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## STUDENT COMMENTS

### CRITICAL LEGAL BISHOPS: ROBERTO UNGER, THE CATHOLIC BISHOPS AND DISTRIBUTIVE JUSTICE

GERARD F. POWERS\*

The second draft of the bishops' pastoral letter on the economy calls for a new "experiment in securing economic rights."<sup>1</sup> The bishops assert that "economic rights should be granted a status in the cultural and legal traditions of this nation analogous to that held by the civil and political rights to freedom of religion, speech, and assembly."<sup>2</sup> This assertion of the importance of economic rights provides substance to the normative demands of a "preferential option for the poor."<sup>3</sup> While it has descriptive and hortatory meaning,<sup>4</sup> as a principle of distributive justice,<sup>5</sup> the option for the poor gives

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1. National Conference of Catholic Bishops, *Catholic Social Teaching and the U.S. Economy* (Second Draft) para. 96, reprinted in 15 ORIGINS 257 (1985) [hereinafter cited as Second Draft].

2. *Id.* para. 85. The bishops are less concerned with precisely *how* rights are guaranteed than they are that a libertarian ideology that rejects the notion that human rights include economic rights be put to rest. *Id.* para. 86.

3. *Id.* paras. 59, 88-94.

4. An option for the poor is descriptive in referring to the Church's institutional commitment to work with and minister to the poor. It is hortatory in calling for two forms of Christian charity. The first, voluntarism, calls for donations of money, time and talent to those in need. *Id.* para. 116. The second, asceticism, calls for both a voluntary poverty that is a sign of solidarity with the poor and a voluntary renunciation of legal rights that prevents equality before the law from becoming a guise for exploitation and discrimination. *Id.* para. 89.

5. *Id.* para. 88. Professor Rodes argues that the preferential option for the poor is an "ascetic principle," rather than a moral one: "[I]t would seem that in theory anyone who does impartial justice between rich and poor is doing all that moral philosophy can ask. On the other hand, experience teaches that if we set out to be impartial between rich and poor we will end up favoring the rich. . . . As Pope Paul II (sic) reminds us:

If, beyond legal rules, there is really no deeper feeling of respect for and service to others, then even equality before the law can serve as an excuse for flagrant discrimination, continued exploitation and actual contempt.

priority to meeting basic necessities<sup>6</sup> and increasing the participation of the poor in economic life.<sup>7</sup>

Some claim that the bishops' specific policy proposals designed to protect economic rights reflect their liberal Democratic backgrounds more than their holy offices.<sup>8</sup> This article argues, however, that any apparent partisanship reflected in their practical proposals derives not from any Democratic agenda, but rather from religious and ethical principles that call into question important aspects of the American economic, social and legal system. In particular, these religious and ethical principles reflect a theory of distributive and economic justice that is in considerable tension with the classical liberal tenets of much of mainstream jurisprudence in the United States today. This tension suggests the need to develop an alternative jurisprudence—an American Catholic jurisprudence. Such a jurisprudence will enable the bishops and the Catholic laity more coherently and credibly to promote and engage in dialogue concerning the development of legal principles and legislative programs designed to protect economic rights.<sup>9</sup>

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In other words, we are faced with a paradox. The preferential option for the poor is not a principle of justice, but we cannot hope to do them justice without it." R. Rodas, paper presented at University of Santa Clara (February 23, 1985) (unpublished manuscript).

Two points should be made here. First, the notion that equality before the law can be a mask for and means of maintaining inequality and injustice is a common theme of Unger and other critical legal scholars. Second, the bishops would not accept Rodas' assertion that the option for the poor is *not* a principle of justice or morality. They see it as a matter of charity, like Rodas, but also as a matter of distributive justice, arising out of need, community or restitution for past injustices. Second Draft, *supra* note 1, paras. 76-77.

6. Second Draft, *supra* note 1, paras. 78, 92. For the most detailed list of specific rights, see John XXIII, *Peace on Earth (Pacem in Terris)* nos. 11-27 (1963); John Paul II, *On Human Work (Laborem Exercens)* nos. 18-19 (1981).

7. Second Draft, *supra* note 1, para. 93.

8. See, e.g., Greeley, *The Bishops and the Economy: A "Radical" Dissent*, AMERICA Jan. 5-12, 1985, at 19; Greenwald, *Am I My Brother's Keeper?*, TIME, Nov. 26, 1984, at 80, 82; Hitchcock, *Two Views on the Economy*, CATHOLICISM IN CRISIS, Feb. 1985, at 7, 9; Spaeth, *Relying on Government*, CATHOLICISM IN CRISIS, Feb. 1985, at 12. In fact, the bishops' failure to critique capitalism in a more explicit and radical manner, in contrast to Unger's "total critique" of the liberal ethos, might be explained as the difference between a *merely* holy office and an endowed chair.

9. This article does not attempt to establish the need for an American Catholic jurisprudence nor does it outline what such a jurisprudence might look like. Some brief points are in order, however. First, the pastoral

This article suggests that the critical legal studies movement (CLS),<sup>10</sup> particularly as represented by Roberto Unger's jurisprudence,<sup>11</sup> provides a somewhat unlikely but potentially fruitful source for the development of this American Catholic jurisprudence. Unger, one of the founders of the critical legal studies movement, criticizes basic tenets of classical liberalism and calls for a revamping of American law that would include the recognition of basic economic rights.<sup>12</sup> In-

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letter and previous NCCB documents suggest, implicitly and explicitly, numerous *legal* reforms. See, e.g., Second Draft, *supra* note 1, paras. 80, 199 (progressive taxation); *id.* para. 210 (national eligibility standards and a national minimum benefit level for public assistance); *id.* para. 291 (plant closing legislation). See generally PASTORAL LETTERS OF THE UNITED STATES CATHOLIC BISHOPS 1792-1983 (H. Nolan ed. 1984); J. BENESTAD, THE PURSUIT OF A JUST SOCIAL ORDER: POLICY STATEMENTS OF THE U.S. CATHOLIC BISHOPS, 1966-80 (1982). Such reforms, however, are not derived from a systematic analysis of legal doctrines or jurisprudential theories. For example, the pastoral letter cites to few legal sources and was written with little input from legal scholars or practitioners. Second, a systematic jurisprudence is necessary if the bishops or lay Catholics are to engage in a credible reading of the "signs of the times," that is, are to do competent social and legal analysis. The idea of an "option for the poor," for example, cannot be discussed without an understanding of its relationship to equal protection analysis. Third, law is an important language of society and has a significant educative function. The bishops must be able to translate general ethical principles into legal terms if the social teachings are to be understood, respected, and effective. The relationship between economic and legal rights is unclear in the pastoral letter—and in the Church's social teachings generally—causing considerable confusion. The bishops' call for the development of a cultural consensus that the poor have economic rights cannot be discussed intelligently without analyzing the role of law in developing and effectuating such a consensus.

10. For an overview of the critical legal studies movement, see Note, *Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669 (1982).

11. See R. UNGER, KNOWLEDGE AND POLITICS (1975) [hereinafter cited as KNOWLEDGE]; R. UNGER, LAW AND MODERN SOCIETY (1977) [hereinafter cited as LAW]; R. UNGER, PASSION (1984) [hereinafter cited as PASSION]; Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983) [hereinafter cited as CLS].

12. Unger's project is to explore "the impoverished assumptions of contemporary jurisprudential practice" by reimmersion in philosophy. Hutchinson & Monahan, *The "Rights" Stuff: Roberto Unger and Beyond*, 62 TEX. L. REV. 1477, 1478 (1984). According to Hutchinson and Monahan, "Unger's relation to the dominant tradition in contemporary philosophy is ambiguous. He is obviously an unstinting and resolute critic of modern liberalism . . . Yet, in seeking to displace contemporary liberal thought, Unger offers a reconstituted 'superliberalism' that pushes liberal premises about freedom and liberation to their outermost limits." *Id.* at 1493.

Admittedly, Unger is less concerned than the bishops with specific issues of distributive and social justice. Nevertheless, distributive issues play, at

terestingly, Unger, who has been called the "Christ figure" of CLS,<sup>13</sup> claims that his allegedly radical jurisprudence<sup>14</sup> is, in fact, "very Catholic."<sup>15</sup>

While this article arises from the perceived need to develop a jurisprudence compatible with the Church's social teachings, particularly those relating to economic rights and distributive justice, it is not a jurisprudential article in any strict sense. It intends only to analyze the framework, the most basic theoretical issues, on which the bishops and Unger must agree if Unger's jurisprudence is to be valuable to those interested in relating Catholic social teachings to American law. Fortunately, this limited project fits well with the bishops' and Unger's own concerns. Both the bishops and Unger suggest that a revision of liberal democratic theory is required.<sup>16</sup> Both are more interested in a theoretical critique of the American legal and economic system than they are with specific policies or practices.

This article is limited, therefore, to a comparison of the bishops' and Unger's respective theories of distributive justice, particularly as they relate to the right to basic necessities. Due to the breadth of this comparison, it will not attempt to provide any systematic critique of their positions. For the same reason, even the description and comparison of their theories will be necessarily brief. Such a sketch, however, shows that, while they diverge at important points, they converge on several principles underlying their theories of

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least implicitly, an important role in Unger's work, but they certainly are not his major concern.

13. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 416 (1984).

14. One legal scholar has suggested that Unger and other critical legal scholars are "unassimilable and irritating foreign substances in the body of the law school." Posner, *The Present Situation in Legal Scholarship*, 90 YALE L. J. 1113, 1128 (1981).

15. Kronman, Book Review, 61 MINN. L. REV. 167, 200 app. (1976).

16. The tone of the second draft is more positive than the first, and even the first draft only hinted at any systematic critique of the liberal democratic ethos. See National Conference of Catholic Bishops, *Catholic Social Teaching and the U.S. Economy* (First Draft) paras. 82-83, reprinted in 14 ORIGINS 337 (1984) [hereinafter cited as First Draft]. Nevertheless, particularly to the extent that the U.S. economy is based on primarily individualistic and utilitarian values associated with classical or neo-classical liberal economic theory, this critique is implicit in both the first and second drafts of the pastoral letter. For a more detailed explanation of this point, see *infra*, notes 19-30, 53-62 and accompanying text. Unger's entire project is to provide this "total critique" of liberal theory. See KNOWLEDGE, *supra* note 11, at 2-3.

distributive justice. These areas of common understanding warrant further exploration of their overall compatibility.

Part I analyzes the theory of distributive justice and its relation to the common good implied by the bishops' and Unger's theories of economic rights. It suggests that the bishops and Unger begin with a shared understanding of the social aspects of human nature and the conception of the common good as distinct from the mere sum of individual interests. More particularly, they share deep theories of human dignity and community that explain the priority of the right to basic necessities, the importance of participation as both an instrumental and substantive norm, the qualified nature of property, and the relationship between the principle of need and economic equality. Despite these general convergences, in contrast to the bishops' largely objective specification of the demands of distributive justice, Unger's skepticism leads him to rely far more on moral intuition and moral consensus as normative for the social order. Furthermore, Unger is considerably more egalitarian than the bishops, due to his close linkage of knowledge of the good and human development to economic, social and political domination.

