute, exclusive, possessive entitlements to divisible portions of the social capital that provide us with a zone of discretion into which no other may intrude. Again, there may be debates as to what to include within the concept of rights, but the fundamental "possessivist" conception of rights remains unchallenged. As these examples demonstrate, the elements of the formative context constrain the trajectory and potential of social interaction. Moreover, there are homologies and points of intersection between the work-organization complex and the private-rights complex, in that each has a constitutive impact on the other.\footnote{51}

More important still, embedded in these two elements of the formative context, one can find a "rigid order of division and hierarchy"\footnote{52} that entrenches inequality, domination, and dependence. The task-definition/task-execution dichotomy legitimizes patron/client relations that are based on "ties of gratitude and fear."\footnote{53} The private-rights complex enables property holders to reduce others to conditions of dependency. Clearly, then, as currently constituted, each of these complexes is antithetical to the "radical project" of empowered democracy.

Yet, for Unger, neither of these twin dynamics should be understood as total. Through a lengthy discussion of the genesis of the work-organization complex, the private-rights complex, and the governmental-organization complex, he presents an historical thesis that demonstrates, not only the contingent and paradoxical origins...
of each of these complexes, but also the pervasiveness of resilient and unassimilable deviations.\textsuperscript{54} For Unger, instability is as pervasive as stability, though it tends to be obscured by the "deceptive patina of naturalness and necessity."\textsuperscript{55} He develops for our consideration the following examples. In relation to the work-organization complex, he posits that, as the twentieth century\textsuperscript{56} has moved forward, economic success has become increasingly dependent upon the ability to innovate. In turn, this has required a flexibility that is incompatible with a rigid distinction between task-execution and task-definition.\textsuperscript{57} With the blurring of the distinction, patron/client relations, though still pervasive, have become somewhat more fluid and dispersed and therefore unstable. Similarly, within the private-rights complex, there have been transgressions and deviations that simply do not fit within the proprietary paradigm: for example, the legal doctrines of unjust enrichment, inequality of bargaining power, and fiduciary relations in contract law. Even more importantly still, Unger argues that the current escalation of these instabilities and deviations echoes the fact that there is emerging an alternative vision of the nature and patterns of human association and the appropriate conditions of social interaction, one that rejects clientalism, domination, and dependence:

The basic, minimal theme has been negative and cautionary: the claim that the dominant forms of industrial society to have emerged in the course of Western history cannot be correctly understood as required by the inherent constraints of practical organization or economic necessity. At successive points in the history of these institutional arrangements, solutions containing the elements of alternative institutional schemes were proposed or tried out. The deviations emerged repeatedly; each step toward the consolidation of a dominant style of economic or governmental organization created new opportunities to break away from it. There is no end in sight to the rearrangements nor - if the general view of society developed in this study is correct - can there be. One of the most important reasons for this continuous recurrence of

\textsuperscript{54} Ibid. at 180-220.

\textsuperscript{55} Ibid. at 262.

\textsuperscript{56} The historical deviance can be traced to petty commodity production which, as we shall see, is the prototype for Unger's reconstructed economy.

\textsuperscript{57} In fact, Unger goes on to suggest that in these developments we can locate the rudiments of a "rival ... style of economic organization," a more democratic "system of decentralized and flexible production and dissociated property" that can provide an alternative to the current hierarchal system of economic relations. Such a system draws its impetus from, but goes far beyond, petty commodity production. \textit{False Necessity, supra}, note 3 at 222.
alternatives is that no set of institutional practices or conceptions of social life ever wins a complete victory. More often than not, the deviations persist. They reach an accommodation with the victorious organizational arrangements, which they both complement and jeopardize, and assume a subsidiary or anomalous role within an order constituted on other principles. At any moment these anomalies of organization or belief may be treated as points of departure for fundamental reconstruction. Thus, the imagination may find in current reality the materials it needs for even its most subversive efforts.58

Unger’s point, then, is that the elements of the formative context are in fact transient, that they vary in the extent to which they tolerate flexibility, and that their inherent tensions can be exacerbated and escalated in order to further "crack them open to politics." Moreover, given their mutually constitutive nature, a modification of one element may help generate modifications of another.

The reason why his discussion of formative contexts is important is that each of the components of the contexts comes about through the peculiar and particular interaction of a variety of microforces. Rather than being some inevitable conglomeration of social forces, each formative context has "a hodgepodge, pasted-together, trumped-up quality."59 It is the combination of these micro-peculiarities that results in one formative context rather than another. More importantly still, the script is not pre-written. It is human agency that gives rise to the direction of each of these microforces and, therefore, it is human agency that contributes to the overall nature of a formative context. Viewed from this perspective, we can remember that "[w]e put more of the infinite us into the finite worlds in which we live."60 This is not to be taken as saying that a particular society is the product of simple voluntarism or individual intentionalism. Rather, it is simply to acknowledge that people play a role in history, that their contribution to a micro-societal force may have some impact – direct or indirect – on the larger context in which they find themselves. The formative context is a combination of a variety of humanly constructed social forces and, in that sense, it is incompatible with necessitarian theories that rely on an

58 Ibid. at 221.
59 Ibid. at 96.
60 Ibid. at 97.
essentialist dichotomy of framework and routine, with the in-built conviction that the former determines the latter. This explanatory theory of formative contexts is significant in that it is pivotal for Unger's reconstructive and programmatic agenda. If a particular formative context is a combination of microforces that are in part the result of purposeful human agency, then, depending on the direction of that agency, that combination could be different. An awareness of combination allows for the possibility of recombination. A formative context is not, therefore, an "indivisible package," for its "components do not have to stand or fall together. They can be replaced piecemeal. And each such partial substitution changes the face of routine politics." Recombination can come about through the reworking of the micro-societal forces so as to change the context. Human agency plays a key role in these micro-societal forces and this, in turn, has an impact upon the larger context. Thus, to return to the example of liberalism with its assumption that there is a necessary connection between private property and a free market on the one hand, and freedom and equality on the other, Unger argues that this is a confusing conflation that equates current (and therefore contingent) market and democratic structures with the essence of true democratic and market ordering. If we were to change the nature and relations of both property and the market, that would not necessarily eliminate freedom and equality. On the contrary, we might just enhance freedom and equality by avoiding the inequality and domination generated by current (monopolistic or oligopolistic) market and political (elitist and privileged) structures/processes. Unger's thesis is that the reason why formative contexts change is not because of some inevitable, metahistorical law, but because the subcomponents of the formative context are dynamic, a dynamism that is generated by the purposeful activity of

61 One interesting example is his reinterpretation of the legal origins of corporate power in the United States. Unger posits that, far from being either a necessary component in the emergence of American democracy (a liberal conservative analysis) or an inevitable stage for American capitalism (a Marxist analysis), the emergence of incorporationism was highly contested and emerged as the result of a fusion of context-specific social microforces. Any inevitability that it might appear to have is either the product of ex post facto rationalization (in the case of liberals and conservatives) or weak economic history (in the case of Marxists). Ibid. at 176-80.

62 Social Theory, supra, note 6 at 63.
destabilizing human agency. Moreover, as we have seen, Unger's preference is for those contexts that render themselves open to self-revision, because those are the ones that offer the greatest scope for human empowerment. Thus, the agenda of disentrenchment/denaturalization is twofold: "the creation of formative contexts that both undermine stable roles and hierarchies and efface the contrast between context-preserving routine and context-transforming conflict."\(^6\)

It is in this way that Unger challenges the fatalism inherent in the Twilightenment, by reclaiming the power of human agency, by engendering empowerment, and by reactivating a smothered politics. Society and social interaction are artifactual, constructed; what has been constructed can be deconstructed and reconstructed. Contexts, good or bad, are contingent; they can be smashed and remade. And even more importantly, this can come about through ways other than total revolution. Through the reworking of the subcomponents of the formative contexts – by taking advantage of the deviations, the resistances, the exceptions, and our human potential for negative capability – the formative contexts themselves change, thereby providing us with a middle path between fruitless reform and inconceivable revolution. The Ungerian alternative is "revolutionary reform"\(^6\) in the organization of government, law, the economy, and our personal relations. In this way, he hopes to regenerate a political practice that pursues the radical "commitment to weaken rigid divisions among roles, genders, classes, communities, and whole societies and to free us from the compulsions of unrevisable contexts."\(^6\)

2. Programmatic: institutional reconstruction

The programmatic argument that grows out of the foregoing explanatory theory is underpinned and inspired by a vision of desirable conditions and relations of social interaction. Unger's

\(^{63}\) *False Necessity*, supra, note 3 at 253.

\(^{64}\) See, e.g., *Social Theory*, supra, note 6 at 163.

\(^{65}\) *False Necessity*, supra, note 3 at 253.
reconstructive proposals for government, the market, and law are carefully designed to advance his conception of human empowerment: the "disengage[ment] of our practical and passionate dealings from the restrictive influence of entrenched social roles and hierarchies." More particularly, "[t]he forms of governmental and economic organization proposed ... emphasize the development of practices and institutions that prevent factions, classes, or any other specially placed groups from gaining control over the key resources of a society (wealth, power, and knowledge)." In Politics, Unger takes to heart the omnipresent liberal critique that traditionally the left has been prolific with critique, but barren when it comes to alternative suggestions. He takes as his responsibility the task of articulating a relatively detailed programme of institutional reconstruction that can facilitate the pursuit of human empowerment through the disentrenchment of privilege. In this way, he hopes to illustrate that his is, indeed, a credible theory of social transformation.

a) Empowered democracy

Before we go any further, let us remind ourselves what Unger is up to. As he is at pains to emphasize:

The program of empowered democracy is merely the next step in a trajectory: not the millennium but the further emancipation of our practical and passionate attachments from a predetermined script, the further subversion of a fixed plan of social division and hierarchy, and the further reach toward the forms of individual and collective empowerment this context smashing may produce.

In this way, he hopes that we will be "freer to deal with one another as individuals rather than as placeholders in the system of class, communal, role, or gender contrasts." Moreover, he proposes that the way to achieve this is to narrow the gap between framework-

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66 Ibid. at 9.
67 Ibid. at 10.
68 Ibid. at 361.
69 Ibid. at 363.
preserving routine and framework-transforming conflict, a move that can be best achieved by the intensification of grass-roots participation in the processes and structures of both state and society. Thus, his ideal of "empowered democracy" encompasses three different levels or varieties of empowerment: the achievement of conscious control over the present formative context, the reconciliation of individual autonomy with the need to establish community, and the fostering of the productive capacities of society. Moreover, the accomplishment of each is intertwined with the accomplishment of the others, "the ends [are] prefigured in their means" and cumulatively they enlarge our vision of the democratic ideal. Further, Unger develops in fairly significant detail how we should begin to remake contemporary western liberal democratic institutions in pursuit of the ideal.

Unger spends a few hundred pages sketching out his proposals for a renovation and recombination of the basic institutional structure of society. His pivotal criticism of the majority of contemporary institutions is that they are primarily preservative. They are designed to reinforce existing cultural patterns, rather than to change them. Such structural conservativism works to the advantage of the already existent citadels of private power, thereby helping to entrench inequality and illegitimate hierarchy. The remedy suggested by Unger is neither anarchy nor revolution, but reconstruction so that our institutions are more open, "structure-revising" rather than "structure-preserving." Such a perspective reverses the received hierarchy of stability and flexibility without falling into chaos. The strategy is revolutionary reform: "the view that formative contexts can be replaced piecemeal and the thesis that the deviant elements in any social order have a subversive and reconstructive potential."71

In keeping with his thesis of the artifactual nature of social interaction and his proposition "that it's all politics" (and probably as a rebuttal of the Marxist propensity for economic reductionism and the lawyer's predilection for juridical self-aggrandizement), Unger commences his discussion of institutional reconstruction by

70 Ibid. at 442.
71 Ibid. at 468.
emphasizing "the importance of the organization of government and of the struggle over governmental power as the chief means for the stabilization or destabilization of society."72 Thus, though still of vital importance, both economics and law are decentered in that "]]awmaking and discretionary economic policy are the chief tools with which the state goes to work on social life."73

b) Constitutional reorganization - political

Unger is very conscious of the crucial strategic power of the state: "[for] the control of governmental power exercises an overwhelming influence upon the course of conflict over the basic form of society."74 In particular, he spends a great deal of time talking about both the institutions and the political processes of empowered democracy. In this section, there is only space to discuss the former.75

Lest there be any confusion, Unger is no anarchist, for he comes not to "bypass the state" but to "rebuild it."76 Indeed, he goes out of his way to repudiate

as misguided and self-defeating, any attempt to do without large-scale governmental and economic institutions and to replace institutional arrangements with an uncontroversial system of pure, uncoercive human coordination. A premise of the program is that no such system exists and that the development of less coercive systems of coordination is bound up with the transformation - not the abolition - of governmental institutions.77

72 Ibid. at 442.
73 Ibid.
74 Ibid. at 401.
75 For tentative, but highly suggestive, discussions of the processes, practices, and strategies of revolutionary reform and empowered democracy: see ibid. at 395-441, 539-50.
76 Ibid. at 312.
77 Ibid. at 432. But this is not to say that Unger sees no distinction between state and civil society. For example, as we shall see later, he advocates a system of rights that limits public, as well as private, power and he discusses what he calls "antigovernmental" or "antistatist" voluntary associations that help "keep the state humble and the people proud, inquisitive, and restless." Ibid. at 480. It is interesting to note, however, that this discussion of voluntary associations makes reference to Tamara Lothian, one of the few references to a woman in his rather useful notes. Ibid. at 627.
For Unger, the great virtue of the state is that it ensures remembrance of the artifactual nature of society, because "the naturalization of society is the peculiar risk of statelessness."\(^7^8\)

