



6-2-2020

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Recommended Citation

Robert P. Burns, *Modernity and the Law: A Late Twentieth Century View*, 10 NOTRE DAME J. INT'L & COMP. LAW 307 (2020).

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Modernity and the Law: A Late Twentieth Century View

Cover Page Footnote

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MODERNITY AND THE LAW: A LATE TWENTIETH CENTURY VIEW

ROBERT P. BURNS*

I intend here to explore Roberto Unger's understanding of the particular situation modernity presents for the law. Unger sets his account of modern law within a broad historical and philosophical context that will help us explore in detail the *significance* of important developments in our procedural law that have occurred in the forty years since he did the work on which I am focusing.¹ He built his account of the relationship between law and modernity around a number of distinctions. One set of distinctions is among customary law, bureaucratic law,² and the "rule of law ideal" that emerged with the modern European liberal society and which survives in a modified form through our "postliberal" contemporary world.³ "In the broadest sense law is simply any recurring mode of interaction among individuals and groups, together with the more or less explicit acknowledgment" of the legitimacy of the reciprocal expectations that these interactions occasion.⁴ If law does not go beyond this, it is what Unger calls "customary or interactional law" which combines factual regularity with a "sentiment of obligation and entitlement" that identifies "established forms of conduct with the idea of a right order in society and in the world at large."⁵ Though dominant in premodern societies, customary law persists as a background to the other forms of legality in various ways, controlling areas that more explicit law does not reach and sometimes offering substantive standards, such as the various "reasonable man" notions. Custom obviously "lacks the attribute of positiveness: it is made up of implicit standards of conduct rather than of formulated rules" and tends to apply narrowly rather than "to very general classes." It also resists being "reduced to a set of rules; to codify them is to change them."⁶

Beyond customary law, there is "bureaucratic or regulatory law" which is public and positive and arises only "in situations in which the division between state and society has been established and some standards of conduct have assumed the form of explicit prescriptions, prohibitions, or permissions

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¹ The next step would be to link Unger's account of law with other, more comprehensive understandings of modernity, such as Charles Taylor's. See CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989). Unger's thought has, of course, continued to develop in the intervening decades. I have been critical of some of those developments. See Robert P. Burns, *When the Owl of Minerva Takes Flight at Dawn: Radical Constructivism in Social Theory*, in *CRITIQUE AND CONSTRUCTION: ESSAYS ON A SYMPOSIUM ON UNGER'S POLITICS* (Robin Lovin & Michael Perry, eds., 1990).

² Perhaps "bureaucratic rule" would be more accurate, in that he includes with "bureaucratic law" rule by specific decrees and orders as well as through rules. For Unger's earlier treatment of bureaucratic order, see ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 170-74 (1975).

³ *Id.*

⁴ ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY: TOWARDS A CRITICISM OF SOCIAL THEORY* 49 (1976) [hereinafter LMS].

⁵ *Id.*

⁶ *Id.* at 50.

addressed to more or less general categories of persons and acts.”⁷ It is “deliberately imposed by government rather than spontaneously produced by society.”⁸ Here, the *state* appears at least nominally to define the relative powers of groups in a subordinated society, though one or more of those groups may actually dominate the state itself. This law is bureaucratic in that it “belongs peculiarly to the province of centralized rulers and their specialized staffs.”⁹ It is the medium through which the will of the sovereign, originally princely but then in some places democratic, can be enforced.¹⁰ Bureaucratic law has always been at least somewhat limited by custom and sometimes by bodies of sacred law presided over by priestly castes.¹¹ The state becomes essential once conflicting social groups appear, though it harbors a central paradox:

Only an entity that somehow stands above the conflicting groups can both limit the power of all the groups and pretend to the posture of impartiality, impersonality, to providential harmony which sanctions its claim to their allegiance. The state, which is the child of the social hierarchy, must also be its ruler; it must be distinct from any one social group in the system of domination and dependence. Yet it has to draw its staff and its purposes from groups that are part of this system. Whenever either side of the paradox is forgotten, the true relationship between state and society is forgotten, the true relationship between state and society is obscured.¹²

A condition for the emergence of bureaucratic law is what Unger calls “the disintegration of community[.]” by which he means only that some important number of its members feel “increasingly able to question the rightness of accepted practices as well as to violate them[.]” a condition that inheres in all concretely imaginable non-voluntary modern communities.¹³

Bureaucratic law is “the device by which the state manipulates social relations” and “a tool of the power interests of the group that control the state.”¹⁴

⁷ *Id.* at 51.

⁸ *Id.*

⁹ *Id.* See also ALASDAIR MACINTYRE, *AFTER VIRTUE* 88–102 (3rd ed. 2007) (emphasizing, in a way that Unger does not, the centrality of the applied social sciences to the contemporary bureaucrat’s claim to authority). See also JASON BLAKELY, ALASDAIR MACINTYRE, CHARLES TAYLOR, AND THE DEMISE OF NATURALISM 15–20 (2016) (describing how the *nature* of that claimed expertise changed as the bureaucracy ceased to claim to speak for a unified national identity and presented itself as mediating among self-interested groups).

¹⁰ See ROBERT P. BURNS, *KAFKA’S LAW: THE TRIAL AND AMERICAN CRIMINAL JUSTICE* 65–71 (2014) (The mass democratic exercise of sovereignty need not always be more benign.); *id.* at 65–71. See also JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2009).

¹¹ The distinction between the prince’s bureaucratic law and a sacred space that he cannot with impunity invade is as old as Sophocles’ *Antigone*.

¹² LMS, *supra* note 4, at 60–61 (linking the need for bureaucratic law with greater divisions of labor and social stratification in more developed societies that raise the level of conscious “apartness” from others). *Id.* at 63–64.

¹³ *Id.* at 58.

¹⁴ *Id.* at 64, 158 (Bureaucratic law has often coexisted with some realm of “sacred, super positive order.”). *Id.* at 158.

As such, it is likely to be viewed in purely instrumental terms. But its legitimacy often depended on satisfying “the need of rulers and the governed alike to justify the structure of society by relating it to an image of social and cosmic order” rather than simply relying on the terror with which the order is imposed.¹⁵ If it is simply the tool of the holders of state power, it can be changed whenever the rulers choose.¹⁶ If not, it gains permanence, but loses some of its flexible instrumental character. This form of law contains tensions that will lead to the emergence of yet another form of law, the modern European rule of law ideal.