Part II relates the bishops' and Unger's theories of distributive justice to their theories of the proper role of government. The bishops and Unger converge to the extent that they stress subsidiarity, or its equivalent, encourage forms of economic democracy, recognize the importance of the political in human nature, and challenge minimalist theories of government that deny its important moral function in taking positive action to ensure distributive justice. They diverge, however, to the extent that Unger is willing to institutionalize economic rights, open nearly all of life to political conflict, and regularly destabilize the social, economic, and legal order.

## I. ECONOMIC RIGHTS AND DISTRIBUTIVE JUSTICE

The bishops' and Unger's concern with economic rights may be understood in the context of their broader theories of distributive justice. Underlying their theories of distributive justice, in turn, are two more fundamental theories that correspond to the individual and social aspects of human nature: the theories of human dignity and transcendence and the theories of community. Their interpretations of these theories of individual human dignity and community are re-

flected in their positions on the more concrete issues of distributive justice that define their theories of economic rights. Three of these issues are particularly important: the right to basic necessities and its relation to property rights generally; the question of human perfection; and the relationship between economic equality and community.

### A. *Fundamental Theories*

#### 1. The Bishops

The bishops' theory of distributive justice begins with the broader concept of the common good. The Second Vatican Council defined the common good as "the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment."<sup>17</sup> The common good evaluates social and economic structures first in terms of their ability to promote human dignity, and second in terms of human solidaristic equality. Therefore, the bishops' conceptions of human dignity and solidarity constitute the foundations, the fundamental theories, underlying their theory of distributive justice. Both start from the basic proposition that human dignity and social solidarity are inseparable. Because they are inseparable, collaboration and mutual interdependence, not conflict or individualism, are necessary to achieve the common good.

#### a. Human Dignity

The first theory defines the common good as the consciously developed complex of structures and organizations that facilitate realization of human dignity.<sup>18</sup> The important aspect of this focus on individual human dignity, and the corresponding human rights and duties, is that, unlike more libertarian notions of rights, it is grounded, not only in the equal dignity of the individual before God, but also in the transcendent dignity of the individual as a member of the human community, that is, as a social being.<sup>19</sup> Therefore, the

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17. Second Vatican Council, *Pastoral Constitution on the Church in the Modern World (Gaudium et Spes)* no. 26 (1965) [hereinafter cited as *Gaudium et Spes*].

18. D. HOLLENBACH, *CLAIMS IN CONFLICT* 55 (1979) ("Pius XI's use of the notion of social justice . . . indicates the emergence of a new sensitivity in Catholic thought to the possibility of conscious institutional change.")

19. The bishops' notion that, to a significant degree, rights are derived from and realized in community differs from the liberal notion that

bishops' theory of human rights is based on the relational quality of human dignity; human rights and thus human dignity are realized and protected only by nurturing and strengthening the bonds of solidarity.<sup>20</sup> Certain human rights are inviolable, but not in an individualistic or libertarian sense. Rather, human rights are realized only in a moral community of mutual interdependence; instead of claiming rights *against* other individuals or against the community, one realizes individual human rights by building and reinforcing community. At the same time, building active participation in community is a primary reason to protect individual rights.<sup>21</sup> Therefore, it is the right to a minimum level of participation as a member of a community that is the foundation of the right to basic necessities, to meaningful work, and to other

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rights are derived from individual autonomy and realized *against* others or the state. This does not mean that the bishops ignore the Hohfeldian truism that all rights must have corresponding duties. The bishops do outline the various duties of different societal actors. See Second Draft, *supra* note 1, paras. 97-122. The bishops differ with liberalism, however, in their recognition that rights can be protected only if all persons participate to some degree in forming a moral community that promotes the common good. Like liberalism, one has rights because one is an individual human being; unlike liberalism, one has rights also because one is a member of the community. *Id.* para. 76. It is in this sense that one has rights *in* community. Since liberalism denies the possibility of such a moral community and common good, rights take on a different, more individualistic character for it. See, e.g., R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974). The liberal notion of rights easily results in the disintegration, rather than the promotion, of community. Compare the discussion of individualistic versus communal notions of rights and the move away from rights language by many critical legal scholars, see *A Symposium: A Critique of Rights*, 62 TEX. L. REV. 1363 (1984). In particular, see *CLS*, *supra* note 11, at 597.

Unger parallels the bishops in viewing rights in terms of community. He argues that communal life, with its concern for mutual interdependence, is "incompatible" with the liberal conception of a right as "a loaded gun that the rightholder may shoot at will in his corner of town. Outside that corner the other licensed gunmen may shoot him down." *Id.* According to Unger, the rights and obligations arising out of mutual interdependence cannot be limited to "perfected acts of will (e.g., the fully formalized, bilateral executory contract) or the unilateral imposition . . . by the state," as in the liberal conception. *Id.* Alternatively, Unger proposes solidarity rights, "the legal entitlements of communal life," which would involve an expanded notion of good faith and reliance. *Id.* at 600. See also *infra* note 67 and accompanying text.

20. Christiansen, *Morality and Public Policy: Defining Domestic Priorities* 14 (unpublished paper presented at Third Annual Jewish-Catholic Dialogue on Social Policy, Univ. of Notre Dame, June 2-4, 1981).

21. Second Draft, *supra* note 1, para. 83; D. HOLLENBACH, *supra* note 18, at 65-68.



civil, political, economic, social and cultural rights.<sup>22</sup>

#### b. Human Solidaristic Equality

The theory of human solidaristic equality is related to this recognition of the social aspects of human dignity. Human solidaristic equality presents a theological reaffirmation of a communitarian ideal of social life, an ideal in direct tension with aspects of liberal individualism.<sup>23</sup> Liberal individualism ignores the social aspects of human nature. It fails to recognize the existence of a common good distinct from and greater than the sum of individual interests, but considers "social solidarities as more or less automatic consequences of individual initiatives, not as an aim and a major criterion of the value of social organization."<sup>24</sup> Human solidaristic

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22. D. HOLLENBACH, *supra* note 18, at 65.

23. The social welfare theory is a popular example of this liberal individualism. It views society as an artificial construct defined by the utilitarian balancing of individual interests. It derives from moral skepticism and rational egoism in the theory of knowledge and a primarily individualistic concept of human nature. Moral skepticism rejects the traditional Catholic concept of a universal and objective truth and adopts the notion of the individuality and subjectivity of knowledge. Communal values do not exist independently of the sum of individual interests or preferences. Ethical egoism asserts that one's primary moral obligation is to seek one's own advantage, whether identified with happiness or pleasure, with knowledge, power, or self-realization, or with altruism, defined as enlightened self interest. This skepticism and egoism leads to a search for neutral principles in decision-making: the market in economics, economic efficiency or procedural formalism in law, and the separation of powers in politics. *Morality*, *supra* note 20, at 8-10. The economic analysis jurisprudence is one of the more influential legal philosophies that is unabashedly based on a skeptical and egoistic epistemology. See, e.g., Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 85 (1985) ("Ethical arguments . . . provide rationalizations for ethical positions taken on emotional grounds." *Id.* at 90. For example, to Posner's "wealth maximizer, altruism is neither good nor bad . . ." *Id.* at 103). For a general discussion of moral skepticism and rational egoism, see W. FRANKENNA, *ETHICS* 17-20 (2d ed. 1973).

The Lay Letter adopts rational egoism, suggesting that "self-interest rightly understood" will lead the rich to assist the poor, and thereby result in the common good. Lay Commission on Catholic Social Teaching and the U.S. Economy, *Toward the Future: Catholic Social Thought and the U.S. Economy*, CATHOLICISM IN CRISIS, Nov. 1984, at 1, 18, 26 [hereinafter cited as *Lay Letter*]. Admittedly, the Lay Letter does not claim that this enlightened self-interest is a moral system; it claims it is only an economic system. In doing so, however, it either denies what it later asserts—that virtue is integral to and is actually promoted by capitalism—or it subsumes all notions of distributive justice into the realm of "heroic virtue" or charity. *Id.* at 17. The bishops would categorically reject both of these propositions.

24. Paul VI, *A Call to Action (Octogesima Adveniens)* no. 26 (1971).

equality suggests that "the controlling insight of the [Catholic] social doctrine is that socioeconomic developments ought to bring about community between social groups. Alternately, they ought not to increase the differences between them."<sup>25</sup> According to Drew Christiansen, in the last twenty years Catholic social teaching has encouraged the creation of social structures which "'form anew fraternal relationships' through a more equitable sharing of material goods and social resources."<sup>26</sup> *Populorum Progressio* specified "duties of solidarity," which enjoin those with power to use their resources to create a community with the poor, a community that is currently lacking given large differences in wealth and power in the world.<sup>27</sup> These duties of solidarity are elements of the Catholic concept of social justice.<sup>28</sup> The important insight here is that community is essential for human dignity, and this community is impossible without at least relative economic equality. Solidarity, which focuses on the material conditions necessary for this community, combines with charity,

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This criticism of excessive individualism is balanced with a recognition of the important role liberal individualism assigns to personal initiative and development as well as to civil and political rights. The bishops clearly recognize the importance of these values, *see, e.g.*, Second Draft, *supra* note 1, para. 85, but oppose the idealized and ideological liberal individualism, grounded in the 18th and 19th century classical writers, that ignores the social aspects of human nature. According to Paul VI, "at the very root of philosophical liberalism is an erroneous affirmation of the autonomy of the individual in his activity, his motivation and the exercise of his liberty." *Id.* at no. 35. Compare the analysis of individualism in American culture in R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWINDLER, S. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985).

25. Christiansen, *On Relative Equality: Catholic Egalitarianism After Vatican II*, 45 THEOLOGICAL STUD. 651, 655 n.6 (1984).

26. *Id.* at 654 (quoting Paul VI).

27. *Id.* at 663 (citing Paul VI, *On the Development of Peoples* (*Populorum Progressio*) nos. 43-55 (1967)).

28. Second Draft, *supra* note 1, para. 75. The social nature of man and the focus on participation grounds not only rights, but also duties. Individuals and institutions have a duty, arising out of social justice, "to organize economic and social institutions so that people can contribute to society in ways which respect their freedom and the dignity of their labor." *Id.* In other words, individuals have both a right and duty to participate in society, to work. Similarly, individuals and institutions have a duty of stewardship, by which the bishops mean that one "should regard one's lawful possessions not merely as one's own but also as common property in the sense that they should accrue to the benefit not only of oneself but of others." First Draft, *supra* note 16, para. 119 (quoting *Gaudium et Spes*, *supra* note 17, no. 69). Individuals also have duties of charity, which include a willingness, if need be, to renounce some of their rights for the good of others. *See supra* notes 4-5 and accompanying text.

which fosters personal and spiritual attitudes essential to community, to form a theological system by which to analyze society.<sup>29</sup>

## 2. Unger

Unger's theory of distributive justice reflects his larger project of forging a third way between liberal individualism and collectivism.<sup>30</sup> Unger parallels the bishops in grounding his theory of distributive justice in what he calls "authentic human nature."<sup>31</sup> He defines the common good as the social and political conditions that allow for "the manifestation and development of individual and universal human nature."<sup>32</sup> This notion of the common good, and the subsidiary theory of distributive justice, may be understood in terms of two more fundamental theories: the theory of human transcendence and the theory of a community of purpose. These theories correspond to the bishops' foundational theories of human dignity and solidaristic equality.

