

BOOKS REVIEWED

LAW IN MODERN SOCIETY. By Roberto Mangabeira Unger. New York: The Free Press. 1976. Pp. ix, 309. \$12.95.

*Reviewed by Vincent Luizzi**

Unger's *Law in Modern Society*,¹ which followed within a year the publication of his first book, *Knowledge and Politics*, is replete with analyses of and information about social theory, political philosophy, and the emergence of a panoply of social orders, all of which is organized within the four corners of a rigidly structured conceptual framework. Unger portrays his work as ultimately providing a reconstruction of a beleaguered social theory which, in its present state, is sorely in need of repair. To facilitate our paying adequate attention to these features of the work, this review begins with a descriptive account, as far as is practicable, of the substance of Unger's thoughts. It will then evaluate Unger's contribution to social theory in an attempt to determine whether the book should carry a warning of *caveat emptor*.

In his first chapter, "The Predicament of Social Theory,"² Unger distinguishes a long tradition of political philosophy from the "classical social theory" of Marx, Durkheim, and Weber.³ Social theory, says Unger, is "engaged in a quest for an understanding of the different forms that people's awareness of each other, of nature, and of themselves assume in each kind of social life."⁴ Classical social theory, which significantly differs from political philosophy partly in its rejection of any notion of a universal human nature, is in a crisis and is beset with problems of *method*, *social order*, and *modernity*. It has turned from the traditional alternatives of logical and causal methods of explanation to an imprecisely defined model that somehow requires both the agent's and the observer's perspective to be accounted for. As for social order, classical social theory has incorporated, without explaining how to harmonize, two views that are in *prima facie* conflict—that men follow rules designed to satisfy their self-interests and that they respond to the dictates of a set of shared social values. Not only has classical social theory tried and failed to account for the unique characteristics for the modern European nation-state, but also, since the time

* Assistant Professor of Philosophy, Southwest Texas State University. A.B., University of Rochester; J.D., Boston University School of Law; Ph.D., University of Pennsylvania. Member, Texas Bar.

1. R. UNGER, *LAW IN MODERN SOCIETY* (1976) [hereinafter cited as UNGER].
2. *Id.* at 1-46.
3. *Id.* at 3.
4. *Id.* at 5.

of that attempt, modern Western society has changed fundamentally with the proliferation of industrial societies. The problem of modernity, therefore, not only remains unsolved, but is now redefined.

Against this background, Unger's thesis can be identified as this—that if classical social theory is to overcome these shortcomings, it must adopt a view of human nature more flexible than those developed by the traditional political philosophers. Classical social theory must recognize that human nature is variable and a function of social context,⁵ for the absence of such a view is at the heart of traditional social theory's problems. To develop this thesis and ultimately to resolve social theory's difficulties, Unger turns to a study of law and its role in modern society. "Law seems a peculiarly fruitful subject of inquiry, for the effort to understand its significance takes us straight to the heart of each of the major unsolved puzzles of social theory."⁶

Unger informs us in the second chapter, "Law and the Forms of Society,"⁷ that of the three main types of law—customary, bureaucratic, and law in a legal system—the last is the rarest. He isolates two conditions that must be fulfilled for a legal system to emerge. First, the social climate must be one where the right to govern is not seen as vesting in any single group. A pluralistic society, characterized by its arbitrary values, fluid social bonds, and recognition of the need to accommodate conflicting interests among its citizenry, meets such a requirement. Second, there is a theological or moral factor. The civilization must rely on some higher body of laws. In testing his hypothesis, Unger points out that a legal order failed to develop in ancient China's feudal society because the theological factor was absent; in ancient Islam, because the social factor was absent; and in the Greco-Roman world, because both conditions were met only imperfectly.

Unger concludes the second chapter by sizing up the problems of any society in which there is a rule of law and by suggesting a solution. In such societies, there is a tension characterized by each individual's furthering of his own goals and accepting the ways of others. The proffered solution, which is so abstract that it might better be labeled a guide to a solution, draws on our understanding of how such an order arose. "If it is true that the theoretical problem of social order arises from a moral and a political situation, this problem can be resolved only by changing the situation."⁸

Paralleling the structure of chapter two, the next chapter, "Law and Modernity,"⁹ deals with the emergence of the modern liberal state and its problems. Instead of a suggested solution it indicates the possible destinies

5. *Id.* at 42.