Through an intriguing discussion of the contingent origins and historical mutations of the contemporary liberal constitutional structure, a thesis that is designed to demonstrate that democracy has no necessary inevitable form, Unger argues that traditionally our political structures have been bifurcated so as to differentiate between "fundamental" and "normal" politics. (Remember the framework-routine dichotomy.) This distinction is institutionalized through the differentiation of constitutional politics and everyday politics, with the former providing the parameters for the latter. The two realms differ in their openness to challenge and change. Because it is understood to be more important, the constitutional structure is rendered more inflexible, requiring exceptional procedures for transformation, thereby "placing much of the established institutional order effectively beyond the reach of democratic politics."\(^7^9\) Viewed in this light, the classical liberal constitutional technique of the separation of powers between the executive, legislature, and the judiciary is primarily preservative of the \textit{status quo} because, like the forms of action, it channels the pursuit of remedies through rigid, discrete, and constraining processes. This encourages a process of institutional fobbing off, thereby reinforcing the already entrenched politics of privilege, facilitating a hardening of the "links between private privilege and governmental power,"\(^8^0\) and allowing the state to become hostage to an entrenched faction. Moreover, the conservative bent of the constitutional political set up has a trickle down effect in that it overdetermines the potential range of possibilities available in the realm of normal politics. Resistance to change is therefore structurally ensured through "constitutional rules that discourage bold programmatic experiments."\(^8^1\)

\(^7^8\) \textit{Ibid.} at 505.
\(^7^9\) \textit{Ibid.} at 449.
\(^8^0\) \textit{Ibid.} at 406.
\(^8^1\) \textit{Plasticity, supra,} note 6 at 85.
Unger argues, however, that there is no need to acquiesce in such "demobilizing constitutionalism,"\textsuperscript{82} that there is no \textit{a priori} reason why our political structures must be constructed in this way. Rather, he argues that such a perspective incorporates a background assumption that prefers stability over change. If we preferred openness to fixity, radical democracy to the entrenchment of elitism, then, because of the importance of the constitution, we would construct it so as to incorporate a "principle of permanent self-revision"\textsuperscript{83} to facilitate change and inspire a volatile normal politics, rather than the opposite. The important question then becomes: In whose interests do these competing assumptions about stability and malleability operate? Unger realizes that, at this point, it is not possible to turn the constitutional structure inside out in a way that would be attractive to him – as a "constitutionalism of permanent mobilization"\textsuperscript{84} – so he suggests that we attempt to liquify the distinction between constitutional and ordinary politics so as to make the former more like the latter.

Particularly, he suggests that we "must therefore multiply the number of branches in governments while attributing overlapping functions to the agencies of the state."\textsuperscript{85} For example, he suggests the establishment of a new branch of government – the destabilization branch\textsuperscript{86} – that is charged with

\textit{enlarging access to the means of communication, information, and expertise, all the way from the heights of governmental power to the internal arrangements of the workplace.\textsuperscript{87}}

Such a branch of government must be legally and financially qualified to oversee the basic arrangements separating technical coordination and managerial advice from a generic disciplinary authority in the workplace.\textsuperscript{88} It must be able to make know-how available to those who, under the conditions I shall describe, set up new productive enterprises. It must be able to intervene in all other social institutions and change

\textsuperscript{82} \textit{False Necessity}, supra, note 3 at 459.

\textsuperscript{83} \textit{Ibid.} at 461.

\textsuperscript{84} \textit{Ibid.} at 462.

\textsuperscript{85} \textit{Ibid.} at 449.

\textsuperscript{86} This is my term not Unger's, although obviously it dovetails with the spirit of his proposal.

\textsuperscript{87} \textit{Ibid.} at 450.
their operations, by veto or affirmative initiative. Its power to intervene must be
directly related to the task of securing the conditions that would maximize information
about affairs of state and achieve the maximum subordination of expert cadres to
collective conflicts and deliberations. The officers of such a branch would be selected
by joint suffrage of other powers in the state, the parties of opinion, and the universal
electorate.\textsuperscript{88}

The purpose of such a branch would be to "rescu[e] know-how from privileges,"\textsuperscript{89} to inhibit the overconcentration of knowledge – for that results in domination – and to facilitate its redistribution because, in
Unger's opinion, that will enhance competition, equality, and efficiency.

The immediate problem with such a proposal is that such an interventionist branch could become despotic, a sort of
superexecutive, unrestrained by the other institutions or processes of government. Such a criticism leads to the second plank of Unger's
proposal for constitutional renovation: the attribution of overlapping functions to different governmental agencies. This suggestion is an
attempt to forge democratic accountability through a technique that
does not succumb to the sclerotic – and structurally conservative –
effects of the system of checks and balances.\textsuperscript{90} The basic idea is to
decentralize power in order to enable various institutions to perform
a variety of responsibilities that are, within the current liberal
democratic scheme of things, functionally discrete. Thus, the
judiciary, legislature, and executive (and his other suggested novel
institutions of government) would begin to fulfill, in part, each
others' functions.\textsuperscript{91} The central advantage is that this would enable

\textsuperscript{88} \textit{Ibid.} at 450-51.

\textsuperscript{89} \textit{Ibid.} at 453.

\textsuperscript{90} Again, the technique adopted by Unger is to demonstrate the contingent historical
sources of the system of checks and balances and to posit its now anachronistic nature.

\textsuperscript{91} This may not be as heretical as one might think. Consider, for example, the various
functions fulfilled by the Canadian Human Rights Commission: advocate, investigator,
adjudicator, conciliator, bureaucracy, lawmaker, monitor, and educator/lobbyist. Consider two
further examples: in \textit{R. v. Operation Dismantle}, [1985] 1 S.C.R. 441 at 455, the Supreme
Court of Canada interpreted the \textit{Charter} so as to give an expansive understanding of judicial
jurisdiction, one that allows them to intervene even on political questions, the traditional
preserve of the executive:

Cabinet decisions fall under s. 32(1)(a) of the \textit{Charter} and are therefore reviewable in
the courts and subject to judicial scrutiny for compatibility with the Constitution. I
have no doubt that the executive branch of the Canadian Government is duty bound
and encourage the citizenry to participate in all the institutions of
government, to mobilize, make claims, and repudiate the bureaucratic
denials of institutional appropriateness. Moreover, given that the
original rationale for the system of checks and balances was for the
protection of citizens from an overly intrusive state, this legitimate
concern can be achieved in an alternative way: through his
reconstructed system of rights.\footnote{To summarize, through a
renovation of the institutions of
government and by the means of a diversification of functions,
Unger hopes to jumble up the currently quasi-paralytic nature of
governmental activity to encourage extended civic participation and
to counteract the politics of private privilege. Those ambitions
however – if serious – also require an assault on the citadels of
economic power.}

c) Empowered democracy and the reorganization of the economy

True to his anti-necessitarian faith, Unger argues that the
concept of the market is institutionally indeterminate. That is, he
argues that the generic idea of a market has no necessary particular
institutional manifestation, that several different variations of
exchange relations can all qualify as a market.\footnote{In making this
claim, Unger seeks to make explicit and direct the connection
between the constitution and the market to illuminate the nexus
between politics and economics. Like the state and law, the
economy is artifactual.}

Unger argues that within liberal democratic society there has
been a conflation of the abstract concept of the market with an

\footnote{\footnote{\footnote{to act in accordance with the dictates of the Charter.}
At the same time, section 33 of the Charter allows for parliamentary or legislative override of
certain constitutional rights, infringing what, in traditional American conceptions of the
separation of powers, is the preserve of the judicial branch.}

\footnote{92 See section III.B.2.(d), infra at 675ff.}

\footnote{93 For example, \textit{laissez faire}, corporatist, cooperative, and regulatory/distributive exchange
relations can all be considered markets, but each envisions very different conceptions of the
market. None more accurately captures the essence of a market because the concept of
market is, to use Galilei’s phrase, "essentially contested."}
historically specific set of juridico-economic assumptions and institutions, what he calls the "consolidated property right." Through this concept, Unger attempts to get an angle on the widely held belief that property has one essential meaning: that the owner has an exclusive, "more or less absolute entitlement to a divisible portion of social capital – more or less absolute both in its discretionary use and in the chain of voluntary transfers by successive property owners."\(^9\)

Although Unger recognizes that the virtue of the consolidated property right is that it allows for decentralization and therefore the possibility of autonomy, he polemicizes vehemently against its weaknesses from the perspective of empowered democracy. When considered through the desideratum of freedom, the consolidated property right is doubly flawed. First, it allows for an unrestrained concentration of wealth, thereby enabling a small number of people to have disproportionate control over the direction of the economy. In a word, it is anti-democratic. Second, it is disempowering in that its acceptance of the task-definition/task-execution dichotomy tolerates and legitimizes "inequalities of wealth that reduce some people to effective economic dependence upon others."\(^9\)

Nor, according to Unger, can these twin concerns be set off against traditional economic criteria such as progress. The consolidated property right is, within the scheme of Ungerian economics, insufficiently efficient, inadequately decentralizing, undersupportive of plasticity and innovation, and overly constraining upon "growth-oriented macro-economic policy."\(^9\) Thus, though it might be deeply entrenched in our collective psyche, the consolidated property right uniquely combines privilege, domination, and waste.

Unger denies the hegemony of this conception of property, positing that other variations on the idea of a property right are conceivable, workable, and desirable if we really do aspire to a more egalitarian society. Unger's favoured alternative is a "disaggregated property right": one that allows for conditional and limited

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\(^9\) False Necessity, supra, note 3 at 481.

\(^9\) Ibid. at 483.

\(^9\) See section III.B.2.(d), infra at 675ff.
individual and group claims to portions of the social capital.\textsuperscript{97} Traces of this proposal are already to be found in the ways in which governments currently interface with industry.\textsuperscript{98} This idea is worked out in greater detail through a discussion of what he calls the "rotating capital fund" which is designed to fragment control over capital into several tiers of capital takers and capital givers. The ultimate capital giver is a social capital fund controlled by the decisional center of the embodied democracy: the party in office and the supporting representative assemblies. The ultimate capital takers are teams of workers, technicians, and entrepreneurs, who make temporary and conditional claims upon divisible portions of this social capital fund. The central fund does not lend money out directly to the primary capital users. Instead, it allocates resources to a variety of semi-independent investment funds. Each investment fund specializes in a sector of the economy and in a type of investment. The central democratic institutions exercise their ultimate control over the forms and rates of economic accumulation and income distribution by establishing these funds or by closing them out, by assigning them new infusions of capital or by taking capital away from them, by charging them interest (whose payment represents the major source of governmental finance), and, most importantly, by setting the outer limits of variation in the terms on which the competing investment funds may allocate capital to the ultimate capital takers. The investment funds may take resources away from one another, thus forming in effect a competitive capital market, whose operations are also overseen by the central representative bodies of the democracy. The investment funds in turn allocate resources to the primary capital takers - teams of entrepreneurs, technicians, and workers - under two different regimes. The funds set the terms on which financial and technological resources may be obtained. The capital users pay an interest charge to their investment fund just as the latter pays a charge to the central social fund. Within the limits laid down by both the central governmental bodies and the competing investment funds, these direct capital takers buy and sell. Within those limits they, too, may bid resources away from one another. They profit from successful enterprise and suffer from business failure. But they never acquire permanent individual or group rights to the capital they receive. Nor does success entitle them to expand continuously, to buy out other enterprises, or to

\textsuperscript{97} Unger would also abolish the hereditary transmission of substantial assets, as he considers inheritance anti-egalitarian and antithetical to dissociation.

\textsuperscript{98} Consider, for example, the plethora of contributions, subsidies, grants, low interest and forgivable loans, loan guarantees, and tax incentives that governments provide to market players. Consider also \textit{Esquimalt and Nanaimo Ry Co. v. A.G. British Columbia}, [1948] S.C.R. 403, [1950] A.C. 87 (Privy Council); \textit{R. v. Lethbridge Collieries}, [1951] S.C.R. 138; \textit{R. v. Joy Oil Co.}, [1949] Ex. C.R. 136, aff'd [1951] S.C.R. 624. These cases, which are usually categorized as lack of governmental contractual intent, may be better understood as progenitors of a disaggregated property right, one that recognizes an entitlement, but one that is temporary, not permanent. Thus, rather than having the absolutist dichotomy of contract/no contract, we can recognize a more context specific understanding of relations of interdependence. See also, \textit{Grant v. New Brunswick} (1973), 6 N.B.R. (2d) 95 (N.B. C.A.).
introduce into their own business a special category of relatively disadvantaged and voiceless workers. Success merely increases their income.\textsuperscript{99}

Underlying the idea of the rotating capital fund, then, there are two seemingly paradoxical ambitions: a more socially responsible economy that is open to democratic review and control and, at the same time, a more flexible and innovative economy because of its structurally ensured decentralization.

This triple layered structuring of the market to decentralize the relations between capital-givers and capital-takers, while at the same time encouraging democratic control and entrepreneurial innovation, can be schematized on the chart on the following page.\textsuperscript{100} The idea behind such a capital-allocation system is to help increase the flexibility and productivity of the market, to convert the economy into a "perpetual innovation machine,"\textsuperscript{101} while at the same time decentralizing and fragmenting economic power with its ever present potential for exploitation and domination. This Unger calls a modernized and "reconstructed version of petty commodity production."\textsuperscript{102}

A reconstruction of the economy on the basis of the disaggregation of the consolidated property right and the rotating capital fund provides a unique opportunity for greater openness and

\textsuperscript{99} False Necessity, supra, note 3 at 491-92.