### a. Human Transcendence

Unger's theory of human transcendence rests on an epistemology and anthropology that are more skeptical and existential than the bishops' theory of human dignity. Rather than a notion of human dignity from which various fairly specific and objective universal human rights are derived, includ-

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29. Christiansen, *supra* note 25, at 665.

30. In criticizing liberalism, neither the bishops nor Unger suppose that the solution to liberalism's inadequacies is to turn it on its head and adopt its opposing principles. KNOWLEDGE, *supra* note 11, at 7. They do not dispense with liberalism's support of individual liberties. But both see this very strength of liberalism to be its major weakness. They seek to introduce other important values that liberalism either excludes or militates against, namely: a coherent notion of the individual and common good and a recognition of the social aspects of human nature.

31. Unger's theory of community is based on a number of crucial assumptions:

The first assumption is that there is a unitary human nature, though one that changes and develops in history. The second premise is that this human nature constitutes the final basis of moral judgment in the absence of objective values and in the silence of revelation. The third assumption is that there might be certain political conditions under which an ever more inclusive sharing of ends in space and time would carry weight as an indication of the nature of man.

*Id.* at 221.

32. *Id.* at 239.

ing the right to basic necessities, Unger's human transcendence embraces a subjectivity, relativity, and historicity that Catholic social teaching has only recently begun to recognize.<sup>33</sup> Because of this contingency, Unger speaks less in terms of a catalog of human rights and more in terms of the existential and subjective development of the individual.

Reflecting his skepticism, Unger's norm of human transcendence suggests that all social theories and practices limit human potential because all are socially and historically contingent and only partially reflect and enhance true human nature. According to Unger, it is not possible to fully ascertain either the normative demands of human nature or the social and political institutions that might approximate these demands.<sup>34</sup> Reflecting his existentialism, Unger asserts that all contexts can be broken because personality has an infinite quality that allows it "to transcend the limited imaginative and social worlds that it constructs."<sup>35</sup> But Unger's is a "soft"

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33. Unger specifically rejects traditional Catholic notions of objective value or intelligible essences. *KNOWLEDGE*, *supra* note 11, at 76-81; *CLS*, *supra* note 11, at 661. Noonan suggests, however, that, while Unger claims to reject intelligible essences, he brings them back in again by speaking of common purposes, which, Noonan claims, "is to consider the human essence under the aspect of final causality. To use human nature as a criterion requires an idea of what human nature is." Noonan labels this a "neo-Thomist" perspective. Noonan, Book Review, 21 *AM. J. JURIS.* 194, 198 (1976). *But see* Hutchinson & Monahan, *supra* note 12, at 1530, suggesting that Unger shares some aspects of a Marxist notion of human nature.

Noonan's conclusion is reasonable with respect to *Knowledge and Politics* but Unger's *Passion* and "The Critical Legal Studies Movement" indicate a more clearly skeptical position that is not neo-Thomist. While Unger distances himself from radical existentialism he admits to be closer to existentialism than to Aristotelianism, a foundation of Thomist thought. *CLS*, *supra* note 11, at 662.

Of course, the Thomist and neo-Thomist notions of objective value and an essential human nature have undergone significant reinterpretation. *See infra* note 56. Despite these developments, Unger is significantly more skeptical than the bishops. He embraces subjectivity, relativity, and historicity; the bishops tolerate them. But theological reinterpretations, such as Rahner's combination of essentialism and personalism (true human nature, the good, is discovered through individual freedom), resonate with Unger's brand of existentialism and may indicate a potential for convergence between the bishops and Unger. *See* J. GUSTAFSON, *PROTESTANT AND ROMAN CATHOLIC ETHICS* 92-93 (1978) (discussing Rahner's treatment of existentialist and essentialist ethics).

34. *PASSION*, *supra* note 11, at 48.

35. *CLS*, *supra* note 11, at 587. *See also* *PASSION*, *supra* note 11, at 8. Unger's context-transcending personality parallels the humanistic psychologists, such as Abraham Maslow, Carl Rogers, and Erich Fromm, who represent an alternative to psychoanalysis and behaviorism. Hutchinson &

skepticism and a qualified existentialism.<sup>36</sup> On the one hand, he claims that although social constructs are contingent, they must be preserved. On the other hand, he asserts that society must continually revise these social constructs in order to more fully develop human potential.<sup>37</sup> According to Unger, the preservation of existing arrangements provides insights which serve as the starting point for a fuller understanding of authentic human nature and a corresponding revision of social, economic and political institutions. In other words, human personality is both context-transcending and imaginative, but within a "stable context of allegiances."<sup>38</sup>

While the bishops are foremost concerned with revising institutions to meet basic needs and other prerequisites for human dignity, Unger is more concerned with meeting basic needs and establishing greater economic equality so that the

Monahan, *supra* note 12, at 1535.

36. Unger does not accept the skeptical notion that all values are merely individual and subjective. KNOWLEDGE, *supra* note 11, at 102. According to Unger, pure subjectivity of value does not correspond with human experience, an experience that he claims is reflected in continuing moral and political controversy over objective truth and that is known through "reflective self-scrutiny." PASSION, *supra* note 11, at 3. This "reflective self-scrutiny" seeks to avoid indeterminacy while achieving universality, much like Rawls' "reflective equilibrium." See Hutchinson & Monahan, *supra* note 12, at 1531 n.256.

Unger's "soft skepticism" synthesizes the Aristotelian or Thomistic notion of objective value and the classical liberal or radical existential forms of ethical egoism. As a "soft" skeptic, he asserts that some values and institutions better reflect human nature—which he claims equals the good—than others. Unlike radical existentialism, his soft skepticism accepts historical and social contingencies as starting points for ascertaining and developing fundamental aspects of human nature, without claiming a secure metaphysical basis for moral claims, but merely one that "escape[s] the most devastating skepticism." PASSION, *supra* note 11, at 52.

Also unlike radical existentialism, the recognition of historical and social contingencies does not lead Unger to adopt a purely negative conception of freedom. According to Unger, freedom requires social and institutional contexts; it has a positive content, but this content is not limited by these necessary constraints. CLS, *supra* note 11, at 661-62. Freedom and self-actualization are not the same as a Nietzschean self-reliance. They are not the absence of all dependencies, but are the acceptance of mutual vulnerability in the context of faith, hope, and forgiving love. This freedom and empowerment is achieved only through changes in both personal relations and social institutions. PASSION, *supra* note 11, at 72-76.

37. CLS, *supra* note 11, at 585. For a discussion of the way Unger uses love to resolve the problem of the relationship between contextuality and community, see Weinrib, *Enduring Passion* (Book Review), 94 YALE L. J. 1825 (1985).

38. CLS, *supra* note 11, at 584-85.

revised institutions do not reflect existing patterns of domination. According to Unger, the lack of basic necessities and economic inequality manifest forms of institutional domination that militate against individual and collective empowerment, or human transcendence and community.<sup>39</sup> That is, economic equality—and the correlative need principle—are necessary, though not sufficient, to escape domination and contingency, develop community, and thereby better understand and realize human potential.<sup>40</sup> Economic equality is an important factor in beginning what Unger calls the spiral from domination to community.<sup>41</sup>

### b. Community of Purpose

Unger's theory of community keeps his existentialism from becoming too individualistic. It introduces need and economic equality as conditions for, and consequences of, community in a way that has much in common with the bishops' theory of solidaristic equality.<sup>42</sup> For both Unger and the bishops, community is both an instrumental and a substantive norm. It is instrumental because it is necessary for the protection and realization of human dignity and human transcendence. It is substantive in that humans are fundamentally social beings, and therefore, require community as an independent good.

Unger defines community as "the situation in which social relations are based on shared purposes whose moral authority is recognized and in which men view and treat one another as concrete and complete beings, that is, as individuals."<sup>43</sup>

This definition of community requires Unger, like the

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39. *Id.* at 598-600.

40. KNOWLEDGE, *supra* note 11, at 267-74.

41. *Id.* at 242-48.

42. According to some critics, Unger's emphasis on transformation and revision as a solution to the problem of relating individuality and sociality "seems to smother and suffocate individuality . . . , [and] frustrate the search for togetherness and community . . . . Unger's obsession with change has caused him to overlook the necessity for constancy." Hutchinson & Monahan, *supra* note 12, at 1533.

43. KNOWLEDGE, *supra* note 11, at 184. Unger compares his community of shared purpose to Aristotle's *philia*, Aquinas' charity, Hume's sympathy, and Comte's and Durkheim's altruism. *Id.* at 220. He defines the related concept of solidarity as, "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." LAW, *supra* note 11, at 205.

bishops, to grant moral authority to human nature.<sup>44</sup> But, unlike the bishops, Unger does not accept the existence of intelligible essences, or objective value in the traditional sense. Rather, he seeks a synthesis of the suprahistorical and the historicist, the relational and the essentialist, and the universal and the personalist notions of human nature.<sup>45</sup> Unger assumes that the relative absence of domination in society allows one to give moral weight to a consensus over time and between cultures in order to determine the content of the universal in human nature.<sup>46</sup> In effect, Unger claims that "authentic" human nature, which equals the good, is whatever exists free of domination, the existence of which is known by moral intuition.<sup>47</sup> Since freedom from domination

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44. KNOWLEDGE, *supra* note 11, at 196, 221, 227.

45. *Id.* at 193-95.

46. *Id.* at 221. Unger, in relying on moral consensus in a situation free of domination, has been likened to "ideal-choice" theorists, like Rawls, who claim that choices gain moral authority to the extent that distorting influences are eliminated. But this likeness ends to the extent that Unger does not seek "an Archimedean point outside history . . . but assign[s] weight to the values chosen by those individuals who actually live in history." Hutchinson & Monahan, *supra* note 12, at 1497-98.

47. KNOWLEDGE, *supra* note 11, at 243-45. This correlation between being and goodness has been criticized for presupposing "some normative standard beyond any fortuitous convergence of values. Yet Unger[s] . . . theory is dedicated to demonstrating the impossibility of discovering any such suprahistorical standard." Hutchinson & Monahan, *supra* note 12, at 1499. "In effect, Unger seeks to fulfill the Spinozian ambition of organizing society so as to approach 'nearer and nearer to the model of human nature.'" *Id.* at 1496 (quoting B. SPINOZA, *ETHICS* (1952)).

Other critics argue that, by defining the good as that which exists free from domination, he has essentially defined sin out of human nature, making it extrinsic to the person. See Kronman, Book Review, 61 MINN. L. REV. 167, 191 (1976); Leff, *Memorandum* (Book Review), 29 STAN. L. REV. 879, 885-86 (1977); Soper, Book Review, 75 MICH. L. REV. 1539, 1551 (1977). Liberalism, it is claimed, succeeds precisely because it accepts and tries to work with sin in human nature (e.g., self-interest will promote the common good), or it takes the contradictions, such as that between the self and others, and tries to balance them. Unger's attempts to resolve these contradictions and approximate an ideal of wholeness "must threaten the individual and alienate man from himself." Harries, *The Contradictions of Liberal Thought* (Book Review), 85 YALE L.J. 847, 854 (1976). Others claim that he has replaced the supernatural with an idealized humanity. Johnson, *Do You Sincerely Want to be Radical?*, 36 STAN. L. REV. 247, 287 n.104 (1984).