The modern rule of law ideal will turn out to have significant discontinuities with the bureaucratic order, but important continuities as well. It emerges in stages. Its precondition is a “liberal society,” a pluralist or interest group social order. No one group dominates or can plausibly claim an inherent right to rule or be accepted as the natural order of things. In a bureaucracy, rules are useful simply “as a generality of political experience,” to allow the higher bureaucrats to control the behavior of their subordinates.¹⁷ “[T]here are no commitments to generality in lawmaking and to uniformity in adjudication that must be kept regardless of the political interests of the rulers.”¹⁸ A liberal society thus cries out for a legal order:

This way of organizing and perceiving society has revolutionary implications for law. Liberal society cannot resolve its problem of social order through the mere imposition of bureaucratic law; it is a form of life in which no one group is able to command for long the loyalty and the obedience of all other groups. Thus, it becomes important to devise a system of law whose content somehow accommodates antagonistic interests and whose procedures are such that most everyone might find it in his own interest to subscribe to them regardless of the ends he happens to seek.¹⁹

The opposing tensions can lead to the “creation of a legal order with the attributes of generality and autonomy.”²⁰ Rules and procedure can then claim

¹⁵ *Id.* at 65.

¹⁶ The apex of this kind of instability actually occurred during the totalitarian regimes of the twentieth century. There, “all laws have become laws of movement” as “decree followed decree” and all stability disappeared. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 463 (New Edition with Added Prefaces, 1973) (The apex of this kind of instability actually occurred during the totalitarian regimes of the twentieth century.). See also DAVID GRAEBER, *THE UTOPIA OF RULES: ON TECHNOLOGY, STUPIDITY AND THE SECRET JOYS OF BUREAUCRACY* 195 (2015) (“Even on the lowest levels, those who enforce the law are not really subject to it. It’s extraordinary [sic] difficult, for instance, for a police officer to do anything to an American citizen that would lead to that officer’s being convicted of a crime.”).

¹⁷ *Id.*

¹⁸ LMS, *supra* note 4, at 67.

¹⁹ *Id.* at 69. This system will be pulled in opposing directions. Those pleased with the status quo will want it preserved, while those less advantaged may see in the legal order an opportunity to oppose the social status quo or the exercise of bureaucratic power. This descriptive formulation parallels Rawls’ normative liberal account of the distribution of primary goods, scarce goods everyone wants regardless of what else they want, behind a veil of ignorance as to their ultimate position in society. See also JOHN RAWLS, *A THEORY OF JUSTICE* 90–95 (1971). (Of course, the creation of the institutions that support the rule of law did not occur behind a veil of ignorance).

²⁰ *Id.*

“to represent, over the long run, that universal interest which consists in the accommodation of all particular interests.”²¹ The interpretation of these laws by specialized institutions, staffed by a relatively independent professional group, steeped in its own craft and techniques of argument seems to ensure that those the legal order seeks to control will not use it as a tool to pursue their own private interests. Though the prince and the bureaucracy begin on the same side (though can come to have divergent interests), *both* may view the independent legal order with suspicion. And so, the legal order has been historically rare. For example, merchant groups throughout Europe preferred their own rules and tribunals. “Only in modern Europe did the breakthrough occur that made it possible to fuse the two bodies of law,” the merchants’ rule and the bureaucratic law of the state, “into a legal order that is different from both its parents.”²²

The rule of law emerged, then, from a compromise among “monarchic bureaucracy, aristocratic privilege, and middle class interest.” No one group was wholly pleased with it:

Rulers had to sacrifice a parcel of their discretion and the aristocracies and the third estates a measure of their desired independence from government. Through this reciprocal conciliation and surrender, the legal order was born. When we study the events that produced legal systems in Europe—the struggles between courts and ministries, between juristic technique and remorseless statecraft, between efforts to submit government to society or to subject the latter to the former—we encounter the signs and stages of this process. *For all parties concerned, the rule of law, like life insurance and like liberalism itself, was an attempt to make the best of a bad situation.*²³

Unger argues as well that some vague notion of natural law was important for the emergence of the rule of law ideal in early modernity. Like customary law, natural law merged fact and value and was not a creature of human deliberation, but it differed from custom “in the generality of its formulation, in the universality of its alleged scope of application, and in the scholarly or religious character of the authority upon which it is based.”²⁴ The natural law notion supports the idea that law “ought to have a measure of critical independence from politics and custom” and so “requires specialized institutions, occupational groups, and modes of discourse.”²⁵ It also gave rise to

²¹ LMS, *supra* note 4, at 69–70.

²² *Id.* at 74. See also Emily Kadens, *The Medieval Law Merchant: The Tyranny of a Construct*, 7 J. LEGAL ANALYSIS 251 (2015) (disputing the existence of a merchants’ law truly independent from the state).

²³ *Id.* at 75–76 (emphasis added).

²⁴ *Id.* at 76. See also Alasdair MacIntyre, *Plain Persons and Moral Philosophy: Rules, Virtues, and Goods*, in THE MACINTYRE READER, 136–152 (Kelvin Knight ed. 1998) (MacIntyre emphasizes the continuity between at least Aristotelian-Thomistic natural law and the “intuitive” judgments of ordinary people.).

²⁵ LMS, *supra* note 4, at 80. See also EDWARD S. CORWIN, THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (2008).

the essentially contested²⁶ notion of equality before the law: “[o]nly in the modern West did a system of law develop that assigned duties and entitlements to individuals regardless of their social rank.”²⁷ The importance of the natural law notion to the emergence of the modern rule of law creates a central issue for contemporary societies: “[c]an the ideals of autonomy and generality in law survive the demise of the religious beliefs that presided over their birth?”²⁸ And is an autonomous legal order, committed to some notion of generality, or equality before the law, a mere “transitory characteristic” of societies where the divine and the political orders are separated?²⁹ These are not wholly speculative questions.

It was, then, the unique and fortuitous *combination* of natural law ideas and a liberal social order that created the notion of a legal order reflecting the rule of law. The former initially suggested the *merger* of moral or religious ideas and the legal world, not, however, the autonomy of the latter from the former. A purely liberal ideal, however, suggests resolving individual problematic situations either by *ad hoc* bargaining or bureaucratic pressure unrestrained by the formalities that may protect the interests of those out of power. The modern notions of natural right and the related theory of “public natural law”³⁰ conceded the existence of norms superior to state power, but reflected modern pluralism by conceiving of “natural rights as powers of the individual to act within a sphere of absolute discretion.”³¹ The synthesis would come under pressure because of the inherent tensions within it. The natural law background suggested inalienable and legally protected rights resistant to any claim of expedience, while the pluralist and interest group background suggested balancing and an ideal of law reflecting the flexibility and the usual devotion of bureaucratic ordering to efficiency.³² This is the institutional version of the tension between

²⁶ LMS, *supra* note 4, at 81 (That equality could remain an abstract equality of equal treatment or give rise to a demand for substantive equality, which would, in turn, require that “one would have to treat people who are in different situations differently.” *Id.* at 81. In the liberal West, the former interpretation obviously dominated.).

²⁷ *Id.* at 85.