\textsuperscript{100} Of course, there are concerns about the extent of state power if it has access to such direct control of the economy. Unger spends a great deal of time outlining new forms of participation and accountability that are designed to counterbalance such power. Economics and politics are carefully woven together in the Ungerian scheme, whereas modern liberalism attempts to deal with their relationship through denying its existence.

\textsuperscript{101} False Necessity, supra, note 3 at 491.

\textsuperscript{102} Ibid. at 31. Unger proudly admits the motivation for this idea is to be traced back to what he describes as the "tradition of petty bourgeois radicalism" which envisions "the co-existence of a large number of relatively equal small-scale producers or productive enterprises as the mainstay of economic organization." Ibid. at 28-29. The differences, however, are that the petty bourgeois radicals believed in a consolidated property right, whereas Unger believes in its disaggregation and that the rotating capital fund does allow for large economic units, though controlled.
opportunity\textsuperscript{103} that does not call for anarchy, or even inefficiency, but the decentering of the economics of privilege. However, a democratized economy and an egalitarian mode of exchange relations can only be achieved if there is also ongoing reworking of the constitutional structure and a remaking of the system of rights.

d) Rights

Greater specificity can be given to these ideas of constitutional reconstruction and economic reorganization through an overview of Unger's system of rights. Unlike many critics of liberalism, Unger does not advocate the abandonment of rights discourse. Rather, he advocates a redefinition and expansion of rights to facilitate individual and group empowerment and to enhance security and participation, while decentering the privileges of property.

Note, however, that Unger's approach to rights is a far cry from the abstract deontologicalism of much of contemporary liberalism. Rather, Unger's conception of rights is much more context specific. It is a carefully tailored schematization that is designed to facilitate the demands of empowered democracy. Perhaps the best way to understand his theory of rights is to recognize the homology with his critique and reformation of the economy. Remember that, for Unger, the core problem with the current economy is the constraining influence of the consolidated property right. The consolidated property right is not simply an economic presupposition, although it is that too and therefore vitally important. It is also a foundational legal principle. Indeed, it is because of its centrality to the legal regime that it is so important to the market. Restated, the consolidated property right is constitutive of both contemporary law and the modern economy. Therefore, it has to go.

\textsuperscript{103} This opportunity ripples beyond the extended availability of capital towards the transformation of the conditions of labour. To a significant extent, Unger expects disaggregation and decentralization to generate a softening of the distinction between task-definition and task-execution that encourages the corralling of all entrepreneurial resources, regardless of the traditional hierarchies of employer and employee.
The problem with the consolidated property right from the legal point of view is that it has attained imaginative and practical hegemony both in form and substance. Earlier, we identified its substantive components — property as exclusive, permanent, nearly absolute control — and its democratic and economic weaknesses. Much of modern law is simply a concretization and routinization of the consolidated property right and its limitations. But the consolidated property right works its nefarious influence on law in a second, perhaps more important, way: through its form. Because of its position of ideological dominance, it has become "a model for rights dealing with matters far removed from the methods for economic decentralization." \(^{104}\) The consolidated property right has become the prototype for conceptualizing rights. All thinking about rights is moulded to "force large areas of existing social practice into incongruous legal forms." \(^{105}\) Unger's thesis is that by mimicking this possessive proprietary paradigm, we have suffered a drastic myopia in developing our imaginative legal structures.

In order to smash through the substantive and formal hegemony of the consolidated property right, the Ungerian constitution would provide for four categories of rights, thereby disaggregating property, enlarging democracy, and capturing more subtly the complex and diverse modes of social interaction.

i) Market

*Market rights* are designed to facilitate economic exchange and would have two facets. First, they would provide capital-takers with "conditional and provisional" entitlements to the economically crucial rotating capital fund. Second, they would regulate the relations of exchange between economic enterprises to ensure entrepreneurial initiative. In a sense, this would be similar to the function fulfilled by contemporary property and contract law, absent, of course, the influence of the consolidated property right. As a result, the Ungerian manifesto does not call for the abolition of property or

\(^{104}\) *False Necessity*, supra, note 3 at 512.

\(^{105}\) Ibid.
contract, but merely their transmutation. Property, as we already
know, would be disaggregated, while contract would pursue with
greater alacrity its current subtext of relative fairness.

This last point should be elaborated upon. Frequently, lawyers
assume that exchange relations are driven by an adversarial, mutually
exploitative dynamic. However, as over two decades of socio-legal
research have indicated, there is extensive collaboration and
interdependence between business enterprises. Economic
efficiency recognizes the value of relationalism, co-operation, and
give and take. Unger simply wants law and the legal framework to
do the same. (I will return to this point in the discussion of
deviationist legal doctrine.)

ii) Immunity

Immunity rights are designed to ensure security of the individual
while enabling the citizen to participate actively and equally in the
polity, free from the oppression of both public and private power.
Not only would they incorporate traditional liberal democratic rights
— freedom of expression and association, freedom from arbitrary
arrest — they would also ensure welfare rights to free the citizen

106 S. Macauley, "Non Contractual Relations in Business: A Preliminary Study" (1963)
28 Am. Soc. Rev. 55; and "Elegant Models, Empirical Pictures and the Complexities of
Contract" (1977) 11 Law & Soc. Rev. 537; H. Beale and T. Dugdale, "Contracts Between

107 See section III.B.2.(e), infra at 681ff. There is an important point to be made here.
Although Unger develops four categories of rights, these should not be understood as mutually
exclusive. As will become clear, aspects of market rights are closely connected with solidarity
rights, while welfare rights, though classified as a part of his immunity rights, are essential
for the adoption of destabilization rights. In this sense, the Ungerian system of rights is
interstructured.

108 They are defined as "guarantees of access to the material and cultural resources
needed to make a life. These include provision for nourishment, housing, health care, and
education, with absolute standards proportional to the wealth of society." False Necessity,
supra, note 3 at 528. Welfare rights are a cognate of equality of condition in that they aspire
to a "major equalization in the material circumstances of life." Ibid. at 47 and see also ibid.
at 588. But there are limits on how far Unger wants to go. In his reconstructed economy,
capital-takers will still gain or lose financially depending on the success or failure of their
market activities. The rationale for differentiation appears in his belief that profit is a
significant, though not necessarily essential, factor for worker motivation. The safeguard is
from economic oppression that not infrequently makes effective participation impossible.\textsuperscript{109} Thus, immunity rights are not to be understood as merely negative freedoms – state keep out – rather they are positive freedoms designed to mobilize the populace to participate, secure in the knowledge that any retribution (public or private) for democratic involvement\textsuperscript{110} cannot result in subjugation. Immunity is a cognate of participation. Moreover, according to Unger, although immunity rights incorporate traditional liberal democratic rights, these will take on a new empowered meaning given that the broader context – economic and political – in which they operate is in the throes of revolutionary reform.

iii) Destabilization

\textit{Destabilization rights} are designed to ensure continued openness and to guard against closure with its correlative dangers of the entrenchment of privilege and the institutionalization of oppression. Destabilization rights enable the citizen to criticize and disturb all institutions and practices, public and private, and contemplate institutional support for such transgressive activity. Thus, for example, if an economic enterprise was able to generate enough economic and political power to achieve "agency capture" of the intermediate investment funds and thereby to rework to its advantage market relations, those who would be reduced to dependence by such developments could call on other branches of that failure will not result in impoverishment.

Note also that welfare rights do not include job tenure, as that would impose too great a limitation upon the requirement of economic flexibility. However, he suggests that the reason why workers want job tenure is because at the present time we have an underdeveloped system of welfare rights, a concern that will no longer apply in an Ungerian society.

\textsuperscript{109} A prime example is women. See, e.g., B. Nelson, "Women's Poverty and Women's Citizenship: Some Political Consequences of Economic Marginality" (1984) 10 Signs 209 [hereinafter Women's Poverty]. The claim is not that women are apolitical, rather it is that they do not participate as actively in malestream politics, in part, because of their economic subordination. They do, however, participate in many other forms of politics.

\textsuperscript{110} Should anyone be so naive as to believe that the power elite of Canadian society, for example, would never be so crass as to use their economic power to coerce the workforce into political line, consider the disciplinary role adopted by employers during the free trade election, 1988. See N. Fillmore, "The Big Oink" (1989) 22:8 This Magazine 13.
government, including, but not limited to, the destabilization branch, to disrupt and derange such developments. And this would be a constitutional right.

Though curious, destabilization rights already have inchoate precedents in contemporary law, for "the opportunity to destabilize and to reconstruct is always built into the very devices that perpetuate the existing social peace."\textsuperscript{111} Consider, for example, the injunctive relief granted by the judiciary in relation to the practices of hospitals, asylums, and schools, institutions which traditionally have tended to be exempt from the \textit{desiderata} of equality or democracy. Or again, consider judicial intervention in the electoral process in an attempt to secure greater equality.\textsuperscript{112} Even more poignant are the activities of the Canadian Human Rights Commission and decisions of the courts promoting the remedies of employment equity.\textsuperscript{113} But note also that the judiciary are not identified as the necessary guardians of destabilization. Given Unger's earlier proposal for overlapping functions and his advocacy in favour of a new destabilization branch, we cannot take refuge in the old shibboleths or trust an ancient and privileged bureaucracy.

iv) Solidarity

Finally, \textit{solidarity rights} recognize our vulnerability as social beings and attempt to "give legal form to social relations of reliance and trust."\textsuperscript{114} In particular, they are a response to the more communal elements of our activities:

The domain of solidarity rights is the field of the half-articulate relations of trusting interdependence that absorb so much of ordinary social life but remain troublesome aberrations for a legal theory devoted to the model of consolidated property. The situations calling for the exercise of such entitlements include family life, continuing business relationships (as distinguished from one-shot transactions), and the varied range of circumstances falling under fiduciary principles in contemporary law. The

\textsuperscript{111} False Necessity, supra, note 3 at 546.


\textsuperscript{114} False Necessity, supra, note 3 at 535.
trust such relations require may be voluntary and reciprocal or half-deliberate and unequal, usually in the setting of disparities of power or advantage.\textsuperscript{115}

Unger is cautious not to be misunderstood in his espousal of solidarity rights. Although they are anti-individualistic in that they impose an obligation to "take other people's situations and expectations into account,"\textsuperscript{116} they are not designed to enforce a "despotism of virtue" where everybody is a "goody goody." That would be too substantive for Unger. Rather:

\textit{[t]he immediate aim, instead, is to accomplish just the reverse of what consolidated property offers the rightholder. People bound by solidarity rights are prevented from taking refuge in an area of absolute discretion within which they can remain deaf to the claims others make upon them. Thus, solidarity rights deny the discretionary action both immunity rights and market rights seek to protect.}\textsuperscript{117}

Finally, solidarity rights differ from the traditional conception of rights in that, rather than being abstract, they emerge from context specific situations of reliance and interdependence.

This is a particularly interesting proposal in that traditionally working on an assumed public/private dichotomy, most legal thought considers law to be too blunt an instrument for the regulation of intimate and communal relations. Not so for Unger. He recognizes that "it's all politics," and where there is politics there is power, and where there is power there is a possibility of domination and subordination. For example, at one point he describes the family as "a structure of power, ennobled by sentiment,"\textsuperscript{118} and suggests that legal abstentionism from the family realm can result in complicity in domination. He refuses to accept such an idyllic conception of community or acquiesce in such a restrictive understanding of rights. Yet, at the same time, he wants to expand our conception of rights so that we are not simply publicizing the private realm. Even though solidarity rights are rights, they need not attain their quality of being a right on the premise of positivism, that is, that they are coercively enforced by the state. That particular presupposition is

\textsuperscript{115} Ibid. at 536-37.
\textsuperscript{116} Ibid. at 537.
\textsuperscript{117} Ibid.
\textsuperscript{118} Critical Legal Studies, supra, note 6 at 65-66.
one that is tied to a conception of rights that is formally underpinned by the consolidated property right. Rights for Unger are a "public declaration of a public vision ... of possible and desirable human association." Consequently, solidarity rights may be coercively enforced, but many "may best be enforced ... by more informal means of mediation, with more ample participation from parties, families, communities or work teams." But they are rights nonetheless.

e) *Deviationist legal doctrine*¹²¹

Unger also opens up everyday legal practice and discourse to reconstruction. He claims that the formalist aspiration to distinguish law from politics is fallacious and that legal disputes always invoke competing background assumptions about alternative schemes of human co-existence. Thus, for example, he interprets contract doctrine to be structured around principles and counterprinciples which co-exist in tension. The ascendent principles relate to the classical model of freedom of and freedom to contract, a perspective that is premised on a more individualistic conception of social relations. He argues that the principles have never attained complete hegemony and have been modified by counterprinciples that emphasize interdependence and reliance, a perspective that is premised on a more communitarian conception of social interaction. He posits that neither can attain such extensive pre-eminence so as to exclude completely the influence of the other, but that different balances reflect broader political understandings of the good society. Thus, he argues that it is the responsibility of progressive lawyers to practice what he calls "deviationist doctrine": to expand from within, to use the tools and doctrine already available to make the law reflect a more interdependent vision of social interaction. For

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¹¹⁹ False Necessity, *supra*, note 3 at 539.