These criticisms overstate the case. Certainly, Unger recognizes the person's inherent incompleteness in both conduct and understanding. But, like Aquinas, this incompleteness is not for Unger properly called sin, in the sense of a defect in human nature. Rather, "[i]t is the character of the world and of man's place within it." It is finite human nature, not its sinfulness, *per se*, that is at work here. KNOWLEDGE, *supra* note 11, at 291. There-

requires equal participation in community, and equal participation requires economic distribution based primarily on need, Unger, like the bishops, ties his theory of community to equality (albeit a more absolute equality), but he adds an epistemological dimension that is not emphasized by the bishops' more objective theory of human nature.

### 3. Fundamental Theories: Possibilities for Convergence

The bishops and Unger share similar fundamental theories that underlie their principles of distributive justice. The bishops' theories of human dignity and solidaristic equality correspond to Unger's theories of human transcendence and community of purpose. But Unger's skepticism leads him to treat these in more instrumental terms than the bishops. To a certain extent, the ability to smash and to transcend all contexts becomes a defining quality of human nature. As will be discussed, Unger's theory of community is more like that of the bishops in its concern for interdependence, its relationship to the development of the virtues, and its relationship to human rights. Unger, however, ties community much more closely to economic equality.

This focus on equality is evident in Unger's stronger stress on equal participation in all areas of social life. It is also evident in his discussion of distributive justice. The bishops and Unger share two basic starting points for their discussion of distributive justice: 1) the social nature of material goods, and 2) the norm of solidarity, or sympathy, as the basis for evaluating distributive inequality. As we will see, they differ, however, in the extent that they take these concepts to their

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fore, Unger's theory of human nature may be compatible with a Thomist concept of grace as elevating finite human nature. He posits an end of human existence—the ultimate harmony of being and goodness—that absolutely transcends human nature; it is properly a supernatural end. Grace elevates finite human nature to a supernatural end. *See generally* R. HAIGHT, *THE EXPERIENCE AND LANGUAGE OF GRACE* (1979).

It is not clear, however, to what extent he would consider grace as healing fallen human nature. To the extent he does not admit to fallen human nature, but locates sin entirely outside of the person, Unger diverges considerably from Aquinas. Even to the extent that Unger recognizes evil, in the sense of philistinism or indifference to developing human potential—both individually and as a species, Unger is far more Pelagian than even Aquinas. He is Pelagian in the sense that he claims that speculative thought, combined with praxis, without more, can overcome philistinism. KNOWLEDGE, *supra* note 11, at 28. This attack on philistinism characterizes the Frankfurt School, from which Unger draws. Johnson, *supra*, at 250 n.8.



logical conclusions. The bishops seem more willing to tolerate inequalities in wealth and power so long as the basic necessities of all are met. Unger's model of distributive justice has a much stricter egalitarian ideal that approaches absolute equality as a norm.

The bishops and Unger's fundamental theories are better understood in terms of their discussion of basic economic rights. Of particular importance are the right to basic necessities, human perfection, and the relationship between equality and community.

### B. *The Right to Basic Necessities*

#### 1. The Bishops

The bishops' emphasis on the various human rights and duties that represent the "minimum conditions for life in community" suggests the priority of basic human rights.<sup>48</sup> These minimum conditions include the right to basic necessities and the duty to help build social structures that will guarantee these basic necessities and other human rights for all persons in society.<sup>49</sup> The basic necessities have been outlined in some detail in the social encyclicals. They include food, clothing, shelter, rest and medical care.<sup>50</sup>

It is important to note that these basic necessities are part of the "minimum conditions" for life in community; they are "rights inhering in the nature of human persons."<sup>51</sup> They are not, as Michael Novak asserts, merely "goods indispensable to a *full* human life."<sup>52</sup> As minimum conditions they

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48. Second Draft, *supra* note 1, para. 83.

49. It is significant that the bishops discuss rights and duties in terms of "norms," whereas the Lay Letter focuses on "virtues." While the ethics of virtue is important—the bishops discuss this in the final section and throughout the letter—the preponderance of the use of "norm" in the bishops' ethical analysis, as opposed to "virtue," has important implications for moral agency, as well as for the general appeal of the pastoral letter. On balance, the Lay Letter has a far greater emphasis on the virtue of individual moral agents, particularly the entrepreneur and those who give to charity. *Lay Letter*, *supra* note 23, at 9-11. The bishops, on the other hand, place greater emphasis on structures and policies that will provide basic necessities and protect other rights of the poor. The Lay Letter tends to focus on the *virtue* of assisting the poor (as well as the self-interest!), whereas the pastoral letter tends to focus on the *right* of the poor to demand distributive justice.

50. See *supra* note 6.

51. Hollenbach, *The Growing End of an Argument*, AMERICA, Nov. 30, 1985, at 363, 365.

52. *Id.* (quoting Novak, *Economic Rights: The Servile State*, CATHOLI-

may relate to the state's obligation to protect the public order, and not merely to the more general obligation of all social actors to promote the "full human life" that characterizes the common good.

The importance of basic necessities for life in community is evident in two of the bishops' three "priority principles." The first priority principle states that "[t]he fulfillment of the basic needs of the poor is of the highest priority;" the third states that "[t]he investment of wealth, talent and human energy should be specially directed to benefit those who are poor or economically insecure."<sup>53</sup> These admittedly indeterminate priority principles are important because they avoid evaluating the economy solely or even principally according to aggregate productivity, efficiency, or profits. Instead, these factors are considered in conjunction with the economy's ability to meet the basic needs of the poor, which is given priority, as a matter of distributive justice.<sup>54</sup>

It is important to note here that the bishops do not share liberalism's reticence about defining basic necessities with some degree of specificity. In refusing to place aggregate productivity and economic efficiency on a moral pedestal, the bishops are rejecting the moral skepticism of classical eco-

CISM IN CRISIS, Oct. 1985, at 10 (emphasis added)).

53. Second Draft, *supra* note 1, paras. 92, 94.

54. The priority of basic necessities can be understood in light of the difference between liberalism's consequentialist and utilitarian ethic and the bishops' mixed deontological-consequentialist, but not utilitarian, ethic. On the one hand, the bishops' deontological ethic does not sacrifice the right to dignified work, basic necessities, a just wage, or certain individual liberties to the ends of economic growth or efficiency. On the other hand, the right to private property and the tolerance of inequality are justified only to the extent that they result in the desired consequences of promoting the human development of all and ensuring that basic rights and necessities are met. To the extent that the bishops' social ethic is consequentialist, prudential moral judgments, based on nonmoral social, scientific, economic, and political data ("the signs of the times"), gain added significance. See, e.g., *id.* paras. 132-33.

Consequentialism, however, does not mean utilitarianism for the bishops. They generally do not support the individual or collective *balancing* of good over evil—precisely because the common good does not consist merely of the sum of individual interests and goods. Rather, they *prioritize* values when they are in conflict—e.g., the right to basic necessities takes priority over any absolute right to private property. Subsidiarity, participation, and the right to private property are instrumental values that are designed to protect human dignity and promote community. See D. HOLLENBACH, *supra* note 18, at 98, Fig. 1 (distinguishing between personal, social, and instrumental rights). For a comparison of deontological and teleological theories of ethics, see W. FRANKENNA, *supra* note 23, at 14-17.

nomics, a skepticism that denies the ability to distinguish between superfluous desires and basic needs.<sup>55</sup> Although the natural law doctrine has been significantly reinterpreted since World War II,<sup>56</sup> Catholic thought still begins with the premise that objective truth is accessible to all people by reason of their common humanity. Reasonable persons, in dialogue with others of good will, can define the individual and the common good with some degree of certainty. Consequently, in contrast to the liberal skeptics, the bishops presume to make moral judgments as they distinguish needs from wants, as they set priorities in economic policy, and as they discuss economic inequality.<sup>57</sup>

Another distinctive feature of the bishops' principle of the priority of basic needs is its relationship to property rights. The bishops reject notions of private property rights that are, for all practical purposes, absolutist and individualistic.<sup>58</sup> Private property is an important instrumental, not substantive, value in Catholic social teaching. Its importance as an instrumental value arises from the empirical judgment that private property rights are an essential means to protect personal liberty, fulfill basic human needs, and promote full

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55. In classical economics there is no way to value the marginal utility of the yuppie's extra scoop of Häagen-daz and the marginal utility of the starving Ethiopian's scoop of grain. The Lay Letter adopts this moral skepticism insofar as it gives basic value to the "rational" market, which it claims is "a kind of calculus of intelligent choices." *Lay Letter*, *supra* note 23, at 45. This "intelligent choice" should not be confused with a rational discernment of truth or good. Here reason is merely used to design a strategy to maximize individual needs and desires.

56. The reinterpretation of natural law has involved three developments. First, there has been a greater appreciation for historicity and pluralism, resulting in a more inductive methodology (i.e., reading the "signs of the times"). See, e.g., C. CURRAN, THEMES IN FUNDAMENTAL MORAL THEOLOGY 99-100 (1977); D. HOLLENBACH, *supra* note 18, at 114-33. Second, there has been a greater stress on the importance of individual freedom and particularity in addition to that of universal human nature. See, e.g., J. GUSTAFSON, *supra* note 33, at 93. Third, there has been a greater reliance on scripture and other distinctively Christian sources to clarify and justify the demands and priorities of philosophical notions of justice and the good. See, e.g., D. HOLLENBACH, *supra* note 18, at 130-33.

57. Second Draft, *supra* note 1, paras. 79, 91-96, 183. The bishops reject what the skeptic must affirm: "that a free market automatically produces justice." *Id.* para. 113.

58. See, e.g., M. FRIEDMAN, CAPITALISM AND FREEDOM (1962); R. NOZICK, ANARCHY, STATE AND UTOPIA 32-33, 169-72 (1974) (presenting a libertarian, strongly anti-utilitarian argument for near absolute individual property rights).

human development.<sup>59</sup> Therefore, the right to private property cannot be defined in absolutist or individualistic terms precisely *because* it is so important a right; rather, its importance demands that "ownership should be possible for a broad sector of our population."<sup>60</sup> In recognizing the great value of property, the bishops nevertheless assert that necessities may take priority over property rights. According to the bishops: "There is a 'social mortgage' on private property. 'Private property does not constitute for anyone an absolute or unconditioned right. No one is justified in keeping for his exclusive use what he does not need, when others lack necessities.'"<sup>61</sup> This ethical precept has important legal implications: It justifies even socialization or expropriation of property in certain circumstances.<sup>62</sup>

## 2. Unger

Like the bishops, Unger insists that human transcendence requires that the minimum conditions of community life be met. Therefore, he proposes limited rights designed to guarantee that all individuals are able to counter developing hierarchies and thereby develop their full human potential.<sup>63</sup> Included in this spectrum of limited rights is the right to basic necessities.

In contrast to the bishops, Unger grounds the moral and legal right to basic necessities not only in essential human dignity, but also in a theory of distributive justice based pri-

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59. D. HOLLENBACH, *supra* note 18, at 55. Cf. C. B. MACPHERSON, *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* 139 (1973) (arguing for an expanded notion of property rights as not merely "rights in material things and revenues," but "a right to a share in political power as instrumental in determining the kind of society, [and] a right to that kind of society which is instrumental to a full and free life"). Compare the discussion of "integral development," *infra* notes 76 to 81 and accompanying text.