²⁸ *Id.* at 83. *See also* TAYLOR, *supra* note 1, at 519–21 (Charles Taylor tends to doubt that some of the aspects of modernity that had Christian origins can survive the loss of the religious foundation.). *See also* HANNAH ARENDT, HANNAH ARENDT: THE RECOVERY OF THE PUBLIC WORLD 313–14 (1979). Hannah Arendt was even more direct in her claim that whole “totalitarian catastrophe would not have happened if people had still believed in god, or in hell rather—that is if there still were ultimates.” Her general project was, however, to see many important public institutions as self-grounding, not needing a transcendent foundation.

²⁹ LMS, *supra* note 4, at 83.

³⁰ Unger cites LEO STRAUSS, NATURAL RIGHT AND HISTORY (1950), who sharply distinguishes modern natural right from classic natural right.

³¹ LMS, *supra* note 4, at 85. *See also* TAYLOR, *supra* note 1 (This is similar to Taylor’s view of the distinctiveness of modern natural right compared to classic conceptions of natural law which broadly imposed obligations rather than underwriting permissions for discretionary action. Unger mentions that this coheres nicely with a view of the legal order as a system of conflict resolution.).

³² This issue arises in the context of the theory of procedure, perhaps most commonly in debates surrounding the appropriateness of class actions. Some scholars argue that there are certain procedural rights of such transcendent significance, usually the right to control the direction of the litigation or to be heard individually, that they can never be balanced against the practical efficiency of the procedural device to provide at least some redress. For a critique of those views, see Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U.L. REV. 485 (2003).

Kantian notions of right and utilitarian balancing that still characterizes academic philosophy and public moral argumentation in the United States.

Lon Fuller famously expanded what he understood as the rule of law ideal to include nine canons that constituted the inner morality of law. These were generality, publicity, clarity, consistency, feasibility, constancy,³³ prospectivity,³⁴ and congruence.³⁵ Fuller made a number of controversial claims about his canons. The term “inner morality” implied that these were moral rather than, or in addition to, analytical requirements. He made the related claims that these features of enactments were “*constitutive* rules,” so that without observing the canons, provisions would not be law at all and that they thus constituted “procedural natural law,” controlling legislation and administration.³⁶ Finally, he made the claim, which goes considerably beyond Unger’s genetic account, that law so understood will “enhance human dignity.”³⁷ David Luban concludes that the rule of law ideal certainly does not wholly prevent oppressive government, but that it “does deprive governments of some of their favorite devices of intimidation, namely, vague laws, secret laws, retroactive law, and confusing and inconsistent laws, all of which are used to keep citizens cautious and fearful.”³⁸ Fuller’s argument, however, goes beyond this.

Fuller distinguishes, as Unger does, between law and what Fuller calls “managerial directives,”³⁹ which are basically orders directed to a specific person requiring or prohibiting a specific act. Of course, any functioning contemporary legal order will employ both, as bureaucratic rule always did, and the relationships between them can be enormously complex. Yet, Fuller maintains “governance through general rules *by itself* implies ‘a certain built-in respect for human dignity’ that managerial direction presumably lacks.”⁴⁰ He argues that laws, however coercive, do not directly order men to do anything. Rather they recognize that a person is a “self-determining agent,” for whom law provides “baselines” that he can then integrate into his decisions.⁴¹ General rules cannot, without infinite regress, provide rules for their own application and they cannot identify all possible exception prior to their application. The citizen himself must then interpret the rule as a member of the same community to which the legislators belong. It is the background understandings of that community, what Fuller calls “implicit law,” that provide the range of plausible

³³ By “constancy,” Fuller meant resistance to rapid change. LON FULLER, *THE MORALITY OF LAW* (1969) [hereinafter Lon 1964].

³⁴ Prospectivity would exclude *ex post facto* laws. *Id.*

³⁵ This requires a close relationship between the law as originally stated and as applied. See David Luban, *The Rule of Law and Human Dignity*, 2 HAGUE J. RULE L. 29 (2010); DAVID LUBAN, *Natural Law as Professional Ethics: A Reading of Fuller*, in LEGAL ETHICS AND HUMAN DIGNITY 99–130 (2007).

³⁶ For a critical assessment by a prominent legal positivist, see Joseph Raz, *The Rule of Law and Its Virtue*, 95 L. Q. REV. (1977).

³⁷ *Id.* at 3. Unger seems to concede that the rule of law does protect human freedom in many contexts, though especially by protecting individuals and groups against state power. Luban concludes that “the conception of human dignity at work in Fuller’s claims is too thin to be accepted.” *Id.* at 4. In particular, Luban concludes that Fuller has too libertarian a notion of the relationship of the law to the citizen and, in the terms I am using here, too small a place of the benign place of bureaucratic law in contemporary society.

³⁸ *Id.* at 10.

³⁹ Lon 1964, *supra* note 33, at 207.

⁴⁰ Luban, *supra* note 35, at 12.

⁴¹ *Id.*

interpretations for any rule. And the rule of law ideal trusts citizens to execute their own rational life plan into which they integrate the requirements of the law.⁴² Luban concludes, however, as does Unger, that the “rule of law as a law of rules” manifests only a weak form of respect for the person. This conceptualization is compatible with “social relationships marked by radical subordination of one person by another,” and “[p]rivate oppression, domestic violence, workplace exploitation, and radical inequality are evils that legal autonomy will not cure.”⁴³ Bureaucracy, what Luban calls “state intrusion,” can “protect people as well as oppress people, and decent states will intervene to establish the conditions in which people can live in dignity . . .”⁴⁴

Because of its centrality to modernity’s self-understanding, Unger tells us, “[t]he transformations of law provide a viewpoint from which to survey the panorama of modernity[.]”⁴⁵ In liberal society, “every individual belongs to a large number of significant groups, but each of these groups affects only a limited part of his life.”⁴⁶ The whole person is never manifested in any one context. Because individuals interact in impersonal contexts like markets and bureaucracy, formal equality and impersonal respect replace tribal solidarity, though never completely. Perceived mutual advantage eventually replaces a common vision of the good: “As interest association replaces community solidarity, the basis for seeing social arrangements as expressions of the good, the beautiful, or the holy collapses” and “the main puzzle of social thought [is] that order can prevail despite this diversity.”⁴⁷

Until the rise of a liberal order, the prince’s commands could be addressed to a single person or to the entire realm; the modern distinction between legislation and administration was nonexistent. Generality was an accidental characteristic, rather than an essential requirement of law. Likewise, in pre-modern Europe, the contrast between administration and adjudication hardly existed. This distinction, which assigned to adjudication distinct institutions, methods of discourse, and occupational groups, was designed to “protect the authoritative interpretation of law, as a sphere of rule-determined decisions, from politics, as a realm of prudential judgments.”⁴⁸ As princely power grew,

⁴² See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971). Rawls counts the ability to have a rational life plan, along with the ability to subject one’s behavior to moral norms, as one of the elements of personhood.