¹²¹ The previous paragraph and this section draw on *Critical Legal Studies*, *supra*, note 6, rather than *Politics*, but, for the sake of comprehensiveness, it is useful to include his proposals.
example, he would see the growth of estoppel and the recent recommendations of the Ontario Law Reform Commission to expand the scope of unconscionability, good faith, and fairness in contractual relations\(^{122}\) as steps in the right direction, although requiring much greater effort and commitment.

f) *Plasticity and Passion*

If we step back from these more detailed proposals for politics, economics, and law, we can see that the "key strategy" of empowered democracy "is to combine freedom of enterprise and governance at the local level with the opportunity for political parties in central government to promote decisive social experiments, particularly experiments that change institutions as well as policies."\(^{123}\) Restated, empowered democracy is about the maximization of plasticity\(^{124}\) and a belief that "law and the constitution [should be] the denial rather than the reaffirmation of the plan of social division and hierarchy."\(^{125}\)

Clearly, then, the Ungerian political agenda is ambitious in that it expects re-visioning of the world, a reconceptualization of politics, and a remaking of the basic structure of society. This is a lot to expect from a community that has become mired in the modernist malaise, succumbed to the "consumerist rapture of a privatistic hedonism."\(^{126}\) Yet true to form and driven by his conviction that "it's all politics," Unger refuses to believe that this is our destiny. Thus, in the penultimate section of *False Necessity*, he posits a "cultural-revolutionary counterpart to the institutional program," by which he means an Ungerian theory of human nature. The claim is relatively straightforward: there are homologies between our


\(^{123}\) Plasticity, supra, note 6 at 87.

\(^{124}\) I will return to the theme of plasticity in the overview of the final volume of *Politics*.


\(^{126}\) *False Necessity*, supra, note 3 at 545.
"practical" and "passionate" lives and for either to be viable they must be mutually complementary. Thus, paralleling his modernist theory of society — the theory that identifies its contextual and artifactual nature — there is a modernist theory of human nature: one that argues that we have no fixed, immutable characteristics, that we are "the infinite caught within the finite." The connection is crucial, for "the qualities of our direct practical or passionate dealings always represent the ultimate object of our conflicts over the organization of society."\footnote{127}{Ibid. at 556.}

Most of the ideas for this "personalized program" were developed in a previous work *Passion*.\footnote{128}{Although he also promises us a successor volume that "will explore the implications of the anti-necessitarian thesis for an understanding of the microstructure of social life: the realm of direct practical and passionate relations." Ibid. at 560.} The basic idea is a revised "ideal of community," but one that does not indulge in the fantasy of unmitigated harmony:

In a sense, this conception of community allows Unger to come full circle. Through conflict as vulnerability, we, as empowered citizens,\footnote{130}{Ibid. at 562.} can begin to defy, transvalue, and jumble up socially ascribed roles — class and gender are two that he mentions.\footnote{131}{Ibid. at 564.} They are roles that tend to swallow the person; roles that play a crucial function in perpetuating and reinforcing the realities of social
guidance and hierarchy; pre-ordained roles that, in large part, are responsible for our disempowerment and dependency.

To reduce Unger's scheme to its most basic: anti-necessitarian social theory, plus institutional reconstruction, plus cultural revolution equals the possibility of empowerment.

C. Plasticity into Power: Comparative-Historical Studies on the Institutional Conditions of Economic and Military Success

This final volume is an in-depth, historical inquiry designed to demonstrate the explanatory superiority of the theory of formative contexts over its positivistic and necessitarian rivals. Through an erudite and thought-provoking discussion of a variety of historical examples, Unger documents how those societies which have been "successful" share a common heritage of institutional flexibility, that is, the ability to adapt quickly\textsuperscript{132} to other rapidly mutating forces within their formative context. The further suggestion is that, insofar as they illustrate a social theory that "enlarges our sense of the real and the possible,"\textsuperscript{133} they provide role models that we should be loathe to ignore. Two substantive themes unite this volume: the first is that "social plasticity brings wealth and power to the societies and groups that achieve it,"\textsuperscript{134} and the second is that "the subjection of factional privilege to challenge and conflict has been the single most important spur to social plasticity."\textsuperscript{135} The Ungerian message of success is twofold: "the gospel of plasticity"\textsuperscript{136} and mastery of the art of "institutional dissociation and recombination."\textsuperscript{137} Each of the three essays in this relatively short

\textsuperscript{132} As he pithily posits, "Worldly success requires self-transformation." Plasticity, supra, note 6 at 101.

\textsuperscript{133} Ibid. at 1.

\textsuperscript{134} Ibid. at 1-2.

\textsuperscript{135} Ibid. at 2.

\textsuperscript{136} Ibid.

\textsuperscript{137} Ibid. at 209.
volume revolves around a theme: productivity, power, and plasticity, which for convenience we might call the three "P's."

The first essay is an intellectually impressive macro-historical review of the cycles of commercial vibrancy and languor that characterized pre-industrial societies. Its particular focus is to unpack "the social conditions and the institutional inventions that enabled some societies to escape these cycles and, as a result, to revolutionize the world." Unger takes as his star examples late medieval Europe and seventeenth and eighteenth century Japan and, through an analysis of their differences, demonstrates the importance of contextual political conflict to the achievement of economic breakthrough.

The second essay is an historical analysis into the relationship between wealth and military force. Specifically, it is an attempt to identify the contingent political events that generate and the innovative (indeed adventitious) social, political, fiscal, and technological conditions which satisfy the successful military protection and consolidation of wealth.

The third essay unites some of the themes of the first two. It attempts to identify the enabling social and political conditions of military success which, apparently within the Ungerian scheme of things, are foundational for the well-being of a society. The key is "the thesis of reconstructability": the societal talent for self-transformation and the relentless re-orderings, "dissociations and recombinations of institutional arrangements," even -- or more accurately, especially -- if that comes at the expense of the subversion of the traditional social roles, hierarchies, and divisions. As the man says, " Anything for success."

\[138\] Ibid. at 3.
\[139\] Ibid. at 206.
\[140\] Unger does point out that such a dynamic has not resulted in "egalitarianism or democracy in the state and the economy," although his suggestion is that, in so far as it is subversive, it is of precedential value. Ibid. at 187.
\[141\] Ibid. at 189.
The common denominator, indeed, "the condition,"\textsuperscript{142} for both productive (wealth) and destructive (military) success is plasticity, that is,

the facility with which work relations among people – in a plant, in a bureau, in an army – can be constantly shifted in order to suit changing circumstances, resources, and intentions. Plasticity is the opportunity to innovate in the immediate organizational settings of production, exchange, administration, or warfare and to do so not just by occasional, large-scale reforms but by an ongoing, cumulative flow of small-scale innovations.\textsuperscript{143}

Moreover, according to Unger, this discovery of the explanatory centrality of plasticity and the historical vitality of "pitiless recombination"\textsuperscript{144} has only become possible because of the insights of an anti-necessitarian social theory. Furthermore, plasticity dovetails with the determinative agenda of anti-necessitarianism: the therapeutic knowledge that humankind does make its own history, that we are not the puppets of a pre-ordained script.

Given the historical and comparative nature of \textit{Plasticity}, one might be tempted to pass over it in a review targeted for lawyers. However, that would be a mistake, for, as will become evident, its very specificity provides us with a critical angle through which to unpack some of the weaknesses in the overall agenda.

What, then, are we to make of this Ungerian "super theory"? Already it has spawned a progeny of responses, particularly from representatives of those whom he critiques – liberals, conservatives, Marxists, social democrats, and civic republicans.\textsuperscript{145} Some of this commentary has been cautiously positive, while others have been viciously hostile. In the following sections, I attempt to develop a critical response to Unger's work, one that is cognizant of the breadth and depth of his efforts, but one that is filtered through the critical prism of feminist analysis.

\textsuperscript{142} \textit{False Necessity}, supra, note 3 at 592.
\textsuperscript{143} \textit{Plasticity}, supra, note 6 at 153.
\textsuperscript{144} Ibid. at 208.
\textsuperscript{145} The most useful source is "Symposium on Unger's Politics" (1987), 81 Nw. U. L. Rev. 589-951. See also, P. Anderson, "Roberto Unger and the Politics of Empowerment" (1989) 102 New Left Review 93; S. Holmes, "The Professor of Smashing" New Republic (19 October 1987); and A. Fraser "Reconstituting Enlightened Despotism" Telos (forthcoming).
IV. POINTS OF INTERSECTION BETWEEN UNGER AND FEMINISM

A. The Personal, the Political, and the Hierarchical

As critics of contemporary society, Unger and many feminists share a great deal in common, politically, philosophically, and methodologically. First and foremost, they agree that there is no aspect of human interaction that can be devoid of political significance or impact. Feminism's proposition that "the personal is the political" and Unger's maxim that "it is all politics" are both direct challenges to legal liberalism's effort to distinguish between the public and the private, a strategy designed to depoliticize aspects of social interaction by means of a definitional fiat. Both recognize that within the public/private dichotomy there is embedded a series of power-laden assumptions that reflect and enforce a partisan – i.e., non-natural, contingent, and partial – vision of the appropriate nature of the conditions of social interaction.

An interconnected idea common to both feminists and Unger is a belief that the pervasive stereotypes and roles which structure our mutual interaction are hierarchical and are therefore conducive to the continuance of domination and subordination. In so far as these socially constructed and ascribed roles swallow the person, they deny our individual potentials, legitimize the status quo, and forestall substantive equality. The whole point of Unger's empowered democracy is to allow us to break free from stereotypical structural constraints. A central aspiration of feminism is to create a society in which one's gender is not a liability.

Apart from these critical political intersections, which I shall return to below, there are also several methodological correspondences that suggest a moment of progressive nexus between Unger and feminism.146

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146 The following paragraphs draw upon and are structured by Jill McCalla Vickers' excellent article "Memoirs of an Ontological Exile: The Methodological Rebellions of Feminist Research" in A. Miles & G. Finn, eds, Feminism in Canada: From Pressure to Politics (Montreal: Black Rose Books, 1982) 27 [hereinafter Feminism in Canada]. Again, to
B. Contextualism

Perhaps the most important methodological insight of feminism is its critique of the "malestream," positivistic predilection for decontextualization and abstraction: the imperative to approach understanding through the tunnels of male identified rational analysis, with its pretensions to objectivity and neutrality. The positive dynamic engendered by such a critique is recontextualization: the preference to think and understand in situ, the ambition to comprehend the world experientially, from the bottom up.

While recontextualizing is extremely important, particularly insofar as it attempts to break down the subject/object dichotomy and identifies common experiences across diverse planes, the feminist awareness of the significance of contexts at times seems only to go so far as advancing a preference for the specific over the abstract. Despite its virtues, this approach may not develop the potential of contextualism far enough. The feminist approach to contextualism runs the risk of simply identifying the plethora of incompatible, individualized subjectivities, a particularism that may be no more than the inversion of abstraction and therefore allowing abstraction to remain the bench-mark. Even more problematic still, contextualism may turn out to be a potential prop for relativism and skepticism, perspectives which, as I have posited, contribute to disempowerment.

Like feminists, Unger is methodologically post-positivist. Unger's theory of formative contexts may be of useful analytical and transformative value for feminism. Although, regrettably, Unger fails to do so,\textsuperscript{147} it may be possible to understand patriarchy as a central component of our contemporary formative context, both imaginatively and institutionally.\textsuperscript{148} Such a move serves a dual

\textsuperscript{147} \textit{False Necessity}, supra, note 3 at 441.

\textsuperscript{148} It seems to me that patriarchy clearly fits Unger's two criteria of membership in a formative context: the subjective and the objective standards. \textit{Ibid.} at 61-66.
purpose: first, it helps identify the pervasiveness of androcentricity, and secondly, and I think more importantly, it suggests its contingency. To elaborate, Unger's theory of formative contexts, with its insistence on the non-monolithic and transient character of any society, allows feminists to posit the possibility of the transcendence of patriarchy. Restated, patriarchy is neither permanent nor necessary. It is simply a social artifact, although an especially pervasive, tenacious, and resilient one. Such an understanding helps feminism to avoid over-emphasizing the repressive hegemony of phallocentrism and thus reinforces feminism's pursuit of empowerment. In particular, it encourages reflections upon and the expansion of the deviances from and exceptions to androcentric norms and values in order to derange and destabilize patriarchy's repressive normalcy. Moreover, the Ungerian analysis of reconstructive praxis suggests that the everyday run of the mill tensions between men and women encapsulate and could be escalated into -- larger scale disturbances of anti-egalitarian relations. Childcare and housework are the two obvious examples. Anti-necessitarian social theory in the support of feminism helps to reinspire the politics of hope.