60. Second Draft, *supra* note 1, para. 112.

61. *Id.* para. 113 (quoting Paul VI, *On the Development of Peoples* (*Populorum Progressio*) no. 23 (1967). Cf. V. HELD, *RIGHTS AND GOODS: JUSTIFYING SOCIAL ACTION* 189 ("[T]o the extent that property rights are moral rights, they extend only to the satisfaction of needs and of the requirements for adequate self-development. Above that level, property 'rights' should be seen *not* as moral rights but as legal fictions resulting from a political decision.").

62. "The determination of when such conditions exist must be made on a case by case basis in light of the demands of the common good." Second Draft, *supra* note 1, para. 113. See generally D. DORR, *THE OPTION FOR THE POOR* 95 (1984).

63. *CLS*, *supra* note 11, at 599-600.

marily on need. Unger adopts the Marxist notion that human needs reveal both concrete individuality and a common humanity. But he also recognizes an epistemological problem in that society lacks self-evident standards which might determine a hierarchy of needs.<sup>64</sup> Furthermore, Unger acknowledges the practical need for capital accumulation to achieve other ends. This analysis leads Unger to concede that society may benefit from a temporary, mixed standard of distribution based on need and merit.<sup>65</sup> Thus, very much like the bishops, the "most tangible and most widely recognized" needs—i.e., basic necessities—would be treated as "absolute entitlements."<sup>66</sup> Beyond this, a standard of merit would operate. Unlike the bishops, Unger considers distribution based solely on need as the ideal. But ultimately, he parallels the bishops in calling for need as a first principle only insofar as basic necessities remain unmet.

Interestingly, Unger includes the right to basic necessities in his "immunity" and "market" rights. For Unger as for the bishops, these rights reflect a desire to develop economic rights in the United States to match already established polit-

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64. The bishops are much more confident in making fairly specific moral judgments about basic human needs and the meaning of justice. Due to his soft skepticism, Unger is confident only that sustained critique can determine which moral intuitions, shared values and human experiences *might* indicate authentic human nature.

65. KNOWLEDGE, *supra* note 11, at 270-72. According to Unger, merit is arbitrary because it is so heavily based on differences in arbitrary natural talents, with the result that:

The lucky ones can then cash in on the favors of nature like prostitutes whose price depends on whether they are fat or slim. The exercise of power by the higher talents over the less gifted becomes simply another form of personal domination unless a moral standard can be found to justify and limit it.

*Id.* at 172-73. But Unger goes further: "The mere possession of skills can never in itself justify material advantages or the exercise of power." *Id.* at 273. Nevertheless Unger admits that diversities between individuals will always lead to inequalities in leadership and moral authority, even if all other distribution of wealth and power is based on need. PASSION, *supra* note 11, at 215-19.

Nozick and Rawls agree that natural abilities may be morally arbitrary, but this assumption does not lead them to Unger's conclusion that these criteria should not be considered as legitimate distributive mechanisms. Rawls creates a presumption that material goods are common property, but tolerates inequalities resulting from meritocratic systems of distribution. Nozick asserts that individuals are entitled to assets they naturally possess. See Hutchinson & Monahan, *supra* note 12, at 1526.

66. KNOWLEDGE, *supra* note 11, at 272; CLS, *supra* note 11, at 599.

ical and civil rights.<sup>67</sup> In contrast to the bishops, Unger views the right to basic necessities as not only a substantive or positive right based in human dignity but also as an instrumental or negative right designed to protect the individual from domination by and dependence on others. Contrary to conservative assertions, Unger claims that welfare entitlements are actually necessary to protect individual political and civil liberties, and do not pose a threat of domination or dependence, either legal or extra-legal.<sup>68</sup>

Unger does not fear the dependence usually associated with welfare entitlements because, in his system, basic needs would be met within the smaller institutions in society, the organic groups.<sup>69</sup> Finally, Unger's concern with decentralization—an issue examined later in this article—leads him to discuss basic necessities not only in terms of rights protected by the government, but also in terms of a distributive principle which operates *within* his organic groups. He moves away from the welfare state and socialist efforts that attempt to create national entitlements to basic necessities. The bishops also expect decentralized, non-governmental organizations to play an important role in providing basic necessities, but they do not propose such a comprehensive communitarian model as Unger advocates with his organic groups.

Unger shares the bishops' fundamental principle that property rights, from both a moral and legal standpoint, are not to be viewed from an individualistic or absolutist perspective, but rather must be evaluated in terms of the extent of their distribution and their promotion of the common good. But Unger's property rights are considerably more qualified

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67. Like other critical legal scholars, Unger has important reservations about a rights-based system. In many respects, Unger reflects the two strands of the CLS critique of the liberal theory of rights. The first and perhaps most pervasive claims that rights are indeterminate. Liberalism offers no objective or neutral way to choose between conflicting rights. Therefore, any choices made in liberal legal argument are inherently political in nature. The second claims that the liberal focus on inalienable individual rights "reinforces the separateness and egoistic in man at the expense of the social nature of man." Thus, individuals come to see in others the limitation rather than the realization of their own freedom. Furthermore, "rights-consciousness" legitimates existing patterns of social hierarchies by creating an "illusion of naturalness and objectivity." While this latter critique is derived from Marx, it differs from Marx by not identifying community as the permanent source of value. Hutchinson & Monahan, *supra* note 12, at 1486-88.

68. CLS, *supra* note 11, at 597, 655.

69. KNOWLEDGE, *supra* note 11, at 272.

than those of the bishops, they are more closely related to domination, and they lack an explicit understanding of the bishops' notion of stewardship.

While Unger considers welfare entitlements on a par with political and civil liberties in that they protect individual and political freedom, he contends that property rights have actually undermined liberty. He rejects the Lockean or Nozickian strict correlation between freedom and inviolable property rights.<sup>70</sup> He claims that absolute property rights reduce some individuals to direct dependence on others. First, they impose a large-scale threat to democracy and freedom "by allowing relatively small groups, in control of investment decisions, to have a decisive say over the conditions of collective prosperity or impoverishment."<sup>71</sup> Second, they support an extra-legal system of social organization that conflicts with the property ideal, for example, by failing to establish universal property ownership. Third, absolute property rights restrain economic development by limiting invention and real competition. Huge disparities of scale, influence, and advantage mean that economic decentralization, or what Unger calls "empowered democracy," cannot be achieved by essentially absolute property rights.<sup>72</sup>

To avoid these problems, Unger does not eliminate property rights but, like the bishops, seeks to ensure that these rights are more widely distributed and exercised. He plans to realize this wider distribution of property rights in a more specific—and more radical—manner than the bishops envision. He proposes the establishment of a "rotating capital fund." This fund, administered by government agencies,

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70. Hutchinson & Monahan, *supra* note 12, at 1525-26. Like Nozick's unsupported claim of the inviolability of private property rights, Unger's redistributive scheme is based on an equally controversial and contingent assumption that property is *a priori* held in common. *Id.*

71. *CLS*, *supra* note 11, at 594.

72. Multinationals are examples of "huge disparities of scale"; by "influence" Unger means political and economic; by "advantage" he means inheritance and related rights. *Id.* at 594-96. According to Unger, the liberal notion of absolute property rights fails: first, because it is a political manifestation of personal relations based in jealousy; and second, because it adopts an objectivism that falsely assumes that the market system requires the absolute property right. *PASSION*, *supra* note 11, at 211; *CLS*, *supra* note 11, at 570, 656. Hutchinson and Monahan suggest that Unger's economic analysis draws on Charles Lindblom who, like Unger, believes that greater flexibility and diversity in policymaking is desirable. Hutchinson & Monahan, *supra* note 12, at 1523 n.217 (referring to C. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL ECONOMIC SYSTEMS* (1977)).

would consist of loans to groups of workers and technicians that would seek to encourage a constant flow of new entrants into the market.<sup>73</sup> The legal counterpart to this capital fund would be the "disaggregation of the consolidated property right" into what Unger calls "market rights."<sup>74</sup> The political process would determine the extent and method of redistribution through this rotating capital fund. But whatever the amount of "disaggregation" determined by this process, market rights would remain a "subcategory of right," not an absolute right from which other rights are derived.<sup>75</sup> The market rights, in the context of the rotating capital fund, are meant to do what the absolute property right is supposed to do: allow individual development free of domination. These market rights do this by guaranteeing access to capital for those without and thereby promoting decentralization.

### 3. The Right to Basic Necessities: Possibilities for Convergence

Both the bishops and Unger stress that human dignity requires that society protect economic rights, especially the right to basic necessities, to the same extent that it protects political and civil rights. They differ, however, in that Unger's skepticism is less confident in defining and prioritizing basic needs. Despite his epistemological humility, Unger goes beyond the bishops in adopting a quasi-Marxist ideal of distribution based on need, both as a means of establishing concrete and universal human nature and, more importantly, as a protection against domination. The bishops follow a more deductive approach in defining concrete human needs and do not judge their importance in terms of domination.

While the bishops emphasize the qualified nature of property rights, Unger more intensely focuses on this qualified aspect of the rights. In stressing this qualified nature, Unger appears to envision a much more fluid—or, as he says, "plastic"—economy than the bishops. Unger is willing to leave the definition of these rights entirely to the vagaries of the political process. The bishops, however, believe that basic rights can be secured more within the context of a reformed but stable economy. Furthermore, Unger is more willing to conclude that aggregation of property automatically leads to

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73. *CLS*, *supra* note 11, at 596.

74. *Id.* at 595-96.

75. *Id.* at 600.



domination. He does not recognize the notion of stewardship that allows the bishops to tolerate unequal control over significant resources in the belief that those in control can and will exercise their control in a responsible way. Unger does not appear to espouse such a notion of social responsibility in the use of property. Despite these differences, the bishops and Unger share the critical notion that property rights are not absolute, but are meaningful only to the extent that property is universally distributed.

### C. *Basic Necessities and Human Perfection*

#### 1. The Bishops

The primary importance of the right to basic necessities and the qualified property right may be understood only in the context of what Paul VI called "integral development."<sup>76</sup> The principle of integral development, or human perfection, differentiates Catholic notions of distributive justice from those based on a materialistic conception of human nature.<sup>77</sup> According to this principle, the common good encompasses more than the economic development of people; it also includes the full development of the human person, both in its material and spiritual dimensions. Therefore, the right to basic economic necessities is not more fundamental than civil, political, or religious liberties—all are equally fundamental.<sup>78</sup>

While integral development has many components, it is important to this discussion because it adds an element to the theory of distributive justice: participation in community.<sup>79</sup> The bishops consider a minimum level of participation through the family, voluntary organizations, and economic, social, and political institutions to be a matter of justice. This means that the economy or political system not only must

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76. Christiansen, *supra* note 25, at 669 (citing Paul VI, *On the Development of Peoples (Populorum Progressio)* nos. 14, 16 (1967)).