⁴³ Luban, *supra* note 35, at 13.

⁴⁴ *Id.* Luban notes the importance of lawyers in blunting bureaucratic state power (for good or for ill) and in many contexts creating (private) law. Fuller is unique among legal philosophers in making lawyers central players in the legal order. He concludes that he fails to appreciate sufficiently lawyers’ role in counseling compliance with the law where state enforcement cannot be universal and the importance of distribution of legal services. And he notes the tension between the independence that a market-based legal profession has and a fair distribution of legal services.

⁴⁵ LMS, *supra* note 4, at 136.

⁴⁶ *Id.* at 143.

⁴⁷ *Id.* at 146.

⁴⁸ *Id.* at 161. In the early modern period, the central bureaucratic power was limited not by the generality of rules, but by the privileges of the estates. The law governing estate privileges had only “the beginnings of a commitment to generality and autonomy,” but not to formal equality or specialized legal institutions. The law of the estates provided only the germ of the notion of a fundamental law preceding politics and limiting bureaucratic power. The French revolution’s assertion of “omnipotent popular sovereignty introduced a rival tradition of constitutionalism.” *Id.* at 164. For the American version of popular sovereignty, see GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1789* (1971). The American version always stood in tension with the “higher law” background to constitutional

the aristocracy and the third estate remained sufficiently powerful to insist that it be subject to preexistent laws, “addressed to broadly defined categories of persons and acts.”⁴⁹ This development led to the establishment of an independent judiciary “to oversee the administrative use of legislation,” as Unger strikingly described it, in a manner detailing the vision embedded in American administrative law since the Administrative Procedure Act.⁵⁰ Liberal constitutionalism provided one path to the control of bureaucratic state power, in part through the rule of law ideal. It was, again, aided by the “belief in a God-given natural order,” and came to be embodied in the expectation that preexisting laws have “the trappings of generality and autonomy” and become “public and positive”:

In the broadest sense, the rule of law is defined by the interrelated notions of neutrality, uniformity, and predictability. Governmental power must be exercised with the constraints or rules that apply to ample categories of person and acts, and these rules, whatever they may be, must be uniformly applied. Thus understood, the rule of law has nothing to do with the content of legal norms.⁵¹

Unger argues that it proved not enough that the various groups that exist in liberal society live at peace that is a balance of terror; the organization of society must be seen as legitimate, even in the absence of the claims of naturalness that characterize traditional societies. This is a major challenge: a “defining attribute of liberal society” is “its tendency to destroy the foundations of the idea that what ought to be somehow inheres in what is.”⁵² This is true especially if “[e]stablished practices . . . are to be approached in the manipulative, instrumental fashion which the liberal style of interest association implies”⁵³ so that “whatever consensus does persist in liberal society seems groundless.”⁵⁴ The “hermeneutic of suspicion,” to use Ricoeur’s term, is the lens through which existing inequalities and the public institutions themselves come to be seen. Our practices can be seen not as reflecting an implicit order in society but “as the products of the very forms of rankings they are used to justify.”⁵⁵ In one of Unger’s most famous phrases, a pervasive moral skepticism produces a “sense of being surrounded by injustice without knowing where justice lies.”⁵⁶

The judge becomes a central figure in liberal society because it is he who ensures that an administrator, who deals with individuals, actually is confined

law, broadly rooted in the Declaration of Independence. For an attempt to reconcile the themes, see HANNAH ARDENT, *ON REVOLUTION* 191–93 (1977) (particularly, her emphasis on the often-ignored words “We hold” in “We hold these truths to be self-evident. . .”).

⁴⁹ LMS, *supra* note 4, at 50.

⁵⁰ *Id.* at 163. Unger argues that “bureaucratic absolutism” came to prevail in Prussia’s version of a non-democratic version of a liberal society, in contrast to England’s path of parliamentary constitutionalism.

⁵¹ *Id.* at 176.

⁵² *Id.* at 169.

⁵³ *Id.*

⁵⁴ *Id.* at 170.

⁵⁵ *Id.* at 173.

⁵⁶ *Id.* at 175.

by the meaning of the law as determined “by a method different from the administrative one.”⁵⁷

The administrator focuses on the most effective means to realize given policy objectives within the constraints of the law. For him, rules of law are a framework within which decisions are made. For the judge, on the contrary, the laws pass from the periphery to the center of concern; they are the primary subject matter of his activity. Adjudication calls for distinctive sorts of arguments, and its integrity demands specialized institutions and personnel.⁵⁸

And so “even the narrowest view of the rule of law includes a differentiation of the procedures of legislation, administration, and adjudication.”⁵⁹ These are the distinctions that turn out to be under the greatest pressure, something the contemporary American legal order amply demonstrates.⁶⁰

The modern rule of law seeks to achieve the impersonality of power but does so only partially. First, the “family, the workplace, and the market” contain forms of power that are not governmental, and so largely are beyond the reach of the rule of law.⁶¹ Second, the assumption that power exercised either by administrator or judge can be effectively constrained by rules it not completely accurate. This is, again, only a partial truth:

Rules could ensure the impersonality of administrative power only if there were indeed a way to determine their meaning independently of the administrator’s preferences. Thus, the problem of administrative legality turns into a question of whether judicial power can be adequately controlled by rules. Can judges make use of a method that purges their decisions of personal whim? If we admit that words lack self-evident reference, that meaning must ultimately be determined by purpose and context, and that the intent of prior lawmakers is always more or less incomplete, it becomes doubtful whether a truly impartial method of judging could ever be fashioned

⁵⁷ *Id.* at 177. The suggestion is, in part, that an administrator’s instrumental sensibility will tend to push past the fair meaning of legislation toward the broader justifications for the statute in a maximizing manner. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF THE RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 42–53 (1991) (providing an analysis of rule-following that gives mandatory rules a force independent from its background justification.).

⁵⁸ *Id.* at 177. Unger writes that the account of the rule of law provided focuses on a narrow understanding rather than a more demanding version that would require lawmaking itself to follow procedures that all would understand it to be in their own interests, a concept underlying the Rawlsian veil of ignorance.

⁵⁹ *Id.*

⁶⁰ See Robert P. Burns, *Is Our Legal Order Just Another Bureaucracy*, 48 *LOY. U. L. REV.* 413 (2016).