C. Restoration of Agency

The Ungerian emphasis on the emancipatory power of his theory of formative contexts dovetails, to some extent, with the feminist emphasis on the centrality of human agency. Feminists argue that traditional malestream understandings of the world -- for example, functionalism, structuralism, and Marxism -- have developed a "context-stripping" analytical discourse that abolishes agency. The problem with such a discourse is that it locates social explanations

\[149\] In particular, I am thinking about the generally pessimistic tone of Catharine MacKinnon's Feminism Unmodified: Discourses on Life and Law (Cambridge, Mass.: Harvard University Press, 1987) [hereinafter Feminism Unmodified]. See also her claim that patriarchy is "metaphysically nearly perfect" in "Feminism, Marxism, Method and the State: Towards a Feminist Jurisprudence" (1983) 8 Signs 635 at 638. It seems to me that "nearly perfect" is to feminism what "relative autonomy" is to neo-Marxism, tantalizingly suggestive but explanatorily and empoweringly deficient. The difficult questions remain: How relative and how nearly?

\[150\] See, generally, my Nomos and Thanatos (Part B), supra, note 2.
in abstractions, with the correlative underemphasis on the significance of human responsibility for such activity, whether it is praiseworthy or culpable:

Human action is sterilized and pasteurized into a parade of forces, factors, roles, structures, institutions, stereotypes, rights, constraints, customs, attitudes, and influences - to name but a few.... It is clear that categorizing something as a custom, rite or whatever explains little of its origins, purposes or whose interests it serves. In fact, it appears to explain away just those things we need to understand.\textsuperscript{151}

Unger's modernist inspired argument that both society and people are artifactual and his proposition that "it is all politics" also highlight the importance of human agency. Whereas feminists have appropriately used the insight to highlight male responsibility for the inequality and subordination of women, Unger puts this awareness to an even more affirmative use: what has been made can be unmade and that we could make ourselves and our societies more open, more egalitarian, less oppressive.\textsuperscript{152}

D. Rebellion against Linearity, Inevitability, and Laws

A third theme grows out of the former two themes.\textsuperscript{153} Feminists have been particularly concerned about the patriarchal, positivistic preoccupation with linearity, coherence, predictability, and regularity. Feminists suggest that such a perspective incorporates a preference for stability, closure, and certainty. The problem is that such desiderata tend to take on an authoritarian dynamic in that they begin to insist on naturalness, universality, and inevitability, not only as the criteria of epistemological validity, but also as the foundations of a viable social structure. None of this sits well with feminists who have been on the receiving end of such pretensions to naturalism (for example, in relation to child-bearing) and whose

\begin{footnotesize}
\textsuperscript{151} Feminism in Canada, supra, note 146 at 39.

\textsuperscript{152} I will suggest later, however, that Unger does fall back into the trap of decontextualization in that he fetishizes the concept of plasticity.

\textsuperscript{153} McCalla Vickers also identifies another theme of feminism, which she describes as "reversal," a concept that is a more generalized version of the strategy of "blaming the victim." Feminism in Canada, supra, note 146 at 29. I see no such parallel theme in Unger.
\end{footnotesize}
central aspiration has been to challenge normalcy, to make their lives different and less normal than they tend to be.

Again, there are important parallels with Unger. Unger's most developed idea in *Politics* is anti-necessitarianism: the espousal of contingency, transience, and malleability and the rejection of constraining, pseudo-naturalistic inevitabilities. He, too, recognizes the nexus between essentialism and the dominant power order. Both feminism and Unger see humanity as a "self-making species" and they reject any attempt to limit this potential for self and societal transformation as an insidious, preservative strategy that constructs knowledge as a repressive politics.

E. The Rebellion Against Objectivity

The final point of intersection between the feminist and Ungerian methodological critiques is their rejection of objectivity. Both approaches recognize that because of the centrality of contextualism, agency, and openness, it is impossible to cling to the liberal or positivistic aspiration to neutrality. They insist that the "view from nowhere" is either impossible or fraudulent and that difficult political preferences are pervasive and appropriate.\(^{154}\) There is no archimedean point, it is all up for grabs.

If these tentative suggestions as to the political, epistemological, and methodological correlations between Unger and feminism are accurate, then it suggests that there may be some common ground to lay the foundation for a conversation between critical theory à la Unger and feminism. If a conversation is possible, if there exists a common – or at least a translatable – interpretative framework, then there may be scope for mutual support as well as mutual critique. Even more optimistically, perhaps such a debate can assist us in our attempt to transcend the modernist malaise, our aspiration to uncouple freedom and domination.

\(^{154}\) McCalla Vickers also points out that feminists understand objectivity in a second sense, as related to objectification. *Ibid.* at 40. I will suggest later that Unger's concept of plasticity also commits this error.
V. UNGERIAN CONTRIBUTIONS TO FEMINISM

I have already indicated one way in which Unger's analysis may be of utility to feminism, that is, the suggestion that patriarchy be understood as a central component of our current formative context. In this section, I want to consider other ways in which Unger's "critical social theory, reinforced by political vision and enriched by detailed institutional proposals and experiments,"155 may be of use to contemporary feminist theory and practice.

A. Contours of the Feminist Political Agenda

As a radical social movement, feminism is in many ways still in embryonic form. Its major emphases and successes have, in the main, been in the realm of critique, rather than reconstruction. Feminists have effectively highlighted the unjustifiable exclusion and inferiorization of women from and in every cultural sphere, including law. However, largely due to the hegemony of patriarchy, it has been difficult for feminism to articulate what the substantive difference of a feminist future might be. Consequently, the predominant tendency within feminism, at least until recently, has been a demand for access, the aspiration for equal opportunity. Although vital, this essentially liberal feminist stance is mired by downside risks, most significantly, the danger that feminism will become just another constituency in liberal pluralism's interest group lottery. The unfortunate result is that not a lot is done to adumbrate what a feminized society, state, or economy might look like.

In so far as there have been serious efforts to give some indication as to the future direction of feminism, there has been little agreement amongst feminists. In particular, feminist discourse has centred around what can be characterized as "equalitarianism"

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155 *False Necessity, supra,* note 3 at 377.
and "difference." However, in part because the stakes are so high, this debate has been difficult, resulting in confrontations that have on occasion been acrimonious and potentially divisive. On a politico-methodological level, Unger may be able to provide an opportunity for feminists to avoid an either/or choice that would necessitate abandoning either equality or difference, thereby enabling feminists to legitimately, coherently, and politically wisely to hold on to both ends of the chain.

Unger posits that every radical social movement must develop the fertile terrain between reform and revolution. He proposes that such movements, if they are to have any chance of success, must develop a dynamic fusion of internal development and visionary imagination. Put differently, there must be a capacity to work from within, to deviate, to expand, and to remake the familiar and normal into the novel and transcendent, while being simultaneously informed, guided, and inspired by a transformative vision. This symbiosis allows a progressive movement to eclipse the false dichotomy of fruitless reform and utopian somnambulance.

It seems to me that these two levels of transgressive strategy currently co-exist within the feminist movement. On the one side, there exists the potential to internally develop and expand the liberal commitment to equality, to remake equality into a substantive reality. On the other side, there is the transformative vision of difference and gynocentrism, a potential value structure that

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156 This point about discourse is important. McCalla Vickers introduces her discussion of agency through a reference to Mary Daly and the importance of "the power of naming," the idea that those who control the world, also control the language. The consequence is that those who want to challenge entrenched power must also challenge the dominant discourse and this requires the development of an alternative discourse – both in form and substance. See generally M. Daly, *Websters' First New Intergalactic Wickedary of the English Language* (Boston: Beacon Press, 1987). This relates back to my previous suggestions on the language adopted by Unger, supra, note 8.


challenges the hegemony of masculinist liberalism in the realm of socio-political institutions, in the dynamics of social interaction, and even in our conceptions of human identity.

Unger's proposal allows feminism to maintain both perspectives, practices, and visions. Thus, when interpreted through the prism of internal and visionary thought, equalitarianism and difference need not be understood as antithetical. To the contrary, they can be reconceptualized as radically and indispensably reinforcing, as interconnected points on a transgressive continuum.

B. Self and Community ... Solidarity and Care

Unger may also be able to make a significant contribution to feminist reflections on the nature of the relationship between the self and her community. In recent years, this debate has been revived by the communitarian critique of liberalism. In essence, the communitarians argue that the liberal preference for individual liberty has gone too far, that it is premised upon a conception of the self that is excessively atomistic, and that it ignores aspects of the self that are constitutively interdependent upon others. The political consequences of such a radically individualistic, some would...
say vacuous, understanding of the self are seen to be undesirable: an impoverished conception of the community, the pervasiveness of an instrumentalist approach to social interaction, increased anomie and alienation, the collapse of consensus, and the abandonment of any sense of a community nomos.

How have feminists responded to this debate? On the one hand, liberalism with its emphasis on the individual and its aspirations to enhance liberty through the pursuit of freely chosen life plans, is clearly attractive to feminists in the light of a history of rigorous restraint. It provides a vital opportunity for women to free themselves from the constraints of a society that limits their potential. Liberal individualism holds out the promise of equal opportunity. Women have experienced the consensual nomos and they have unpacked the deeply embedded coercive nature of gemeinschaft relations. Feminists have recognized that the sense of shared values is more apparent than real. They are some people's values, i.e., men's, that are not just valued, but systemically and coercively enforced – publicly and privately – with the correlative devaluation, indeed repression, of women's values and aspirations. Viewed in this light, communitarianism may be male hegemony in a different guise.

At the same time, liberalism, despite its attractions, is both problematic and insufficiently responsive. For some feminists, the monadic vision of the self simply does not ring true for their experiences of social interaction. Although they see the self as fundamentally important, that is only part of the story, in that vital elements of the self are based upon its capacity for human interconnection. On a more explicitly political level, the ideology of individualism is understood to be unresponsive to the existential needs of women because it leaves too much up to the particularized person, putting the burden of achievement completely on the individuated self. The problem with this approach is that it pays insufficient attention to the structures of inequality that frequently inhibit the achievement of the very values that liberalism purports to hold dear. To make individual self-fulfillment an obtainable ideal

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demands more than formal pretensions. It requires affirmative community support, that is, proactive state intervention, but that contradicts the liberal preference for neutrality.

Thus, once again, feminism follows its tendency for non-alignment: it refuses to fit nicely into the traditional structures and categories of politico-philosophical discourse. As Donna Greschner suggests, feminism's response to both communitarianism and individualism is "yes" and "no." There are elements in each tradition that feminism rejects and aspires to, but feminism cannot be identified with or reduced to either individualism or communitarianism.\(^{165}\)

It seems to me that, depending on how you read him, Unger shares the same ambivalence as feminists about the individualism/communitarian debate. Although in Knowledge he advocated in favour of organic communities, drawing on a discourse and vision that had strong communitarian overtones, he appears to have abandoned this approach in Politics. In particular, he tends to identify communitarianism with a repressive corporatism and/or civic republicanism: "Consider what happens to the communal ideal when it must be realized in a setting of recalcitrant but also resented inequality. Every rebellion against dependence and domination takes on the character of a betrayal of communal bonds, whereas fidelity to these communal bonds requires submission to a hierarchal order."\(^{166}\) Community, in this view, is "little more than the softening halo of a brutal power system."\(^{167}\) However, another response to the question of the connection between self and other that appears to have stayed with Unger throughout his work is the mediating concept of solidarity. Unfortunately, its meaning and significance appear to have gone through several, not necessarily compatible, transmutations.

In his earliest work, Unger seems to understand solidarity as a substantive, normative vision for social interaction, a regulative ideal.

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\(^{165}\) D. Greschner, "Feminist Concerns with the New Communitarians: We Don't Need Another Hero" in A.C. Hutchinson & L.J.M. Green, Law and the Community (Toronto: Carswell, 1989) 119.

\(^{166}\) False Necessity, supra, note 3 at 387.

\(^{167}\) Ibid.
For example, he describes it as "love struggling to move beyond the circle of intimacy ... our feeling of responsibility for those whose lives touch in some way upon our own and our greater or lesser willingness to share their fate." Or again:

The kernel of solidarity is our feeling of responsibility for those whose lives touch in some way upon our own and our greater or lesser willingness to share in their fate. Solidarity is the social face of love: it is concern with another as a person rather than just respect for him [sic] as a bearer of formally equal rights and duties or admiration for his [sic] gifts and achievements.\(^{168}\)

Understood in this strong substantive sense, solidarity suggests that we mediate (for we can never eliminate) the tension between self and other, not by a self-sacrificing of the self, nor by a callous disregard of the other, but by an earnest sense of responsibility for their destiny, a willingness to attempt to experience the world from their existential base, and further, to attempt to make the world more responsive to their needs. Read in this light, solidarity attempts to reconcile the alienating and latently destructive dualism of self and other.\(^{169}\)

I would suggest that such a conception of solidarity dovetails with the espousal by some feminists – for example Carol Gilligan and Joan Tronto\(^{170}\) – of an ethic of care. The central insight of an ethic of care is a consciousness of the constitutive interconnection and interdependence of the self and other. This sense of mutuality militates against isolation and separatism, with their potential for selfishness, aggression, and violence. An ethic of care encourages enthusiasm for an awareness of the needs of others, a willingness to respond compassionately and responsibly to those needs,\(^{171}\) and

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\(^{168}\) Knowledge, supra, note 6 at 206.

\(^{169}\) Feminism in Canada, supra, note 146 at 29-31.


\(^{171}\) Voice, supra, note 161 at 62, 74-98.
to participate in the lived experiences and reality of others.\textsuperscript{172} It identifies "a world of mutuality" that "creates and sustains the human community."\textsuperscript{173} It reconceptualizes and reconstructs moral dilemmas to be issues of competing responsibilities of the self because of its connection with and responsibility for others, rather than a conflict between self and other in which the only options are assertion of the self's trumping rights or martyred self-sacrifice on the pyre of altruism.\textsuperscript{174} For Gilligan, the ethic of care aspires to "a more generative view of human life,"\textsuperscript{175} one that rejects freedom that is built on the back of subordination and thereby pursues an affirmative transformation of the polity.

However, it is important to point out that, on my understanding, the ethic of care is distinct from the traditional masculinist stereotype of "female self-abnegation and moral self-sacrifice,"\textsuperscript{176} what Virginia Woolf has described as "The Angel in the

\textsuperscript{172} Ibid. at 79. A similar theme can also be located in M. Minow, "Justice Engendered" (1987) 101 Harv. L. Rev. 10 at 14: "the commitment to seek out and appreciate a perspective other than one's own."

\textsuperscript{173} Voice, ibid. at 156.