77. John Paul II argues that materialistic conceptions of human nature derive from the "fundamental error of thought . . . called an error of materialism . . . [or] economism." The error lies in the fact that materialism "directly or indirectly includes a conviction of the primacy and superiority of the material, and directly or indirectly places the spiritual and the personal (man's activity, moral values and such matters) in a position of subordination to material reality." John Paul II, *On Human Work (Laborem Exercens)* no. 13 (1981). It is important to note that John Paul II includes under "materialism" or "economism" both Marxism's dialectical materialism and "primitive capitalism and liberalism." *Id.*

78. Hollenbach, *supra* note 51, at 363-65.

79. Second Draft, *supra* note 1, para. 81.

meet the basic necessities of individuals, but must also allow individuals to be active and productive members of society. The belief that participation is essential for human development partially explains the bishops' advocacy of experiments in economic democracy.<sup>80</sup>

Participation is both a substantive and an instrumental norm: substantive because it is part of the development and expression of an individual's talents and abilities; instrumental because it is a condition of community, and it is a means by which basic necessities and other substantive human rights are guaranteed.<sup>81</sup> In other words, full human development requires community, community requires minimal levels of participation, and participation requires the protection of—and is necessary to protect—certain rights, such as the right to basic necessities.

While there is a positive correlation between participation and the protection of the right to basic necessities, there is a negative correlation between the second aspect of integral development and material concerns. This second component suggests that individuals are complex spiritual beings whose proper ends conflict with a materialistic ethos of modern society. This Christian critique of the materialistic ethos is a critique of idolatry; it is a claim of Christian anthropology that mere existence does not precede being, that security is found only in God. It is also a critique of blindness, of wealth's destructive power over love and of its callousness to the needs of the neighbor, especially the poor.<sup>82</sup> In sum, a consumer society that creates and feeds superfluous wants but that fails to meet the basic needs of some has become a "slave of the objects which [it] makes."<sup>83</sup>

The rejection of materialism has a double significance for social and distributive justice as it is expressed in the option for the poor. First, those who reject materialism, who

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80. *Id.* para. 197.

81. *Morality*, *supra* note 20, at 32.

82. *Id.* at 16; J. BENESTAD, *supra* note 9, at 123-25. Paul VI called greed, "[t]he most evident form of moral underdevelopment." Second Draft, *supra* note 1, para. 79 (quoting *On the Development of Peoples (Populorum Progressio)* no. 19 (1967)). See also *id.* paras. 55-60. What is morally objectionable is not the enjoyment of material well-being, which is part of natural happiness, or the attainment of basic economic security, which is a natural right. It is the "ceaseless striving after material advantage which, as Hobbes said, 'ceaseth only with death.'" Christiansen, *supra* note 20, at 16.

83. Paul VI, *A Call to Action (Octogesima Adveniens)* no. 9 (1971).

enter into solidarity with the poor, and who promote justice "experience the power and presence of Christ."<sup>84</sup> Second, one can ascertain and meet the needs of the poor only by rejecting materialism.

Therefore, the concept of integral development significantly qualifies any concern with individual productivity or with the mere meeting of basic needs. An increased GNP, increased equality, and the provision of basic necessities do not alone produce the common good. The common good is defined in terms of levels and quality of employment, the amount of cooperation and community, and the significance of spiritual values in a society.

## 2. Unger

To some extent, the bishops' ideal of integral development has some parallels in Unger's social theory. Unger defines freedom in terms of the development of the virtues, and he insists that such virtues as faith, hope, and love can flourish better under certain institutional arrangements.<sup>85</sup> He does not emphasize economic development in describing the good society—not because he does not think it is critically necessary, but because, as in Catholic social teaching, it is not sufficient for human development or the promotion of the common good. Unger is more concerned with the impact of the social order on the development of the virtues and the reduction of the psychological instabilities or antinomies experienced by modern humanity, especially as these relate to interpersonal relations.<sup>86</sup> In that sense, Unger's theory of distributive justice has a heavily spiritual dimension.

The important role of participation in the development of the individual and species aspects of human nature relates to this spiritual dimension. According to Unger, limitations on participation limit human transcendence. Even moreso

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84. First Draft, *supra* note 16, para. 62.

85. PASSION, *supra* note 11, at 247-50. For example, he recognizes that the "higher standard" (virtue) of solidarity (community)—i.e., the voluntary denunciation of rights and the granting of primacy to the interests of the other party—must be exceptional, and should not be incorporated into contract law, because it departs from standard practices and sentiments. On the other hand, he does not accept the notion of liberty of contract as pure arms-length bargaining. The "counter-principle" of solidarity can inform contract law by requiring that the interests of the other party be taken into account, at least to a significant, though not predominant, degree. *CLS*, *supra* note 11, at 641-42.

86. *CLS*, *supra* note 11, at 586.

than the bishops, Unger adopts a model of society based on participatory democracy, or what he calls "empowered democracy."<sup>87</sup>

"Empowered democracy," or "democracy of ends," would "remake social and [economic] life in the image of liberal politics."<sup>88</sup> In other words, Unger wants to extend the liberal political and civil ideals of equality of participation, freedom from dependence, and a positivistic view of the state to all areas of society and the economy. Contending that "everything can be brought into the arena of public discourse," Unger wants to abolish traditional distinctions between public and private and between politics and economics.<sup>89</sup>

The synthesis of these traditionally autonomous realms applies at two levels. In the organic group, it means that efficiency considerations or other economic criteria should neither determine the division of labor, power, and material resources, nor should they establish the community's ends. These decisions should be subject to democratic determination. Unger calls this democratic determination within the organic group the "democracy of ends." The democracy of ends is more radical and comprehensive than the bishops' call for greater worker participation in industry and for more experiments in cooperative enterprises.

Beyond the organic groups, Unger also sees macroeconomic questions as being largely matters for political decision—precisely because he considers capital to be social in nature.<sup>90</sup> Therefore, the political process is to determine the precise nature of market rights, for example. Society should not establish these rights as part of objective legal doctrines or the market. In general, just as privilege and merit are not principles of decision in the political realm, Unger seeks to eliminate them from the social and economic realms.

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87. *Id.* at 591-93.

88. *Id.* at 602.

89. *Id.*; KNOWLEDGE, *supra* note 11, at 274.

90. Unger's system would replace "the absolute, consolidated property right" with "market rights," i.e., "conditional and provisional claims to divisible portions of social capital." *CLS*, *supra* note 11, at 600. According to Unger, "[h]ow provisional and conditional they should be, in any given sector or in the economy as a whole, poses one of the key questions to be answered by conscious collective decision." *Id.*

### 3. Basic Necessities and Human Perfection: Possibilities for Convergence

Ironically, the bishops, who certainly have the more overtly spiritual mission, concentrate, at least in the economy pastoral, more on economic rights than Unger, who focuses more explicitly on the inadequacies of liberal thought and practice and the effect on interpersonal relations. Any difference, however, derives more from the particular economic focus of the pastoral than it does from any theoretical difference. Clearly, both the bishops and Unger consider basic economic rights only in the larger context of full human development in community. Both recognize that this full human development necessitates active participation in all areas of social life. For the bishops, this participation suggests "experiments" in forms of economic democracy such as cooperatives, but more fundamentally, it requires an opportunity to develop oneself and to contribute to the common good through work and through civic and political participation. For Unger, participation is more strictly construed. He does not merely advocate "experiments" in economic democracy but desires to democratize and politicize nearly all areas of life: the political, the economic and the social. This more radical notion of participation is a consequence of Unger's closer identification of community and knowledge of the good with economic equality. Because the bishops do not so closely link community and equality, participation may take more varied forms and is not as limited to the one person, one vote model seemingly presupposed by Unger.

While the bishops recognize that inequality of wealth inhibits participation in community, they emphasize the detrimental effect of any excessive wealth on an individual's ability to know and to do the good. For the bishops, materialism may taint even economic equality; for Unger, economic equality furthers knowledge of the authentic human nature. He has little or nothing to say about materialism *per se*.

#### D. *Economic Equality and Community*

##### 1. The Bishops

A final principle of distributive justice is the developing norm of relative equality.<sup>91</sup> According to Christiansen, relative equality requires that "wealth and resources ought to be

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91. See Christiansen, *supra* note 25.

regularly redistributed to redress the differences between groups, sectors, and even nations" so as not to inhibit human solidarity.<sup>92</sup> Relative equality, or strong egalitarianism, is not merely a perfectionist ideal; rather, it institutionalizes the substantive principle of human community or solidarity. This norm suggests that economic inequality is objectionable, not because it violates some egalitarian principle in Catholic social teaching, but because it tends to undermine the potential for building human community.

According to Christiansen, recent social encyclicals have come to the empirical judgment by "reading the signs of the times" that inequality is the major social problem of the modern world. Based on empirical evidence, these social encyclicals have concluded that toleration of inequalities in the belief that economic growth would reduce poverty and economic injustice has, in fact, led to greater inequalities and aggravated injustice, creating a "crisis of solidarity." Therefore, the encyclicals have proposed egalitarian redistribution or relative equality as the means for redressing these inequalities and injustices and promoting human community.<sup>93</sup>

The bishops adopt the norm of relative equality in part. They recognize that "[s]ome degree of inequality is not only acceptable, but may be considered desirable for economic and social reasons,"<sup>94</sup> but they condition the moral acceptability of unequal income on two moral principles: the priority of basic needs and the importance of participation. The priority of basic needs establishes "a strong presumption against extreme inequality of income and wealth as long as there are poor, hungry and homeless people in our midst."<sup>95</sup> This pre-

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92. *Id.* at 652. Christiansen suggests that the norm of relative equality entails three functions: "(1) the (re)distribution of resources on egalitarian lines, (2) for the realization of full human life by all, (3) in a spirit which reduces differences and increases the life shared in common." *Id.* at 666.

93. *Id.* at 654-55. The bishops are not calling for absolute equality or a general leveling of condition, but seek to hold inequalities within defined moral limits. Permissible differences depend on the norm of communitarian equality, which aims to sustain and enhance social bonds. *Id.* at 653-54. *Cf.* Second Draft, *supra* note 1, paras. 78, 183.

94. Second Draft, *supra* note 1, para. 183.

95. *Id.* In the first draft the bishops cited favorably to Rawls' second principle but concluded that Rawls diverges from Catholic social teaching on several key points. First Draft, *supra* note 16, para. 99 n.23). *See* J. RAWLS, A THEORY OF JUSTICE 303 (1971) ("All social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any

sumption can be overridden only if an absolute scarcity of resources renders the fulfillment of material necessities "strictly impossible." The bishops conclude that no such scarcity exists in the United States, and therefore, that existing inequalities are "unacceptable."<sup>96</sup> The principle of participation suggests that, "extreme inequality [is] a threat to the solidarity of the human community, for great disparities lead to deep social divisions and conflict."<sup>97</sup>

The bishops appear to move away from a "maximim" distributive principle similar to that implied by John XXIII's theory of social justice. A maximim criterion looks to socio-economic development to promote the welfare of all, even if it might result in increased inequality. To the extent the bishops adopt the norm of relative equality, they move closer to the "least difference" principle. This principle demands policies that reduce significant inequalities between the rich and the poor, even if the basic necessities of the poor are met by an increase in aggregate wealth. The bishops are concerned, not only with the injustice of some going without necessities while others hold considerable wealth, but also with the detrimental effect of inequality on the development of community and increased participation of all persons in that community.

## 2. Unger

As with the principles of need and qualified property rights, Unger takes the notion of relative equality or strong egalitarianism further than the bishops. Unger more closely approaches a notion of absolute equality of material resources and power. For Unger as for the bishops, this relative equality is an instrumental norm necessary to ensure the achievement of the substantive norms of sympathy (community) and participation (the democracy of ends). These norms, in turn, are necessary for the full understanding and development of human nature.