⁶¹ LMS, *supra* note 4, at 180 (emphasis added). Unger’s conclusions have, of course, been under assault by those who contend there is a straightforward way to determine constitutional and statutory meaning. In my view, those attempts have achieved relatively little success. Gary Lawson, a dedicated formalist, finds it a bit of a scandal that there does not exist a consensus on the legitimate methods of statutory interpretation. See GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 9–12 (7th ed. 2016).

within the conditions of liberal society. The sense of the precariousness of the illegitimacy of consensus makes it difficult for the judge to find a stable authoritative set of shared understandings and values upon which to base his interpretations of the law. Hence, every case forces him to decide, at least implicitly, which of the competing sets of beliefs in a given society should be given priority. And it requires him to rely on an accepted morality that, even if it can be identified, is increasingly revealed as the product of a social situation itself lacking in sanctity. To this extent, adjudication aggravates, rather than resolves, the problem of unjustifiable power.⁶²

Unger then provides an account of the rise and fall of rule formalism in Germany after 1848, an account about which this Article will say little. One set of conclusions, however, is relevant to this project. *Both* the bureaucracy and the judiciary could, at different times, embrace either a mechanical formalism of rule-following *or* greater discretionary power. That distinction need not provide the dividing line between agency and court. And specifically, the fall of formalism in the Weimar years “brought judges’ reasoning closer in style and method to the instrumental rationality of the administrative bureaucracy.”⁶³ And “[t]he basic impulse of top bureaucrats remains everywhere and always the same: to ensure maximum leeway for their own instrumental rationality and to limit the discretion of other groups.”⁶⁴

England’s parliamentary constitutionalism embraced a more central role for the rule of law, which was “both a cause and effect of the direct participation of the middle classes in government.”⁶⁵ But Unger draws a general conclusion from the German example: “The mere commitments to generality and autonomy in law and to the distinction among legislation, administration, and adjudication have no inherent democratic significance.”⁶⁶

Unger argues that within modernity, liberal societies are followed by postliberal societies, whose characteristics “undermine the rule of law” and “ultimately discourage reliance on public and positive rules as bases of social order.”⁶⁷ Because the rule of law is “the soul of the modern state[.]” study “of the legal system takes us straight to the central problems faced by the society itself.”⁶⁸ People become conscious that “society consists of a constellation of governments,” rather than the liberal vision of “association of individuals held together by a single government.”⁶⁹ As the government becomes a welfare state, the social hierarchies that always existed under the liberal rule of law become an object of political debate and the state becomes involved in the “tasks of overt

⁶² *Id.*

⁶³ LMS, *supra* note 4, at 189. Law-and-economics instrumentalism brings courts closer to the ideal of the expert agency. See Burns, *supra* note 60, at 425–27.

⁶⁴ LMS, *supra* note 4, at 190.

⁶⁵ *Id.*

⁶⁶ *Id.* at 191. He writes, “They can help promote an oligarchic or dictatorial monopoly of power.”

⁶⁷ *Id.* at 192.

⁶⁸ *Id.*

⁶⁹ *Id.* at 192–93.

redistribution, regulation, and planning.”⁷⁰ The law comes to rely on “open-ended standards and general clauses in legislation, administration, and adjudication” as it determines which contracts are unconscionable, what is unjust enrichment, what markets are competitive, and whether an agency has acted in the public interest.⁷¹ Similarly, legal reasoning turns:

[F]rom formalistic to purposeful or policy-oriented styles of legal reasoning and from concerns with formal justice to an interest in procedural and substantive justice ... An idea of justice is formal when it makes the uniform application of general rules the keystone of justice or when it establishes principles whose validity is supposedly independent of choices among conflicting values. It is procedural when it imposes conditions on the legitimacy of the processes by which social advantages are exchanged or distributed. It is substantive when it governs the actual outcome of distributive decisions or of bargains.⁷²

The ideal of formal justice assumes at least the possibility of formalistic legal reasoning,⁷³ while procedural and substantive ideals envision an overt choice by the court among competing values.⁷⁴ Postliberal societies tend to oscillate between relatively short periods in which formalistic, procedural, or substantive ideals dominate.⁷⁵ The latter makes more sense as the state attempts to address concentrated power in the private sector and to qualify the negative consequences of mechanical jurisprudence. The administrative state will address increasingly complex issues where the helpfulness of general rules run out and the administrator or judge will have to individualize the meaning of broader principles or standards on a case by case manner.⁷⁶ The explanation for these

⁷⁰ *Id.* at 193.

⁷¹ *Id.* at 194.

⁷² *Id.* Unger offers the example of contract law. Justice is formal when objective indicia of intent renders a contract enforceable. It is procedural when enforceability turns on equality of bargaining power. It is substantive when the court must determine whether the performances are of at least approximately equal value.

⁷³ See generally FREDERICK SCHAUER, *PLAYING BY THE RULES* (2002) (defending of the possibility of such reasoning, though Schauer concedes that he has not established that such reasoning is actually a fair characterization of American law).

⁷⁴ A major threat of modernity, associated most prominently with Max Weber, asserts that any such choice must be arbitrary. See RICHARD J. BERNSTEIN, *THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY* 47 (6th ed. 1976) (quoting MAX WEBER, *ESSAYS IN SOCIOLOGY* 143 (H.H. Gerth & C. Wright Mills eds., 1946)).

⁷⁵ Brian Tamanaha has argued that there never existed a purely formalistic understanding of legal discourse. See Brian Z. Tamanaha, *The Combination of Formalism and Realism*, Washington University in St. Louis, Research Paper No. 17-03-01, 2017).

⁷⁶ The Supreme Court approved an agency’s individualizing broad norms in a case-by-case manner, even where no prior general rules existed in *Chenery II*. See *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). The dissenters, including Justices Jackson and Frankfurter, thought this to be “administrative authoritarianism” violative of due process for an agency to proceed in much the way a common law court might. In another context, Justice Scalia sought to avoid the conclusion that executive administrators “legislate” by conceding that there is an element of law creation in the act of decision in individual cases, whether it occurs in what would more commonly be viewed as adjudication or not. See *Mistretta v. United States*, 488 U.S. 361 (1989) (Scalia, J., dissenting). For an attempt to impose the discipline of common

developments is, to some extent, obscure. They involve a kind of nominalism about common linguistic categories and the legitimacy of existing distributions, leading to consequentialist evaluations of governmental activity. Unger will eventually say that “[t]he welfare trend in postliberal society moves the rules of law back in the direction of bureaucratic law.”⁷⁷

Unger’s account of the discontinuity between the implicit claim of the legal order to act impartially and the claim of bureaucratic law to act in the public interest and the underlying multiplicity of interests in many ways parallels Alasdair MacIntyre’s account of the inevitably strained and unprincipled policies in any modern state. MacIntyre is notoriously unenthusiastic about modern pluralism. The notion that “political authority is justified in so far as it provides a secure social order within which individuals may pursue their own particular ends, whatever they are[,]” a “conception at once individualist and minimalist,” is dangerous, because it will be rational to be a free rider and because this kind of society may not “provide adequate justification for the kind of allegiance that a political society must have from its members, if it is to flourish.”⁷⁸ He ends his account in *After Virtue* with a stark dichotomy between a traditional society structured by Aristotelian internal norms or one ruled solely by the will to power. In other essays, he has argued that our society is in essence the latter and that Aristotelian principles are unavailable to us.⁷⁹

MacIntyre is impressed as well by the “exceptional degree of compartmentalization” imposed by the structure of advanced Western countries.⁸⁰ One consequence is that “norms governing activities in any one area are specific to that area.”⁸¹ Thus a “[c]ompartmentalized society imposes a fragmented ethics.”⁸² His broader view of modern societies draws out the consequences for the character of politics of Unger’s agonistic view of politics:

Modern states retain the allegiance of those heterogeneous,
overlapping and sometimes competing social groups to which

law courts on at least formal agency adjudication, see *LeMoyné-Owen Coll. v. NLRB*, 357 F.3d 55 (D.C. Cir. 2004).