\textsuperscript{174} Ibid. at 114.

\textsuperscript{175} Ibid. at 174.

\textsuperscript{176} Ibid. at 9. See also, I. Marcus & P. Spielgelman, "Feminist Discourse, Moral Values and the Law – A Conversation" (1985) 34 Buffalo L. Rev. 46 [hereinafter Discourse]. Deborah Kearns suggests that even the most sophisticated and progressive liberal of the late twentieth century incorporates a vision of women as self-sacrificing into his work: see "A Theory of Justice – and Love; Rawls on the Family" (1983) 18 Politics 36. For a powerful critique of this "denial" interpretation of women's identity, see Robin West's groundbreaking article "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Liberal and Radical Feminist Legal Theory" Wisconsin Women's L.J. (forthcoming). West argues that, if women are accurately understood as "giving selves," this has come about because of the pervasive threat of violent and acquisitive male sexuality which has resulted in women driven by fear "re-constituting themselves in a way that controls the danger and suppresses the fear.... This does not make her an altruistic person, it makes her a negative." Ibid. at 15, 22. In other words, women's identity as "giving selves" is a "coherent, understandable" defence mechanism to survive patriarchal oppression, not authentic feminism. As the text makes clear, the ethic of care approach does not reduce women to an interpretation as "giving selves," it is not a servile interpretation of women's moral character and promise. Indeed, later in her paper West also considers the possibility of an ethic of care absent the dangers of patriarchy. Ibid. at 38. See also her reflections on the importance of trust in human relations: Ibid. at 61-62.
It should not be confused with passivity or delicacy, submissiveness or obedience, dependence or domesticity. It is neither what Irigaray has posited to be a "phallic feminine," nor "a romantic prescription for chaining women to the classical definition of femininity." Indeed, Gilligan's own example refutes such self-negation, for at least some of the women to whom she listened had had abortions, thereby demonstrating that care does not necessarily prioritize the other over the self. Rather, it attempts to consider the interests of the other in a responsive and responsible manner. Thus, although the ethic of care necessitates a keen consciousness of the "social consequences of action," it also includes care for oneself.

If the ethic of care and solidarity share as much in common as I have suggested they do, then the homology allows us to mediate the concern raised by some feminists that the ethic of care is at bottom male ventriloquism: the only place that women are allowed to be, because that is all that men, in their politico-cultural supremacy, have valued women for. Catharine MacKinnon is a leading advocate of this perspective. She argues that it is impossible to articulate the authentic voice of women because "the foot is on the throat," suggesting that an espousal of the ethic of care as a

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178 *Feminism in France*, supra, note 159 at 87.

179 K. Karst, "Women's Constitution" (1984) Duke L.J. 447 at 480. Emphatically, although there is some verbal intersection, the ethic of care is not what MacKinnon has described as "contemporary industrial society's version of woman ... docile, soft, passive, nurturant, vulnerable, weak narcissistic, childlike, incompetent, masochistic and domestic, made for child care, home care and husband care." See "Feminism, Marxism, Method and the State: An Agenda for Theory" (1982) 7 Signs 515 at 530. Moreover, lest there be any confusion, I want to stress that nothing in my suggestions is premised upon the idea that the ethic of care grows out of the rosy private family life of women. For many women, the family is anything but "a haven in a heartless world." It is, in many instances, itself the locus of extreme domination, subordination, inequality, and violence.

180 *Voice*, supra, note 161 at 167.

181 *Ibid.* at 139.
feminist ethic may be an insidious strategy of anti-feminism.\textsuperscript{182} Solidarity, or its cognate the ethic of care, need not be the imposition of a disempowering male stereotype upon women. Instead, we can conceive of it as a corrigible vision of reconstruction for progressive persons of both genders to pursue, a vision that capitulates to neither communitarianism nor individualism.

In this way, Unger, or more accurately the younger Unger, can make a positive contribution to feminism in its attempt to resolve tension between self and other: a contribution that provides the foundation for a corrigible substantive societal vision capable of challenging the cynical, fatalistic twilitenent ideology, but one that is in no way premised upon biological determinism. As we shall see in my discussion of the potential feminist critique, unfortunately the older Unger appears to retreat from such a strong conception of solidarity.

C. Institutional Reconstruction

Another vitally important contribution which Unger can make to feminism is his proposals for institutional reconstruction. As we have seen, Unger's primary criticism of the basic structure of society is that its institutions are primarily preservative: they are designed to reinforce existing cultural patterns, rather than to change them. Women are obviously disadvantaged by such structural conservativism. Unger's alternative is to remake the basic structure so as to be structure-revising, rather than structure-preserving. Women could potentially benefit from such reconstructive openness, in that the basic structure would be rendered more congenial to their differential demands. In this section, I will provide only a few illustrative examples, one each from the economic, legal and political realms of social interaction. Many other suggestions could be found.

\textsuperscript{182} See "Difference and Dominance: On Sex Discrimination" in \textit{Feminism Unmodified}, supra, note 149 at 32. If authenticity is identified with essentialism, then MacKinnon has a point. But I don't think Gilligan, for example, is attempting to make such a universal or total claim.
1. Economic

a) *Liquefaction of task-definition and task-execution*

Take, for example, Unger's proposals that the conditions of labour be rendered more plastic by softening the distinction between task-definition and task-execution and that greater financial support be provided by the state through the rotating capital fund for innovative workers, technicians, or entrepreneurs. As the economic structure is currently set up, it is difficult for women either to make it into the centralized ranks of decision makers\footnote{R. Moss Kanter, *Men and Women of the Corporation* (New York: Basic Books, 1977).} or to successfully enter or remain in the market as independent actors. Increasingly, in part due to their gradually increasing autonomy and driven by the necessity of the feminization of poverty, women are attempting to make a go of it on their own in the market. Frequently, these women entrepreneurs do not draw any line between task-definition and task-execution and they could certainly benefit from the support of the rotating capital fund with its ability to decentralize market power. Moreover, Unger's insistence on the "perpetual breakdown of status and hierarchy" reinforces the dynamic to undermine sex role stereotyping by providing opportunities for women to develop their potentials for self-assertion, to be innovative and dynamic.

As far as my research has gone, feminist scholars and activists have not devoted much energy to the task of proposing macro-economic reconstruction,\footnote{For some tentative suggestions, see, however, *Women's Poverty*, supra, note 109; B. Bergman, "Feminism and Economics" (1983) 69(5) Academe 22; N.J. Sokoloff, *Between Money and Love: The Dialectics of Women's Home and Market Work* (New York: Praeger, 1980); and C.C. Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy, and Society* (Cambridge: Cambridge University Press, 1988).} a lacuna in their practice that is particularly worrisome (although from another perspective understandable) given the centrality of economics in structuring social interaction. Unger's proposals could therefore prove very helpful in this arena.
2. Legal

a) **Disaggregation of the consolidated property right**

Similarly, Unger’s undoubtedly controversial proposal for the disaggregation of the consolidated property right could be of crucial importance for women, both imaginatively and economically. The consolidated property right is the idea that property has one essential meaning: the property owner has an exclusive, unchallengeable, permanent, possessive right to subjects or objects. Unger denies the hegemony of this conception of property, positing that other variations on the idea of a property right are conceivable, workable, and desirable if we really do aspire to a more egalitarian society. Unger’s disaggregated property right allows for conditional individual and group claims to portions of the social capital.

I would suggest that many males premise their interactions with females, both intimate and removed, within the paradigm of the consolidated property right. Whether they interact with women as companions or as others who provide services, there may be an instrumentalism in such relationships that denies the equality and integrity of women. In so far as the disaggregation of the consolidated property right would decentre the ideology of dehumanizing, possessive instrumentality, it provides scope for the improvement of women’s lives.

Further, the consolidated property right, as an instrument of domination, impacts on women’s life experiences in another more tangible way. One of the greatest problems for women on divorce has been the amounts of and access to income and maintenance payments and the resultant phenomenon of the feminization of poverty. A central reason for this problem is that malestream thinking about the division of property and ongoing support after the dissolution of marriage is premised in part upon the ideology of the consolidated property right. This translates into the deeply embedded belief that the property is really the husband’s – especially if the woman is a homemaker – and that it is only in the interest

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of formal equality and fairness that we are redistributing his wealth for her benefit. Such a preconception reinforces a reluctance to be too generous to the wife and to fully consider what her real needs might be in a society which still systematically discriminates against women. However, if we no longer clung to such a possessive conception of property, if we reinterpreted property rights in a more open and contingent manner, if we understood wealth as societal rather than possessive and individualistic, if women could claim both destabilization and solidarity rights, then perhaps their economic situation post-divorce may not be so strained.\textsuperscript{186}

b) Equality of Circumstance

And again, Unger's proposal that the state guarantee a minimum of welfare entitlements to provide "equality of circumstance" helps to undermine the economic coercion which forces some women to remain in unfulfilling or harmful relationships. It would also allow other women the opportunity to experiment with and develop alternative lifestyles to those which restrict them to the confines of gender stereotyping.

What these discussions of Unger's economic and legal proposals indicate is that a reconstruction of the economy – on the basis of the disaggregation of the consolidated property right and the establishment of a rotating capital fund, supported by a regime of destabilization, solidarity, and welfare rights – though, perhaps, incapable of eradicating the feminization of poverty, can make a significant contribution. It is a contribution that feminists simply cannot afford to ignore in the light of liberal reform agendas that, even in their best light, have not produced the expected results or, less optimistically, have backfired.

\textsuperscript{186} There is, of course, a downside risk for some women in the abandonment of the consolidated property right. Some of the main benefactors of the women's movement have been middle class women, whose access to wealth and power is dependent upon the consolidated property right. Inevitably, they may lose out. But I think feminism must make a choice between gaining access to the politics of privilege or attempting to reconstruct the polity itself.
3. Political

a) Liquefaction: feminism and constitutional reform

A couple of examples from the political realm might also help. The Ungerian critique of the contemporary political structure and processes echoes the critique of economic and legal relations: they are conservative, preservative, and anti-democratic. Nowhere does this become more obvious than through a reflection upon the nature of constitutions: because of their importance they tend to be inflexible, requiring exceptional procedures for transformation. To avoid the sclerosis induced by such "demobilizing constitutionalism," Unger suggests that we liquefy the distinction between entrenched constitutional politics and a more volatile normal politics.

Feminists, I suggest, could be benefactors of such a liquefaction. Take, for example, the efforts of Canadian feminists to have their equality rights entrenched in the Charter, the resistance, and the extraordinary lengths they were required to go, both provincially and federally, to achieve recognition. Witness also, their marginalization throughout the Meech Lake constitutional process through which eleven men came to an agreement which, if ratified, will render constitutional reform almost impossible.

Or again, we can reflect on the impact of the American constitutional structure on the campaign for the ERA. The mobilization generated by feminists was phenomenal, having a major impact on local and state politics, but coming up against the brick wall of the procedures of constitutional amendment. If

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187 False Necessity, supra, note 3 at 459.


189 A. Dobrowolsky, Promises Unfulfilled: Women and the Theory and Practice of Representative Democracy in Canada (M.A. Thesis, Political Science, Dalhousie University, 1990) [unpublished] [hereinafter Promises].

190 J. Mansbridge, Why We Lost the ERA (Chicago: University of Chicago Press, 1986).
liquefaction had taken place, if constitutional politics were structured so as to be more responsive and less resistant to demands for social and political change, then constitutionally sanctioned inequality would possibly not be a foundation for the contemporary American polity.

Moreover, such openness would encourage greater recourse to the institutions of participatory democracy and would enable those groups who are discriminated against in society to be less dependent on the paternalistic good will of lesser democratic bodies, such as the courts.

VI. FEMINIST CONTRIBUTIONS TO UNGER

A. The Trashing Job

Despite all of these potential correspondences between Unger and the feminist agenda, for some reason that I simply cannot understand, Unger leaves himself open to an easy trashing job by feminists.

He, too, is guilty of all the sins of omission that feminists have identified as characteristic of malestream ideology. Rarely does he adopt gender neutral language and even less occasionally is there any specific discussion of gender related issues. Although he spends hundreds of pages discussing production, the economy, and work, issues such as reproduction, the sexual division of labour, and their fundamental economic significance never get a mention. At other times, he discusses the "main traditions" of political thought – liberalism, libertarianism, socialism, communitarianism, communism, social democracy, even civic republicanism – but with nary a reference to feminism. Viewed in this light, the parallels with Kant, Hegel, and Marx may be less than flattering.¹⁹¹

Moreover, I suspect that one of the things that feminists will have heard about Politics is the reference, in manuscript form, to the parallel between Ungerian empowerment and de Sadean sexual

innovation. No doubt, a good feminist deconstructionist could unpack this now omitted reference\textsuperscript{192} to unmask Unger's antifeminism and to cast him onto the already overflowing scrap-heap of unsalvagable malestream ideology.

However, I think such a response would be too hasty. For although there is much in \textit{Politics} that can be criticized from a feminist perspective, as I have indicated, there is also much that merits serious attention if feminism aspires to make its own transformative vision realizable. What I want to do in this section is to discuss some of the critical contributions which feminists can make to Unger that will be to their mutual benefit.