Unger insists that a theory of human nature that accurately perceives both its individual and social aspects cannot

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or all of these goods is to the advantage of the least favored."'). For a Catholic critique of Rawls see M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982). For a critique of Sandel, see Baker, *Sandel on Rawls*, 133 U. PA. L. REV. 895 (1985).

96. Second Draft, *supra* note 1, para. 76.

97. *Id.* para. 78. See also *id.* para. 183 ("large inequalities in the economic sphere mean that the degree of power and the level of participation in the political and social spheres is also very uneven.").

tolerate significant inequalities of wealth or power because such inequalities are often unjustified, and therefore, involve domination.<sup>98</sup> According to Unger, neither class nor merit can serve to justify the distribution of resources or power in the private realm, so he adopts need as a distributive principle. His system, therefore, implies relative, if not absolute, equality. The bishops do not endorse such a conclusion because they view merit and factors other than need as morally justifiable criteria. Unger tolerates consideration of these other factors when practical necessity dictates, but he does not find them morally compelling.

For Unger, the only morally acceptable foundation for power or wealth is that which derives from authentic human nature or human need, and such a nature can only be known and developed through a democratic community of shared ends freed from inequality or domination.<sup>99</sup> Relative equality is a prerequisite for the democratic participation that defines the shared values necessary to overcome the problem of subjective value and to better understand authentic human nature and its needs. Furthermore, strong egalitarianism is the consequence of Unger's acceptance of need as the basic principle for distribution.

Unger also considers equality in community in terms of the role of the passions in interpersonal relations. Not only can inequality corrupt community and collaboration, as discussed above, it also obscures the distinction between mere envy of others and justified indignation at inequality. By reducing inequality and the attendant indignation, the existence of envy becomes readily apparent. While envy cannot be entirely eliminated, it must be diminished because it prevents one from treating others as concrete and unique individuals; it limits the possibility of transformed personal relations based on mutual acceptance of diversity and love.<sup>100</sup> The bishops also recognize that inequality of wealth affects the virtues, but they focus less on the problem of envy and more on the blindness to the needs of others that corresponds with excessive materialism. Finally, as mentioned earlier in the discussion of immunity and market rights, because Unger correlates the accumulation of property with domination, his theories demand that society reduce inequality in or-

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98. KNOWLEDGE, *supra* note 11, at 271; PASSION, *supra* note 11, at 210-11.

99. KNOWLEDGE, *supra* note 11, at 267-72.

100. PASSION, *supra* note 11, at 212-16.



der to empower individuals and in order to encourage initiative and experimentation.

### 3. Economic Equality and Community: Possibilities for Convergence

As discussed earlier, Unger's model of distributive justice incorporates a fairly strict egalitarian ideal that approaches absolute economic equality as a norm. The bishops, on the other hand, tolerate significant inequalities of wealth so long as society meets basic necessities and guarantees minimal levels of economic participation.

This difference in the degree of economic equality required corresponds to a difference in the extent that the bishops and Unger correlate inequality and domination. Unger more closely links the two and more strongly asserts that political and economic equality are conditions for the fuller understanding and development of authentic human nature and community. Both the bishops' and Unger's theories are based in human sociality; they differ significantly, however, in the more concrete implications of this sociality.

To the extent that Unger does not establish a strict norm of equality, he, like the bishops, relies on prudential judgment to determine the proper limits of inequality. The bishops' judgment is grounded primarily in their empirical analysis of the relationship of inequality to unmet basic needs, and only secondarily in the negative effect of inequality on participation in community. Unger, on the other hand, treats these more equally. Therefore, he tends more towards a least difference principle while the bishops maintain some aspects of a maximim principle of distribution.

## II. THE ROLE OF GOVERNMENT

### A. *The Bishops*

The principle of subsidiarity and the theory of government provide the political and social theory, the institutional arrangements, which are necessary to achieve distributive justice. In conjunction with the distributive principles discussed above, they provide means of ordering conflicting rights and duties associated with providing the minimum conditions of human dignity and community.

#### 1. The Principle of Subsidiarity

The principle of subsidiarity derives from the fundamen-

tal right and duty to participate in the common good and from the traditional Catholic distinction between state and society.<sup>101</sup> The latter distinction recognizes that the state is only one actor within a larger society, or body politic, which is made up of diverse communities and associations, each possessing varying degrees of authority. The state is responsible for the public order: justice, public peace, public morality, and public prosperity. The body politic, as a whole, is responsible for the broader common good, or human flourishing in all of its material and spiritual dimensions.<sup>102</sup>

The principle of subsidiarity has three components that take into account these distinctions. First, individuals and groups must have a degree of autonomy in order to carry out their roles in promoting the common good. Second, larger communities, such as the government, must respect this autonomy but *also must take positive action to aid these individuals and groups in fulfilling their roles*. Third, the government and other large organizations are not only allowed, but are required, to assume responsibilities for promoting the common good that lower levels of organization cannot manage.<sup>103</sup>

Subsidiarity assumes a pluralistic model of society that places considerable importance on the family, voluntary associations, and other mediating institutions. It is essential to the fulfillment of human dignity that society support and protect these associations, in part because they allow for fuller participation by individuals in the life of the community. Support for these intermediate structures also arises from a recognition of the deleterious effects of aggregation of power in large organizations: concentrated power corrupts and aggravates oppression and injustice.<sup>104</sup>

The bishops recognize the importance of mediating institutions in their lengthy section entitled, "Working for Greater Justice: Persons and Institutions."<sup>105</sup> Clearly, the bishops expect these institutions to play a key role in meeting

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101. J. COLEMAN, AN AMERICAN STRATEGIC THEOLOGY 224-28 (1982).

102. Hollenbach, *supra* note 51, at 364.

103. The classic statement of this principle is found in Pius XI, *On the Reconstruction of the Social Order*, (*Quadragesimo Anno*) no. 79 (1931). See J. BENESTAD, *supra* note 9, at 97 & n.8.

104. Drawing on Catholic principles, E. F. SCHUMACHER, *SMALL IS BEAUTIFUL* (1973) develops this point and also argues that decentralization promotes efficiency and participation. For a theological development of this insight from a Protestant perspective, see R. NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* (1932).

105. Second Draft, *supra* note 1, paras. 97-122.

basic necessities through voluntarism, the creation of jobs, and the provision of basic services, as well as through just institutional practices.

It is important to note, however, that the principle of subsidiarity applies not only to government but also to these intermediate associations and institutions.<sup>106</sup> Therefore, the public-private distinction does not shield economic and other private institutions from the operation of the principle. On the other hand, subsidiarity is a presumptive, not an ontological, norm.<sup>107</sup> As a presumptive norm it does not object *per se* to all concentrations of power, but only to the *unnecessary* arrogation of power. If mediating institutions in the body politic cannot solve problems of distributive justice, the principle of subsidiarity alone does not prohibit intervention by larger organizations, including the state. Therefore, Catholic social teaching reserves a positive role for government in promoting distributive justice in particular, and the common good, in general.

## 2. The Limits of Government

This positive role of government conflicts with a minimalist or negative view of the role of government. It is closely associated with the bishops' rejection of a strict public-private distinction in political and legal theory.

In Catholic social teaching, individuals are fully social only as political beings.<sup>108</sup> According to the bishops, the government's primary role is "the coordination and regulation of the activities of diverse groups in society in a way that leads to the common good and the protection of basic rights."<sup>109</sup> Far from being a necessary evil that should be lim-

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106. The first draft was criticized for applying this principle only to the state: "[I]t is mute on the centralization of monopoly power in American industry . . . . [The bishops] do not seem to comprehend that their own social theory should compel them to question the humanity and the efficiency of all large corporate bureaucracies: governmental, educational, industrial, professional (including unions), military and even ecclesiastical." Greeley, *supra* note 8, at 22-23. See also Greeley, *What is Subsidiarity? A Voice from Sleepy Hollow*, AMERICA, Nov. 9, 1985, at 292.

107. J. COLEMAN, AN AMERICAN STRATEGIC THEOLOGY 227 (1982).

108. "As a social being, man builds his destiny within a series of particular groupings which demand, as their completion and as a necessary condition for their development, a vaster society, one of universal character, the political society." Paul VI, *A Call to Action (Octogesima Adveniens)* no. 24 (1971).

109. First Draft, *supra* note 16, para. 124; D. HOLLENBACH, *supra* note 18, at 159 (the state has primacy over economics).

ited at all costs, the government has a "moral function: protecting human rights and securing basic justice for all members of the commonwealth."<sup>110</sup> Since, as discussed earlier, basic necessities are not merely part of human flourishing, but are fundamental human rights whose protection is part of the state's duty to maintain the public order, the state, consistent with the principle of subsidiarity, may play quite an active role. It should not only coordinate and promote private initiatives to protect basic necessities and ensure distributive justice, but, in the last resort, it should intervene itself. As the bishops state throughout their letter, distributive justice is not a goal to be achieved only if it is possible to do so through the family, through private enterprise, or through the various voluntary associations. It is something *to be achieved*, if not by these lower social bodies, then by the government.<sup>111</sup> While the bishops recognize that government intervention poses dangers to individual freedom, they also recognize that greater social interdependence and government intervention may actually improve the capacity to protect basic economic rights.<sup>112</sup>

### B. Unger

Unger shares the bishops' basic assumptions about the importance of decentralization and the affirmative role of government in promoting the common good, in general, and distributive justice, in particular. But, paradoxically, he takes both decentralization of power and the affirmative role of government to greater extremes than the bishops. As a result, he interestingly borders on anarchism and statism at the same time. To the extent that he pushes his theory to these fringes, he diverges from the distributive role of government envisioned by the bishops. His intensification and integration of the individual and social aspects of human nature lead him away from the bishops; he models an "expressivist synthesis" that is institutionalized in what might be called a substantially modified anarchism—or an expressivist democracy.<sup>113</sup>

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110. Second Draft, *supra* note 1, paras. 119, 122.

111. *Id.* paras. 121-22. Since subsidiarity is a presumptive, not an ontological, norm, it provides no principled objection to — but may actually demand—active government involvement in promoting distributive justice.

112. First Draft, *supra* note 16, para. 258: On the role of government, see generally, D. HOLLENBACH, *supra* note 18, at 66, 155-67.

113. NOMOS XIX: ANARCHY, at xxvii-xxxii (J. Pennock & J. Chapman

## 1. Empowered Democracy

Unger's decentralization or empowered democracy arises out of his soft skepticism, his context-transcending theory of human nature, and his linkage of inequality and domination. Since, according to Unger, all social arrangements are contingent and imperfectly reflect authentic human nature, institutional structures have to be "self-revising"; they have to "provide constant occasions to disrupt any fixed structure of power and coordination in social life."<sup>114</sup> Because inequality of wealth and power might be considered, at least presumptively, to be domination, liberal notions of interest group politics and a constitutional balance of power should be replaced by "a social order all of whose basic features are directly or indirectly chosen by equal citizens and rightholders rather than imposed by irresponsible privilege or blind tradition."<sup>115</sup> In other words, Unger envisions intermediate associations and government to be highly malleable and continually destabilized in order to counteract what he sees as the inevitable tendency toward bureaucratization and the aggregation of privileged power. This fear of bureaucratic power provides the rationale for Unger's distribution based on need and relative equality, as manifested in his rotating capital fund, welfare rights and similar provisions. For Unger, participation is the key, and meaningful participation requires relative equality.