⁷⁷ LMS, *supra* note 4, at 238.

⁷⁸ ALASDAIR C. MACINTYRE, *Politics, Philosophy and the Common Good*, in THE MACINTYRE READER, 235–52, (Kelvin Knight ed., 1998).

⁷⁹ ALASDAIR MACINTYRE, *Theories of Natural Law in the Culture of Advanced Modernity*, in COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW 91–115 (Edward B. McLean ed., 2000). MacIntyre argues that on a Thomistic view “all positive law that conforms to what reason requires by way of justice – and only laws that conform to reason and justice” are true law and that all plain persons are in agreement as to the fundamental of law and morals. But no fact seems plainer in the modern world than the extent and depth of moral disagreement, often enough disagreement on basic issues ... [W]e should not expect those older conceptions of natural law to continue to flourish in the modern world. And they do not. What we find instead, for the most part, are very different theories of natural law, theories that have come to terms in greater or less degree with cultural modernity.

Contemporary forms of natural law, Moore’s or Weinreb’s for example, deprive appeals to natural law of what was two central features, features that gave such appeals their distinctive point and purpose. What the natural law was held to provide was a *shared* and *public* standard by appeal to which the claims of particular systems of positive law to the allegiance could be evaluated. But a shared and public standard, of this kind, must be one that is able to secure widespread, if not universal rational assent. Contemporary forms of natural law do not achieve that kind of assent.

⁸⁰ MACINTYRE, *supra* note 78, at 235.

⁸¹ *Id.*

⁸² *Id.*

their subjects belong by negotiating temporary settlements with those groups ... [They] have to adopt a range of varying and sometimes incompatible stances, appealing to different and sometimes incompatible values, here giving market considerations an overriding value, there denying them this weight, here accepting governmental responsibility for this or that aspect of social life, there disowning it, here expressing respect for custom and tradition, there flouting them in the name of modernization... A willingness to break promises and to shift positions has become, not a liability, but one aspect of what in the social life of modernity is accounted the chief of virtues, adaptability.⁸³

Political outcomes are “determined by shifting coalitions of interest and power with the limits set by and for those elites who determine—although not at all at will—the range of choices confronting governments.”⁸⁴ There are few forums in which “substantive issues concerning ways of life” can be debated in any sustained and serious ways.⁸⁵ Though, the apparently neutral determinations of liberal government “undermine some [forums] and promote others.”⁸⁶ MacIntyre thus concludes that “local arenas are now the only places where political community can be constructed, a political community very much at odds with the politics of the nation-state.”⁸⁷

The autonomy and generality ideals become implausible to the extent that the range of *relevant* facts, facts reflecting “numerous and inchoate interests,” is understood to increase.⁸⁸ The system faces a Hobson’s choice between an intuitively attractive flexibility and discretion in applying general standards or an unattractive “petrification” that reduces standards to rules.⁸⁹ Purposive legal reasoning introduces flexibility based on variations in the factual context and the instrumental means concretely available to achieve the law’s perceived purpose. “Hence, the very notion of stable areas of individual entitlement and obligation, a notion inseparable from the rule of law ideal, will be eroded.”⁹⁰ The attempt to achieve a refined substantive justice, for example, by expanding the range of excuses available to a criminal defendant based on “judgments about particular persons and individual situations,” also will “resist statement as rules.”⁹¹ The

⁸³ *Id.* at 245.

⁸⁴ *Id.* This view is consistent with his general view that modern Western societies “are oligarchies disguised as liberal democracies” where the “large majority of those who inhabit them are excluded from membership in the elites that determine the range of alternatives between which voters are permitted to choose.”

⁸⁵ *Id.*

⁸⁶ *Id.* at 238.

⁸⁷ *Id.* at 248.

⁸⁸ *Id.*

⁸⁹ See HANNAH ARENDT, *ORIGINS OF TOTALITARIANISM* 302 (1973) (“No doubt, whenever public life and its law of equality are completely victorious, where a civilization succeeds in eliminating or reducing to a minimum the dark background of difference, it will end in complete petrification and be punished, so to speak, for having forgotten that man is only the master, not the creator of the world.”).

⁹⁰ LMS, *supra* note 4, at 198.

⁹¹ *Id.* at 199. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 139–41 (2011). Stuntz celebrates the vagueness of the legal standards applied by *juries* in the early twentieth

autonomy of the rule of law ideal is likewise eroded by broader standards that invite invocation of “the technician’s conception of efficiency or the lawman’s view of justice” and so legal discourse “approaches that of common place political or economic argument” which is “characterized by the predominance of instrumental rationality over other modes of thought.”⁹² “Courts begin to resemble openly first administrative, then other political institutions” which, in turn, erodes the difference between lawyers and other bureaucrats or technicians.”⁹³ All these developments contribute to reducing the appeal of the distinctive ideals of generality and autonomy in the law.

The rise of the corporate state also serves to qualify the ideals of the rule of law by effacing the boundaries between “state and society, and therefore between the public and the private realm.”⁹⁴ Administrative, corporate, and labor law “merge into a body of social law that is more applicable to the structure of private-public organizations than to official conduct or private transactions.”⁹⁵ Private organizations themselves become more bureaucratized to achieve the power that bureaucratization confers and allows them to exercise sometimes “decisive influence over government agencies.”⁹⁶ And the concrete “[l]aw of institutions is a law compounded of state-authored rules and of privately-sponsored regulations or practices; its two elements are less and less capable of being separated.”⁹⁷ Unger concludes in the speculative hope that the corporatist and communitarian themes in post-liberalism undermine bureaucratic law and open the “way for the return to the custom of each group as the fundamental and almost exclusive instrument of social order.”⁹⁸

Central to legal modernity, then, is a development away from formalism⁹⁹ and toward other doctrines more responsive to the ideals of equity and solidarity, notions the formalist distrusts because liberalism assumes that “all moral judgments are subjective even if they are widely shared.”¹⁰⁰ Purposive legal interpretation creates an unstable compromise, resolving none of the underlying

century. *See also* CHARLES TAYLOR, *A SECULAR AGE* 704–07 (2007). Taylor offers an account of why any normative view cannot be reduced to rules.