B. \textit{The Assumption of Conflict}

Undoubtedly, one of the things that feminists will notice about \textit{Politics} is the disturbingly adversarial discourse adopted by Unger. The treatise is pervaded by a truculent and belligerent vocabulary. For example, "war," "assault," "fighting," "smashing," "crack," "dismember," and "shatter" provide some of the fundamental metaphors of the work. In and of itself, such terminology may not merit too great a concern. However, it appears to be symptomatic of a much more fundamental aspect of the Ungerian agenda. As Jill McCalla Vickers asks: "why [is] Western man's conception of himself, of us, and of nature so destructive?"\textsuperscript{193}

Unger is very explicit that the programme of reconstruction will require conflict, if only for the reason that those who benefit from cultural conditions as currently constituted will be reluctant to surrender their advantages. But he also goes much further in arguing that for progress to be realizable, conflict must continue: "The path to equality passes through conflict. Otherwise it is likely to lead to a mirage."\textsuperscript{194} Within this Ungerian scheme of things, it seems that conflict is the very kernel of our transgressive potential, the guarantee of our irrepressible ability for individual self assertion

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\textsuperscript{192} \textit{False Necessity}, supra, note 3 at 579.
\textsuperscript{193} \textit{Feminism in Canada}, supra, note 146 at 28.
\textsuperscript{194} \textit{Plasticity}, supra, note 6 at 67.
\end{flushright}
and breach of context, the dynamic that "keeps us infinite within the finite." Indeed, he seems to go so far as to claim that this talent for context smashing, filtered through the matrix of societal conflict, is the empowering fulcrum of our potential as human beings. Without it we would stagnate.

Unger does recognize that some will object to this stance, in particular, he identifies classical republicans with such a critique. His response is that the republican vision of consensus is a myth, that republicanism has never been a realistic political possibility, and that consensus theory legitimates hierarchy, domination, and disciplinary conservativism. For Unger, "the denaturalization of society through conflict" has the advantage of historical precedent and successes that have resulted in extended emancipation.

Although there is truth in Unger's position, it is also problematic. We must not forget that conflict also has a history of subordination and domination, imperialism and violence, genocide and torture. This side of conflict cannot be simply hidden in the closet of history. Moreover, it is interesting that Unger should choose republicanism as his foil, when at least some feminists are concerned about the negative consequences of conflict on both the micro and macro levels. As Catharine MacKinnon has sardonically noted, "Conflict [may be] a peculiarly ejaculatory means of conflict resolution." More specifically, why should the choice be between conflict and consensus? Could we not understand peoples' differing perspectives and disagreements as socio-political tensions emerging from our differing experiences, interests, and desires, as disputes necessitating resolution? Such a perspective acknowledges the lack of consensus, but does not necessarily embrace as inevitable an assumption of conflict. As Gilligan's research on women's decision-making in relation to abortion suggests, interests may be incompatible, even irreconcilable, but that

195 False Necessity, supra, note 3 at 558, 586-87.
196 Social Theory, supra, note 6 at 52.
197 He suggests that alternative viewpoints are "literally incredible," a position that is clearly premised upon on the complete absence of feminism from his analysis. False Necessity, supra, note 3 at 560.
198 Discourse, supra, note 176 at 23.
need not necessarily result in a conflictual understanding of the process.\textsuperscript{199} And what of Unger's own idea of solidarity? What is the relationship between solidarity and conflict?

C. The Retreat from Solidarity

As I indicated earlier, the young Unger developed a strong conception of solidarity, relying on it as a partial foundation for his programme of reconstruction. Solidarity, as a cognate of love, as a response to the needs of others, as an alternative formulation for the ethic of care, does not fit well with Unger's more recent celebrations of conflict.

This lack of fit can only be explained if we understand Unger's later work as backing away from such a strong conception of solidarity towards a more tentative perspective. In Passion, the concept seems to transmute from a regulative ideal for the mediation of the tensions of social interaction to a restatement or reformulation of the tensions themselves. Unger's powerful discussions of the "genealogy of the passions," in that essay, is built around his understanding of our shared experiences as human beings, of our unlimited mutual need and fear, longing and jeopardy, interdependence and vulnerability, which he describes as "the problem of solidarity." Although the book makes clear Unger's own preference - that we should develop our lives and our society so as to be more open to the redemptive power of love, towards greater trust and vulnerability - his approach characterizes solidarity as the problem, not the solution. Solidarity and love are now disconnected. The dualism which solidarity had originally sought to mediate appears to have been revived.

This retreat from solidarity, as it might be called, is further reinforced through an analysis of Politics. Although solidarity does continue to maintain a position in the Ungerian scheme of things, it is lamentably underdeveloped. It is more a subterranean aspiration than a mediating corrective vision. Unger does provide that solidarity rights should be constitutionally encouraged and that

\textsuperscript{199} Voice, supra, note 161.
law, more generally, should reinforce the dynamic of reliance and trust. Moreover, the closing four pages of the centrepiece work *False Necessity* once again return to the problematic relationship between empowerment and solidarity to suggest obliquely that the two need not be incompatible. Apart from these rather sparse references, the remainder of this one thousand page *opus* is preoccupied with his espousal of unmitigated conflict.

The problem then, as I see it, is that Unger has lost control of the idea of conflict. Conflict has taken on a life of its own in *Politics*. It has been elevated to the level of a generative and indefatigable imperative that comes dangerously close to an authoritarian impulse that trammels any other mediating concept. Viewed from this perspective, the destructive potential latent in dualistic thought (the conflict between self and other) comes front and centre threatening to eradicate completely the countervailing, mediating, and directive power of solidarity. To me, this comes close to a depressing surrender to necessitarianism and an unjustifiably impoverished "vision for society and project for individuals."

D. Power and Plasticity

These reflections on conflict also suggest that attention should be paid to Unger's conception of power. Despite the rhetoric of "empowerment," *Politics* betrays a unilateral conception of power. It understands power in the Weberian sense of "power over," a

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200 Disturbingly, the last word of *False Necessity*, is a failed attempt to revive any hope we might have for solidarity, for solidarity transmutes to "sweet." *Supra*, note 3 at 595.

201 Unger does admit that solidarity is "downplayed" and that empowerment à la *Politics* "fails to make up the whole of a defensible social ideal." However, this turns out to be more of a strategy of confession and avoidance, than an attempt to come to terms with this lacuna. *Ibid.* at 592.


203 Weber defines power as "the chance of a man or a number of men [sic] to realize their will in a communal action even against the resistance of others who are participating in the action." See H.H. Gerth & C.W. Mills, eds, *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1958) at 180.
negative and repressive approach, what Foucault identifies as a juridical conception to power. But power is more than simply pervasive and systemic, it is also heterogeneous, polymorphous, and multifaceted. Power can also be understood in the sense of "power to" as well as "power over." "Power to" is power as a cognate of freedom, a progressive, emancipatory, and potentially transformative conception of power: a conception which emphasizes the creative, capacity-enhancing, ability-encouraging variations of power. This is a qualitatively different conception of power, one that correlates more closely with the concept of "empowerment."


205 The following reflections on power are influenced in part by the work of Foucault. He suggests that traditional conceptions of power are based upon three assumptions: (1) power is possessed; (2) power is primarily coercive, it is a repressive prohibition backed by sanctions; and (3) power is centralized and tends to be hierarchical, it flows from the top down.

Foucault argues that these assumptions unduly constrain our understanding of power, that power has many variations beyond the juridical conception. Thus, he argues first that power is exercisable rather than possessed, thereby emphasizing a more relational understanding of power. Second, we can understand power is productive as well as repressive. This claim becomes most apparent through his discussion of the connection between knowledge and power. Knowledge as power constructs, creates, and moulds our understandings of ourselves, our relations, and our world. Power, therefore, can be proactive and creative, rather than just sanction-determined. Third, and as a correlative of his first and second theses, if power is exercisable, relational, and creative, then it can be located elsewhere than in centralized authorities. Put differently, power is a micro-phenomenon as well as a macro-phenomenon (although the two are interrelated). It can be exercised through our everyday relations, from the bottom up, as well as from the top down, as localized centres of resistance, reconstruction, and empowerment, as well as domination, either on the micro or macro levels. See M. Foucault, Power/Knowledge, supra, note 204; Discipline and Punish: The Birth of the Prison (New York: Vintage Books, 1979); The History of Sexuality (New York: Vintage Books, 1980); J. Sawicki, "Foucault and Feminism: Toward a Politics of Difference" (1986) 2 Hypatia 23; and I. Diamond & L. Quinby, eds, Feminism and Foucault: Reflections on Resistance (Boston: Northeastern University Press, 1988).

Though I do not propose some meta-normative project, I am also more optimistic than Foucault who resists envisioning transformation, mostly because of his anti-humanism, his post-modern skepticism.

206 Y. Cohen, "Thoughts on Women and Power" in Feminism in Canada, supra note 146 at 236. G. Finn, "On the Oppression of Women in Philosophy – Or, Whatever Happened to Objectivity?" in ibid. at 302. For example, certain of the privileges of citizenship can be understood as "power to," rather than "power over." The Oxford English Dictionary also suggests these various conceptions, beginning with "power to," but ending with "power over": "the ability to do something ... possession of control or command over others; domination; government; sway; authority ... ability to compel obedience ... wage war."
Men may understand and use power in its imperialistic guise in order to crush women, other men, and nature, but that does not mean that "power over" is the immutable essence of power. Feminism, with its substantive emphasis upon an ethic of care, may pose the opportunity to conceptualize another, emancipatory side of power: a side that expands our horizons rather than curtails them, a side that nurtures our personhood rather than stultifies it, a side that fosters care for the inherent human dignity of others. Feminism, rather than working within and thereby reproducing the androcentric interpretation/imposition of power, may be able to challenge the very meaning of power itself.\footnote{207}

These concerns are further reinforced on a reading of Plasticity. In this volume, Unger utilizes his anti-necessitarian perspective to develop a revised practice of social and historical analysis that at once has greater explanatory potential than its strongest rivals (Marxism or modernization theory), as well as emphasizing the human capacity for innovation, flexibility, and reconstruction. The central thesis is that there is no pre-ordained path to societal success. Rather, it is argued that those societies that have been successful have been those who have recognized the importance of plasticity – with its potential to weaken social division, roles, and hierarchy – thereby facilitating the emergence of hitherto unforseen innovations, the techniques of success. By connecting plasticity with success, Unger links openness, empowerment, and radical democracy.

The problems begin, however, not with the theory but with its application. Plasticity is a study of the enabling institutional conditions of economic and military success. Although Unger's purpose is relatively narrow historical revision, his choice of topics leaves me rather uncomfortable. Unger's perilously close identification of wealth and power with success, in my opinion, raises

\footnote{207 It must be made clear that the extension of our understanding of power suggested in the text is not a sentimentalized, romanticized approach. It is obvious to me that, if "power over" and "power to" come into direct conflict, then the former will trump the latter. The opportunity, however, that is implicated in the idea of "power to" is precisely to circumvent and defuse the conflicts that make "power over" seem so inevitable and the consequences so repressive, painful. In this light, power undimensionalized to "power over" is self-fulfilling and viciously circular. To break that circle, we must reconceive the possibilities of dispute resolution, to challenge the pervasiveness of dominance and dependence at its cognitive and epistemological core.}
issues about his vision of the good society, concerns that relate back to his almost euphoric espousals of conflict.²⁰⁸ I want to concentrate on his discussions of military success.

No doubt, Unger is correct to identify the integral historical connections between societal survival, growth, and expansion on the one hand, with wealth and power, riches and force, on the other. Yet there is a disturbing tendency to uncritically assume such connections as inevitable, necessary. For example, throughout the discussions there is a pervasive assumption that predatory relationships between states are inevitable.²⁰⁹ This leads him to claim that successful societies should always be in a state of military preparedness, which, to me, sounds like a euphemism for militarism, thanatical doublespeak.²¹⁰ Thus, the recent efforts of Gorbachev to modify the military tensions between the superpowers would be seen as foolish and potentially fatal within the Ungerian scheme of things. Unger's espousal of "plasticity or death"²¹¹ could be easily interpreted as a justification for deterrence theory, the Reagan/Bush administration's star wars initiative, the further development of the new "invisible bomber," and continued nuclear build up, either through the honing of cruise missiles or the serious consideration by the Mulroney administration of the development of a fleet of nuclear submarines. Furthermore, Unger's discourse of cold, dispassionate detachment in his discussion of the techniques and technologies of destruction on occasion almost crescendos into eulogy. For example, he is particularly enthusiastic about the ability of commando forces to transcend hierarchy by softening the

²⁰⁸ For example, at one point he describes the "repetition of war" as the "great wheel of fortune." Plasticity, supra, note 6 at 147.

²⁰⁹ See also Social Theory, supra, note 6 at 56.


²¹¹ Plasticity, supra, note 6 at 162.
boundary between task-definition and task-execution. Immediately, I am tempted to think of the plasticity, creativity, and ingenuity of the R.U.C Special Branch shoot to kill policy in my native Northern Ireland, where the execution aspect has been perfected into an art. I am not enthusiastic about celebrating such destructive innovation.

To be fair to Unger, there are at times indications that he is not indefensibly sanguine about war. Although he refers to war's "untrammelled violence" and its nightmarish aspects, critiquing combat as "a retreat from love" and its "distorting nature," these reservations are disturbingly underdeveloped. For someone whose other work is in many ways premised upon the redemptive power of love, optimistic about compassion, trust, reliance, and vulnerability, he simply does not protest enough. Although we can undoubtedly learn about the importance of plasticity through a discussion of militarism — and I do not want to be understood as saying that we should not discuss or attempt to understand our history — Unger's position lacks a sufficiently critical component. His critique is oriented against alternative theories of military success, but not against militarism itself. His over-concentration on the techniques of plasticity costs his critical credentials severely. Rather than attempting to uncouple freedom and domination, his espousals of plasticity only seem to rationalize the efficiency of domination, to capitulate to the "cult of violence." It is a sad thought, but Ungerian plasticity, unmodified as it is in Plasticity, may only differ in degree from Posnerian efficiency. Like Conrad's Mr. Kurtz, Mr. Unger may realize the horror only when it's too late.