In more concrete terms, Unger envisions a vastly decentralized structure based on his theory of organic groups. The model of organic groups applies principles of economic democracy and community to bureaucratic organization in the modern welfare-corporate state. The intimate nature of these groups, the shared values, the democracy of ends, and the breakdown of specialized divisions of labor are meant to overcome the problems of size and bureaucratization that plague modern society.

To the extent that these groups are designed to integrate all aspects of life in a decentralized community, they are much more comprehensive in scope—much more communitarian—than the limited-function voluntary organizations envisioned by the bishops' principle of subsidiarity. For

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eds. 1978). Hutchinson and Monahan reject this idea that Unger advocates anarchistic democracy, Hutchinson & Monahan, *supra* note 12, at 1520 n.208.

114. *CLS*, *supra* note 11, at 592.

115. *Id.* at 591.

example, as discussed earlier, Unger considers these organic groups to be the primary means of establishing a just distribution of goods, both in the sense that these groups will ensure full participation in community and in the sense that they will ensure that society meets individual needs.

Unger's decentralized organic groups are similar to the bishops' voluntary organizations in that they protect individuals from the state and counter any tendencies toward state control. These groups fulfill many of the functions otherwise left to the state in welfare-state and socialist societies. To the extent that Unger's organic groups give content to some of these functions, they could give considerable content to the bishops' rather indeterminate principle of subsidiarity.

## 2. The Limits of Government

In Unger's system, the government would have two general responsibilities. First, it would unify the various organic groups in a larger community of shared purpose. According to Unger, the state is the "universal association capable of expressing a universal humanity."<sup>116</sup> Like the liberal state, it would maintain peace between the various organic groups and protect individual freedoms. But it would go beyond the liberal state and would attempt to develop a community of shared values (as opposed to a mere temporary alignment of interests), a community that would be completed only through a "world state."<sup>117</sup>

The second function of the state is to ensure the continual breakdown of hierarchies and divisions within society and to promote experiments in alternative forms of social, political, and economic organization. The state would accomplish this goal through the rotating capital fund, through its legal counterpart, market rights, and through destabilization rights. The latter would enlarge judicial powers of injunctive relief and allow courts to more easily override existing laws that reinforce social and economic inequalities.<sup>118</sup> These three mechanisms would redistribute large concentrations of capital to those without as well as allow for open political debate over matters generally considered free from political scrutiny.

In expanding the scope of political scrutiny, Unger envi-

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116. KNOWLEDGE, *supra* note 11, at 282.

117. *Id.* at 283-84.

118. CLS, *supra* note 11, at 602-14.

sions a breakdown of the traditional public-private distinction, literally opening all areas of life to politics.<sup>119</sup> The bishops, too, reject the strict public-private distinction, but they would not go so far as Unger in politicizing most areas of life, including family life.<sup>120</sup> Unger does recognize that some areas of life must remain autonomous, but even this autonomy would not be absolute; rather it would be granted on a case-by-case basis when necessary to protect individual freedom and development.<sup>121</sup>

### C. *The Role of Government: Possibilities for Convergence*

Unger and the bishops share two basic assumptions that inform their theories of government. First, participation through a decentralization of function and power is a fundamental substantive and procedural principle. Second, the political is the highest form of the social element of human nature, and therefore, government plays an important role in the common good and promoting distributive justice.

#### 1. Subsidiarity and Empowered Democracy

As in other areas, Unger pushes the principle of participation through decentralization to its limits. The bishops advocate cooperative ownership and similar types of institutionalized economic democracy, but they do not have a comprehensive theory of organization to match Unger's theory of organic groups. The bishops take a step toward decentralized communitarian politics but they are far from advocating the major deconstruction and restructuring of large-scale bureaucratic organizations that is meant to be accomplished through Unger's organic groups, rotating capital fund, and destabilization rights. They would largely limit to

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119. The politicization of virtually all areas of life derives from Unger's epistemology — institutions that reflect and develop authentic human nature can only be known through a free and democratic process of moral discernment — and from his theory of human nature — the social aspects of human nature require an approximation of a universal *political* community.

120. Unger's vision of law as a primary tool in the restructuring of contemporary society "clings to the naive belief that the legal process stands at the center of social life." Hutchinson & Monahan, *supra* note 12, at 1514. Unger virtually abolishes the distinction between state and society which is so important to the bishops' theory of distributive justice. Only Unger's organic groups prevent the state and society from becoming coterminous. See *supra* notes 101 and 102 and accompanying text.

121. KNOWLEDGE, *supra* note 11, at 274, 259-81.

the family or well-defined government initiatives the kind of distributive powers that Unger delegates to his organic groups. Furthermore, because Unger so distrusts any forms of inequality of wealth or power, as well as models of organization based on class or role, he is unwilling to tolerate the kinds of large-scale economic organization that the bishops quietly accept as in the nature of democratic capitalism. In that respect, Unger takes the bishops' principle of subsidiarity much more seriously than the bishops themselves.

## 2. The Limits of Government

Neither the bishops nor Unger accept the minimalist theory of government or the strict distinction between the public and private realms. Neither consider government merely a necessary evil. While not naïve about the dangers of governmental power, both attribute to the government a moral function of ultimate responsibility for attainment of the common good. For Unger, this primarily signals the destruction of all forms of domination—especially economic domination—that would inhibit the development of the organic groups. For the bishops, this primarily means that the government is the provider of last resort. Both the bishops and Unger expect the government to play an important role in ensuring that society provide basic necessities and protect economic rights because neither the bishops nor Unger begin with the presumption that the economic is distinct from the political.

The major difference between Unger and the bishops is not whether, but to what extent, the government may intervene to promote distributive justice. The bishops are much more reluctant to expose all of life to political conflict. They do not even go so far as Unger in explicitly calling for establishing the right to basic necessities and other economic rights as legal rights. This difference in views concerning the degree of government intervention may be of such significance as to make their theories of government irreconcilable. Furthermore, since Unger relegates the precise definition of his system of rights to the political process, he aggravates the differences between himself and the bishops. Therefore, the degree of intervention that he envisions remains less determinate than the bishops would probably tolerate. Even in economic affairs—which the bishops do not remove from political intervention—they would not tolerate the kind of comprehensive government intervention that Unger envi-



sions. These differences aside, the bishops and Unger agree on a fundamental principle that sharply distinguishes them from liberal theorists. That is, they agree that the government has an affirmative, moral, and ultimate role to play in promoting distributive justice.

### III. CONCLUSION

Can Unger's jurisprudence, as evidenced by his theory of distributive justice, serve as a starting point for the development of an American Catholic jurisprudence? The answer is a qualified yes—perhaps a *very* qualified yes.

Certainly, the preceding analysis has shown a number of areas of fundamental agreement. Both the bishops and Unger base a mixed deontological-consequentialist theory of distributive justice in an authentic human nature, and in so doing reject liberalism's strict distinction between fact and value. Their theories of human nature converge in the critical notion that the person is fundamentally a social and political being, and therefore, the right to basic necessities and other economic rights are defined, not in individualistic terms, but in terms of the integral development of the person in community with others. Their social theories also converge on the important notion that distributive justice cannot be reduced to the mere utilitarian balancing of individual interests. Rather, they stress human dignity and community as the foundational norms of their theory of distributive justice. Finally, both the bishops and Unger stress subsidiarity and participation in all aspects of society as critical components of their theories of government. Furthermore, they both reject liberalism's minimalist view of government, stressing rather the positive—indeed, moral—function of government in protecting economic rights.

But of course there are many important differences between the bishops and Unger. Unger is a far greater skeptic, even if only a "soft" skeptic, than the bishops are likely to tolerate. Even given the generally indeterminate nature of the Church's social teachings compared to her personal ethic, Unger's soft skepticism may be an insuperable problem. Due to his skepticism, Unger's view of human nature is more existential than that of the bishops; it is also more positive. Unger certainly recognizes sin in the world, but it is almost entirely located in social and political institutions. The bishops see far greater possibilities for social change through conversion of hearts, although they also recognize the important

role of social sin.

Another major difference with the bishops is Unger's definition of distributive justice in essentially egalitarian terms, that is, based primarily in need. Need plays an important role in the bishops' theory to the extent that basic needs remain unmet, whereas Unger adopts a more strictly egalitarian notion of need as the sole criterion for distribution of goods. But both are concerned with reducing inequality in order to foster the flourishing of community and the common good.

Finally, Unger is both more of a statist and more of an anarchist than the bishops. He is more statist insofar as he grants a greater role to government, especially in terms of directing the economy and guaranteeing economic and cultural rights. The bishops leave the latter largely to the realm of developing a moral consensus that individuals have economic rights and that the various actors in society—not only the government—share responsibility in ensuring that these rights are protected. Unger is more of an anarchist because his existential and skeptical concern for context revision and his corresponding destabilization rights envision a society far more plastic than that of the bishops, who traditionally have a great concern for social order.

Can we say then, "critical legal bishops"? Is Unger "very Catholic" in his radical jurisprudence? The answer is a qualified yes, but given the qualifications, might better be stated as a "qualified no." But, perhaps the question, itself, is somewhat off the mark. First, given the nature of the bishops' competence as teachers and pastors, they will never—if they are doing their job and remaining faithful to the Gospel—be identifiable with a single jurisprudential theory. Nevertheless, some theories certainly are much more compatible with the Church's social teachings than others. And it is partly the role of the bishops, and moreso, the role of the Catholic laity, to determine which legal theories and practices better represent the general norms of the social teachings. This paper is one attempt to do this.

Second, this article is far too limited in scope to provide anything but a qualified answer to this question. It has dealt only with the issues preliminary to doing serious jurisprudential analysis: aspects of the theories of knowledge, human nature, society and government that underlie the bishops' and Unger's notions of distributive justice. It has not even begun the next step of discussing particular jurisprudential issues, such as what components of their theories of distributive jus-

tice, if any, should properly be embodied in law—that is, the relationship between law and morality, and whether private or public law is the proper realm for implementing such distributive principles. Nor has it discussed whether their notions of distributive justice are compatible with United States constitutional, statutory and common law. And it has not analyzed whether jurisprudential theories other than Unger's might be more compatible with the Church's social teachings. Finally, it has not determined about which of these more particular jurisprudential issues Catholic social teaching has anything to say, and which involve prudential moral and non-moral judgments to which the bishops do not and should not speak.

Nevertheless, this paper has attempted to show that there is much in Unger's basic theory of distributive justice that warrants pursuing a comparison of other aspects of his epistemology and social and political theory, as well as the more specific jurisprudential issues mentioned above. Certainly the Church's social teachings cannot be identified exclusively with a particular jurisprudence, and Unger's may not be as compatible as other contemporary jurisprudential theories. Nonetheless, considering the extent to which Unger and his Critical Legal Studies colleagues have been ostracized by many legal scholars, it is both surprising and significant that such a "radical" has so many important principles in common with the bishops. It suggests both that Unger really is not as radical as he may seem and that the bishops are far more radical than many would like to admit, particularly in the priority they give to need, economic participation, solidarity, and relative equality in their theory of distributive justice.