⁹² LMS, *supra* note 4, at 199. The threatened dominance of instrumental rationality over all other modes of thought in modern society is a central theme of both Alasdair MacIntyre and Charles Taylor, though Taylor seems to accept a greater *modus vivendi* with objectivizing and instrumental modes of thought as elements of the modern identity. TAYLOR, *supra* note 1, at 499–502. MacIntyre is distressed that there exist no common measures to evaluate the relative importance of competing values in modern society.

⁹³ LMS, *supra* note 4, at 200.

⁹⁴ *Id.* at 201.

⁹⁵ *Id.*

⁹⁶ *Id.* at 202. *See also* ROGER G. NOLL, *REFORMING REGULATION* 46 (1971) (articulating that the fear of “capture” of agencies by regulated parties has been, of course, one of the driving forces in American administrative law).

⁹⁷ LMS, *supra* note 4, at 202.

⁹⁸ *Id.* at 238.

⁹⁹ *Id.* at 204 (“A system of rules is formal insofar as it allows its official or nonofficial interpreters to justify their decisions by reference to the rules themselves and to the presence or absence of facts stated by the rules, without regard to any other arguments of fairness or utility.”). He concedes that formalism is a matter of degree. *Cf.* SCHAUER, *supra* note 57, at 93–100 (making an account similar to Unger’s, though emphasizing the contrast between justification by appeal to rules, not to broader notions of fairness or utility, but rather than to the purposes the rules themselves were designed to achieve). *See also* LMS, *supra* note 4, at 204.

¹⁰⁰ LMS, *supra* note 4, at 205.

issues. Unger *seems* to suggest that the tension between formalism and equity reflect ever-present conflicts within legal traditions, rather than as one specific to modernity. Unger's view of *procedural* justice is largely Weberian, where that form of justice is an attempt to qualify the results of naked arms-length bargaining or power politics by strengthening one of the participants, leading to distributive consequences, though without directly mandating substantively just outcomes.¹⁰¹ Unger also provides a list of the ways in which basically formal legal systems may at least nod in the direction of broader moral or political goals. In particular, "technical legal doctrines developed and applied thought adjudication"¹⁰² probably under the equal protection clause, may have a limited role in recognizing "both comparative fault and relative need"¹⁰³ and attacking the "problem of domination at its core."¹⁰⁴ They implicitly reject modern notions of the subjectivity of value and "insist on judging the moral quality of social relations."¹⁰⁵ The continuing appeal of hard law under modern conditions stems from both unavoidable free-rider problems and a deeper reason: "[i]n modern society, in which much of religion and morals are seen as prerogatives of individuals' conscience, law is the preeminently collective order," one that can respect the authority of moral standards over concrete social life.¹⁰⁶ Conceding the Hegelian point that there cannot be too great a discontinuity (though it is healthy that there be some), between the "modes and motives of ordinary conduct" and public law, Unger urges that the tension be thought of as within public law, not in the typically modern imaginary of discontinuity between private morality and the norms applicable to public institutions.¹⁰⁷ Unger then tells the dark story of the death of formality in Weimar Germany and the "high risks critical intelligence runs when it attacks the idea of positive law on behalf of an ideal of self-governing community."¹⁰⁸

There exist, then, a number of questions about the way forward for a modern postliberal order:

Do these events suggest a return to the near exclusive primacy of custom? Or do they point the way to a novel kind of normative order? Do they irremediably compromise liberalism's cherished ideals of freedom and of the capacity to distinguish critically between what ought to be and what is? Or do they accommodate these ideals with a broader vision that also embodies the claims of community and of the sense of

¹⁰¹ See BERNSTEIN, *supra* note 74, at 47 (elaborating that consistent with his value skepticism, Weber tends to regard all procedures only in light of their distributive consequences).

¹⁰² LMS, *supra* note 4, at 212.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 213. Unger wrote these words in 1976. His hopes on this score have not been realized in the United States. As he feared, such legal theories have remained "isolated in a politically inhospitable atmosphere."

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 215–16.

¹⁰⁸ *Id.* at 220. His reflections are consistent with what can only be called Arendt's reverence for the rigidity of law, something that places "hedges" between persons that make public freedom possible. As Unger puts it, in Germany "[t]he ideology of corporatist union became a pretext for unchecked bureaucratic dictatorship."

participation in a natural order permeating society and the entire world?¹⁰⁹

Unger envisions two broad possibilities. The first is a kind of contraction of the historical development he described, in which the rule of law ideal, closely allied with the notion of individual freedom, and bureaucratic law, associated with the notion that social arrangements can be understood and changed, both recede. The former development may threaten individual freedom and may portend a kind of conservative or tribal fatalism. The other possibility is more hopeful, perhaps utopian, and envisions an upward spiral in which a higher reconciliation of conflicting perspectives can take place. Freedom is reconciled with community, on the one hand, and an understanding that we create our social world¹¹⁰ is “reconciled with the sense of an immanent order in society.”¹¹¹ Moving beyond bureaucratic law and the rule of law ideal could occur only after a number of unlikely developments: a lessening of inequality which would be the social precondition for an emerging consensus on matters of justice that is reliably perceived as reflecting a “moral foundation” that is not an ideological expression of dominant groups. Even such a consensus would have to retain the openness to the future through its own continual revision through “the conflictual process by which communities are created over time.”¹¹²

Such a reconciliation of immanent order and transcendent criticism would imply a greater replacement than we could now comprehend of bureaucratic law or the rule of law by what in a sense could be called ‘custom.’ This customary law would have many of the marks we associate with custom: its lack of a positive and a public character and its largely emergent and implicit quality. Yet it would differ from custom in making room for a distinction between what is and what ought to be. It would become less the stable normative order of a particular group than the developing moral language of mankind.¹¹³

Currently, in post-liberal society, the three kinds of law all exist and interpenetrate each other. There exists (1) a sphere of blackletter law where the distinctive conventions of the legal profession dominate, (2) a sphere of bureaucratic law¹¹⁴ where an administrative elite employs what may fairly be called policy sciences, and (3) a background that reflects “the inchoate sense of equity and solidarity.”¹¹⁵ The last, he tells us, in a less unequal society, could be “the primitive form taken by “the struggle to discover a universal given order in

¹⁰⁹ *Id.* at 221.

¹¹⁰ See DAVID LUBAN, LEGAL MODERNISM 51–92 (1994).

¹¹¹ LMS, *supra* note 4, at 239.

¹¹² *Id.* at 241.