The problem with Plasticity is not its central thesis, the unimaginable horizons opened up by plasticity, but the extent to which the thesis is carried. Unger may have led us out of our servitude to necessitarianism, opened up the waters of reform and retrenchment which continually threaten to submerge us, and provided guidance toward a better era, but only to abandon us in

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213 "[T]he test of success that counts is the comparison of one war machine or industrial economy with its closest and most threatening adversaries." Plasticity, supra, note 6 at 209.
214 False Necessity, supra, note 3 at 584-85.
the valley of mutually inflicted death. All too often his third volume seems to suggest that conflict and militarism are essential conditions for success. Success is defined as economic and military power, but why should this be the case? If success is to be measured on these criteria, with their potential for apocalyptic destruction, then, perhaps, we don't want success or, perhaps, we need to redefine and revalorize success to disentangle it from such a warped value structure. If the gospel of plasticity is accurate, if necessitarianism is part of the problem not the solution, then the spirit of the Ungerian project demands that we question the assumption of conflict that Unger entrenches in his own work so that we can tentatively edge towards social recombination that does not require seemingly endless baptisms of violence. To do this requires us to inquire into the very nature of the modernist project itself, to query whether our much vaunted progress is more apparent than real, to wonder whether our achievements have been attained only at an unconscionable cost, and to ponder whether our economic and military successes have been self-deluding myths.

E. Plasticity is not Enough

Here, once again, I think Unger fails us. As I have indicated earlier, Unger, with his unrepenting emphasis upon malleability and the creative potential of humanity, is an archmodernist. The problem that arises, I think, is that throughout his analysis there is a dangerous tendency to reduce this creative capacity of humanity to instrumentalism. His over-concentration on and, perhaps, excessive prioritization of the self-assertive potential, the context-transcending talent, is disturbingly close to a will to empowerment that lacks a sufficiently developed complement of intersubjectivity. The fusion of reason and desire is too narrowly construed, over-

emphasizing technique at the expense of interconnection. For example, his discourse is pervaded by terms that discuss mastery of our contexts, whether economic, political, military, ecological, or interpersonal. Even his theory is reduced to serfdom, press-ganged into the "service of radical democracy." It is, perhaps, because of this instrumentalist hegemony that Unger puts so much emphasis upon the importance of wealth and power, unduly prioritizing them as the fundamental aspects of success, thereby denying that things could be otherwise.

All of these problems are compounded and exacerbated by Unger's own vital insight into what he calls "the demonic problem of politics: the tendency of means to create their own ends." If conflict is the means, then conflict will be the end. Conflict has as its central concern and effect inequality, for it is premised upon adversariness and driven by the polarities of victory and defeat, domination and subordination. If Unger is right, and I think he is, that there is no social teleology, that although everything is up for grabs, there is no guarantee that the future will necessarily turn out to be positive, that each advance towards greater plasticity and disentrenchment creates new dangers of reversion to less revisable and more oppressive orderings of social life, and that the burden is upon us as historically responsible social actors, then surely contextualism and plasticity need some direction. The "relentless imperative of plasticity" is not enough, for, as even he admits, talented conservative reformers can use it to reinforce their privilege.

Two brief examples help illustrate in a dramatic way the political limitations of an unmodified plasticity. We will remember that Unger is sanguine about the radical potential of the petty

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216 See subtitle of False Necessity, supra, note 3.

217 That Unger believes militarism is necessary for statecraft becomes obvious when, for example, he identifies achievement in "rule, production and war" as "worldly success." Plasticity, supra, note 6 at 102.

218 False Necessity, supra, note 3 at 396.

219 Social Theory, supra, note 6 at 213.

220 Ibid. at 59.
bourgeoisie mostly because of their innovative and experimental tendencies, that is, their propensity for plasticity. Let us not forget, however, that it was the petty bourgeoisie who also provided the vanguard for European fascism. The second example, from the Canadian context, is of particular relevance to women and other disempowered groups. In the realm of constitutionalism, Unger dislikes the arthritic system of checks and balances and favours a process that will allow for rapid and effective decision-making that can encourage "bold programmatic experiments." Just such an experiment in constitutional innovation took place at Meech Lake, where a sort of super-council of "eleven men met in private in the night while their limousines waited outside, engines running." The result was an Accord that has a potentially massive impact upon the politico-constitutional status of women, the northern territories, and natives, absent their participation and, seemingly, oblivious to their concerns.

Plasticity needs to be supplemented by a substantive vision, corrigible no doubt, that can provide us with guidance as to the direction of our political, economic, and cultural reconstruction. In particular, I think that the Ungerian project requires a revitalization of his earlier strong conception of solidarity, a commitment to seriously consider recent feminist contributions to politico-jurisprudential discourse and praxis, and a dramatic expansion of his

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221 Plasticity, supra, note 6 at 85.


223 See generally, Promises, supra, note 189.

224 The suggestion in the text that Unger tends to favour process over substance is a correlative of his anti-essentialist commitment, in that any substantive ideal continually threatens to become a metaprinciple. The reproduction of this epistemological hierarchy is manifest in, for example, the following comments on the relationship between contextualism and equality:

We come to recognize the ideal of social equality, for example, as a partial, subsidiary aspect of our effort to free ourselves from a social script that both subordinates us unnecessarily to an overpowering scheme of class, communal, gender, and national divisions and denies us as individuals, as groups, and as whole societies a greater mastery over the institutional and imaginative contexts of our lives. This enlarged view of the radical cause.

Social Theory, supra, note 6 at 7.
conception of empowerment so as to make it less overdetermined by juridicalism and more a cognate of freedom. In this way, it may be possible to both reconnect solidarity and empowerment and uncouple freedom and subordination. When I discuss solidarity and the ethic of care, it is not to set up a new authoritarian orthodoxy, a neo-naturalistic determining metaprinciple. Rather, they are developed as corrigible, normative, and experiential bench-marks intended to inspire and facilitate empowerment, helping us to apprehend the reality of the other, as well as ourselves. Thus, although they are aspirational generative principles, they only provide indications of the general direction in which we should move, not authoritative right answers.

Thus, contrary to his own guiding idea, Unger may have bought into a necessitarian belief that conflict is inevitable, a credo that may be traced to his androcentricity, his excessive predilection with individual self-assertion, his fetishization of plasticity, his retreat from solidarity, his ignorance of the ethic of care, and his over-concentration on history to the exclusion of an alternative heritage. Unger has failed to realize that perhaps one of the most pervasive and recalcitrant elements of our contemporary formative contexts is patriarchy, and has thus become a victim of his own myopia. Indeed, the absence (or at least the underdevelopment) of a reconstructive norm, such as solidarity in *Politics*, makes one wonder if it may be no more than the restatement of the philosophical and political origins of the Enlightenment, failing to persuade that the Ungerian empowered democracy may be any less "solitary, poor, nasty, brutish and short" than the Hobbesian Leviathan.

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225 Which is, I suspect, the Ungerian response. As he says, "All clear-cut versions of the naturalistic premise ... attribute to the personality some proper order of emotions, or of virtues and vices." *Ibid.* at 24.


227 The ethic of care may be already interstitially recognizable in the basic structure of the welfare state, although severely bastardized, distorted, and instrumentalized by the legitimizing imperatives of the late capitalist state and relegated to second fiddle behind bureaucratic imperatives. But it may be accessible to deviationist development.
A reflection on Unger's work over the last fifteen years indicates that two central themes pervade his thinking: contextualism and solidarity. However, their relationship has not been constant. It, too, has been through the throes of modernism à la Unger. Indeed, in *Politics*, it appears that, like everything else, they are in conflict. The unfortunate result of such a characterization of their relationship has been that contextualism has emerged triumphant. This is because the "thesis of revisability" insists that Unger refrain from replacing one totalizing and repressive conception of humanity and society with another, for that would be to invoke a "fantasizing, sentimental, archaic, tyrannical prospect of devotion to a shared vision of the common good" or what elsewhere he calls "a stifling despotism of virtue." Of course, Unger is correct to be concerned about the repression inherent in too thick a vision of the good society. However, solidarity – even in its strongest sense – does not demand the societal prostration that haunts Unger. Rather, solidarity provides direction in the form of a moral theory that requires of us that we respond to the needs of others at the same time as we assert our contextualism. As the examples of the Meech Lake Accord and the European petty bourgeoisie indicate, to the extent that contextualism smothers solidarity, that may be the extent to which contextualism slips into anti-democracy and, perhaps, even eschatology. Thus, it seems to me that Unger's vision of the good society, though not as anorexic as that of Rawls, is still too thin. If he had not abandoned his more substantive conception of solidarity, if he had shown some regard for the ethic of care, then he may have been able to avoid the repressive hegemony of a totalizing substantivism and, yet, have been able to provide us with an evaluative bench-mark – corrigible, of course – by which to measure our anti-necessitarianism progress.

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228 *False Necessity*, supra, note 3 at 471.

229 *Critical Legal Studies*, supra, note 6 at 83.
So, why has Unger retreated to such a radicalized neo-proceduralism? Why has he surrendered so much critical reconstructive ground? There are, I think, two not unconnected reasons. First, although Unger is at pains to emphasize that "the ultimate stakes in politics are the fine texture of personal relations," much of his analysis (and consequently many of his proposals) are based upon a structural dichotomy between our "practical" and "passionate" lives. Thus, while *Passion* and a promised subsequent volume are focussed upon our nature and potential as human beings, both as individuals and as members of communities, *Politics* is primarily concerned with the reconstruction of social institutions. The connection, of course, is that the renovated institutional structure is designed to facilitate both our potentials as human beings and more open interpersonal relations. However, I think this structural/discursive dichotomy has a substantive impact, which I fear comes perilously close to reproducing the old public/private dichotomy (*Politics* is war, *Passion* is vulnerability) that has been thoroughly criticized by both critics and feminists alike.

The reason for this structural – and perhaps unintentional – reproduction of dualistic thought, I would conjecture, is to be located in the politico-academic realm in which Unger finds himself. It's all politics, is it not? Unger's earlier work had come under repeated attack for its optimism, its "millenarian" tendencies, "utopianism," as his detractors would say. In *Politics*, Unger makes a serious effort to assuage the concerns of these critics by distinguishing between utopian and speculative thought, claiming that his enterprise comprises the former but not the latter. He posits that his approach is dependent neither on too great a change in our qualities as human beings, nor on too great a rupture with where we are now. This recanting is also related to suggestions in *Politics* that we cannot expect too much from our more extended forms of social interaction and that we cannot expect altruism. I agree with Unger.

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230 *False Necessity, supra*, note 3 at 518.

231 See, e.g., *ibid.* at 398.

that a progressive political programme can be easily thwarted if it is seen to be too idealistic. However, we must always be careful of not allowing those who have power from setting the terms and the parameters of the agenda, for that too will stymie the radical project. If the mature, middle-aged Unger had retained his more substantive conception of solidarity as outlined in his more juvenile Knowledge, an aspiration that dovetails with some feminists’ discussions of the ethic of care, then the leap from here to there may not be so dramatic. It might only need to take into consideration a perspective that is already adopted, by at least some (how many?) women. Feminism in both theory and practice exists here and now, providing a vital – perhaps unique – opportunity to make the transition to the there and then. But, unfortunately, Unger ignores this alternative vantage point. He is too cautious, too defensive, and takes all too hasty a refuge in a politically problematic dichotomy that reduces politics to the proceduralism of plasticity. Thus, rather than capitulating to his pseudo-realist critics, Unger may have been better advised to have pursued the politics of passion inspired by the Atwoodian maxim of resistance: *nolite te bastardes carborundorum.*

VII. CONCLUSION

In this review, I have suggested that Unger can make a significant contribution to a progressive politics, primarily through his ability to connect empowerment and anti-domination with an agenda for the disentrenchment of hierarchy, supplemented by both an impressive institutional reconstruction and the foundations for a freedom enhancing social theory. I have also argued that there is a great deal in feminism that may dovetail with the spirit of the Ungerian project. Most significantly, feminism’s potential to provide an alternative vision of the norms of socio-cultural interaction and the possibility of historically and existentially locating the transgressive dynamic that can engender an empowered democracy. Between them, feminism and Unger provide us with an opportunity

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(and that is all it is) to transcend the paradox of the Twilightenent with its repressive paradox of freedom embedded in domination.

Having said that, the lacuna of not explicitly incorporating feminism is not merely worrisome but positively disconcerting. Not only is it almost incredible that a social theory developed in 1980s – a theory that purports to be radical to boot – can pay so little attention to the conditions of gender subordination. Moreover, in ignoring the feminist perspective, Unger has missed a fruitful radical opportunity to both learn and inspire.

By way of a closing comment, although I have discussed the possibilities of a fruitful interchange between feminism and critical theory, my aim is the contemplation of a coalition, not co-option. Although I have suggested that there are important parallels between these two progressive perspectives, there are also important differences, primarily political differences, that cannot – and should not – be ignored or assumed into irrelevancy. The idea pursued here is something along the lines of what Iris Marion Young and Jesse Jackson have described as a "rainbow coalition": where alliances are celebrated and developed to progressive effect, while at the same time differences are articulated, discussed, understood, valued, and acted upon as a sign of progressive vibrancy and not as factional weaknesses. I think the alternative to keeping the conversation open between feminism and critical theory is depressing: sectarianism, closure, stultification, continued marginality, and disempowerment.

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