¹¹³ *Id.*

¹¹⁴ *Id.* These spheres do not neatly align with the institutional division between courts and agencies. Courts can employ instrumental methods and agencies aspire to more traditional adjudication.

¹¹⁵ *Id.*

social life.”¹¹⁶ In a manner reminiscent of Fuller, he tells us that this is the natural home of the lawyer:

The search for this latent and living law—not the law of prescriptive rules or of bureaucratic policies, but the elementary code of human interaction—has been the staple of the lawyer’s art wherever this art was practiced with the most depth and skill. What united the great Islamic ‘ulama’, the Roman jurisconsults, and the English common lawyers was the sense they shared that the law, rather than being made chiefly by judges and princes, was already present in society itself. Throughout history there has been a bond between the legal profession and the search for an order inherent in social life. The existence of this bond suggests that the lawyer’s insight, which preceded the advent of the legal order, can survive its decline.¹¹⁷

Note that his examples are largely pre-modern, but he is describing here a future that would occur *after* modernity’s destructive effects on the rule of law ideal. And so, this has to be speculation, a projection of perceived trends. It may turn out that the future remains like the present, a directionless tension among the legal order, bureaucratic law and custom.

Unger ends by returning to issues of social *theory*. The “problems of method, order, and modernity are closely connected.”¹¹⁸ He calls for an interpretive social science that explains by placing elements of social life within the meaningful wholes that confer significance to the “logic of situations.”¹¹⁹ He argues that this is the most appropriate method for the study of law, because “[a] society’s law constitutes the chief bond between its culture and its organization; it is the external manifestation of the embeddedness of the former in the latter.”¹²⁰ It treads a middle path between behaviorism and idealism. It yields a view that attempts to synthesize “the doctrine of private interest and consensus, and hence between the instrumental and non-instrumental view of rules.”¹²¹ (The latter focuses on their legitimacy.) The natural home of the latter is customary law; its theoretical *and* practical limitation is addressing conflict and change, where they inevitably occur.

The doctrine of private interest is most applicable to liberal society, and more generally, to those aspects of modernity characterized by the antagonism of individual ends and the felt

¹¹⁶ *Id.* at 242.

¹¹⁷ *Id.* Recall that by “the legal order,” Unger means only the modern rule of law ideal.

¹¹⁸ *Id.* at 243.

¹¹⁹ KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 60 (1960). This recalls at a theoretical level the “situation sense” that the Realists claimed to guide lawyers and judges in making concrete decisions. See generally HANNA PITKIN, *WITTGENSTEIN AND JUSTICE* 241–86 (1972) (providing an insightful treatment of the issues surrounding the connection of interpretive to causal explanation).

¹²⁰ LMS, *supra* note 4, at 250–51. This is most obvious in customary law where we find “tacit standards of right that are actual patterns of conduct” that “stamp a meaning on every act committed in obedience to them or in violation of them.”

¹²¹ *Id.* at 262.

illegitimacy of consensus. The social situation it portrays are those that serve as the settings for an imposed bureaucratic law or for an allegedly impartial legal order.¹²²

The theories justifying liberalism have difficulty accounting for social stability and cohesion and liberal societies experience their arrangements as fragile and sometimes illegitimate. Liberalism is thus “the form of social life that most depends on impersonal rules, yet it is the one least able to shape and apply them.”¹²³ When consensus fails, both bureaucratic law and the legal order lack the resources to address the crisis. That is because both individuality and sociability of persons are basic attributes of persons that cannot completely be suppressed. What is the utopian solution? “A society resolves the crisis of order insofar as it manages to reconcile individual freedom with community cohesion, and the sense of an immanent order with the possibility of transcendent criticism.”¹²⁴

He rejects the account of modernity offered by liberalism, that of “an association of individuals who have conflicting ends and whose security and freedom are guaranteed by the rule of law”¹²⁵ and the competing Marxist account of class struggle masked by ideology and false consciousness. Liberal modern society denies “both community and immanent order and is therefore best described by the doctrine of private interest.”¹²⁶ Post-liberal modern society, embodied in the welfare state, is “obsessed ... with the reconciliation of freedom and community.”¹²⁷

This alliance is part of a broader responsibility; the sense of a latent natural order in social life must be harmonized with the capacity to let the will remake social arrangements. To achieve this reconciliation, and thereby to work toward the ideal of a universal community, is the great political task of modern societies.¹²⁸

Unger ends with a respectful acknowledgement that the great modern social theorists’ assault on metaphysics, with its speculative illusions, and politics, with the variation of political judgment, was partially successful. Now, however, the task is to travel back in the opposite direction: social theory must become both metaphysical and political. Metaphysical, because to solve its own problems, it must embrace understandings of knowledge and human nature of which a rigorously scientific account will never give. He concedes that we do not have

¹²² *Id.* at 263.

¹²³ *Id.* at 264.

¹²⁴ *Id.* See generally JAMES HOOPES, COMMUNITY DENIED: THE WRONG TURN OF PRAGMATIC LIBERALISM (1998) (forgiving an account, based on Peirce’s philosophy, one that is friendly to modern science and is both epistemologically realist and defeasible).

¹²⁵ *Id.* at 266.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

such a metaphysics.¹²⁹ Political, because there is inevitably a dialectic between political events and our social understanding, and description can never be fully separated from evaluation. We do not yet have such a politics. As Clifford Geertz put it with regard to explanation: insight comes from a “continuous dialectical tacking between the most local of local detail and the most global of global structures in such a way as to bring them both into view simultaneously.”¹³⁰ Unger puts it this way: “For surely it is true of social theory as of other branches of knowledge that the deepest insight is likely to be gained when one is in passage from a more general to a more particular perception, or from the particular to the general.”¹³¹

Unger has set out a global account of modern law and linked the most dramatic features of contemporary law to the social background and to the intertwined philosophical issues. He demonstrates the appeal of legal formalism in a liberal, interest group world, the pervasive limitations of its claim to autonomy from the underlying political conflicts, and the dangers inherent in its decline. He shows how the second coming of bureaucratic law¹³² is rooted in the limitations of formalism. Finally, Unger provides a picture of modernity characterized by a pervasive belief in the subjectivity of value intertwined with a pluralism of social groups and interests. He ends with an argument that only a transformed politics and a not yet existent metaphysics would provide the way forward.

¹²⁹ *Id.* at 261 (His “conception of the relationship between human nature and history could be fully worked out only with the help of a metaphysics we do not yet possess.”).

¹³⁰ Clifford Geertz, “From the Native’s Point of View”: *On the Nature of Anthropological Understanding*, 28 BULL. AM. ACAD. ARTS & SCI. 26, 43 (1974).

¹³¹ LMS, *supra* note 4, at 267–68.

¹³² See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1249 (1994).