6. *Id.* at 44.

7. *Id.* at 47-133.

8. *Id.* at 129.

9. *Id.* at 134-242.

of liberal society. Unger portrays the modern liberal state as one in which each individual holds membership in an array of groups, perceives a multiplicity of views regarding basic values as the good and the beautiful, and lives in accord with society's standards, believing it to be mutually advantageous for himself and others. Yet he is primarily interested in himself. Unger further identifies the modern liberal state by contrasting it with two other society-types, tribal and aristocratic, where community solidarity and honor operate as the cohesive forces, such forces being absent in the modern liberal state.

With this as a characterization of modern liberal society, Unger then gives a genetic account of its emerging out of European aristocratic society, taking on the attributes of generality and autonomy from the law of edicts, and attributes of being public and positive from the law of estate privileges. The society that has emerged is plagued by problems which involve a serious discontinuity and struggle between the ideal and the actual. Perhaps the most troubling example of this tension is the conflict between the need for authority and, given the ideal of equality, the inability to justify such a need.

Now there is more to the story of modernity than the definition, emergence, and problems of liberal society. For modern society is now in its postliberal state, and its law suggests the peculiarities of this society and its ills:

The study of the legal system takes us straight to the central problems faced by the society itself.

If this hypothesis, which underlies my argument, is correct, then any revision of the nature and uses of law will reveal changes in the basic arrangements of society and in men's conceptions of themselves.¹⁰

Unger's analysis reveals that several trends have resulted in the re-definition of modern liberal society, which in its postliberal state displays a decaying rule of law. Among these developments is the proliferation of open-ended standards and policy-oriented arguments, both of which function to preclude the strict application of rule to facts and ultimately foster ad hoc balancings of interests. Law thereby loses its generality, its ability to be formulated with broad categories and applied without reference to personal or class interest. And since generality is a necessary ingredient of the rule of law, any erosion in generality is accompanied by a deterioration in the rule of law.

Modern society, in its postliberal form, has, as its peculiar problem, its "ultimate political issue,"¹¹ the harmonizing of individual freedom with community solidarity. Also, modern society in its various forms is undergoing a dialectic, not unrelated to the ultimate political issue, "of the

10. *Id.* at 192.

11. *Id.* at 236.

experience of personal dependence and the ideal of community."¹² The reader is told little more about the nature of this dialectic save that its outcome is uncertain. In the face of this uncertainty, Unger feels justified in suggesting two models with reference to which we can speculate on the fate of modern society.

The first model suggests that the history of law progresses in a linear fashion from a point of origin to a pivotal point at which time it reverses and returns to the beginning. On this model, the decline of the rule of law, apparently the pivotal point, culminates with the loss of individual freedom, which we understand to be the situation at or before the dawn of the history of law. The second model has a more optimistic outcome, for there is a possibility that individual freedom and community solidarity can be reconciled with one another. The model is that of a spiral that reverses direction but does not return to the starting point.

Unger concludes with "The Predicament of Social Theory Revisited,"¹³ where he reaffirms his observations in chapter one that social theory requires a view of human nature. Human nature, the reader is told, can be seen as existing only in concrete social settings and as changing, up to a point, as the form of social life varies. The constant features are the perpetually recurring problems of how man deals with the inescapable features of his world—nature, other persons, and his work. Armed with this conception of human nature, social theory is still not prepared to operate properly. For such a notion of human nature needs a metaphysics and a politics we as yet do not have. This requires social theory, on the one hand, to "take a stand on issues of human nature and human knowledge"¹⁴ and, on the other, to "acknowledge that its own future is inseparable from the fate of society. The progress of theory depends upon political events."¹⁵ In so doing, social theory will be set back on the track of the traditional political philosophers and will overcome the impasse reached by classical social theory.

With this chapter-by-chapter summary complete, one may turn to the evaluative concerns and note two systematic and not unrelated problems with Unger's work, problems that permeate the work as a whole and which need to be addressed in order to assess the value and success of Unger's enterprise. First, it seems there is some *prima facie* incongruity in Unger's methodology. Unger identifies at the outset of the work the problems of *social theory* and offers at this time a promissory note that he will provide a better perception and resolution of these problems. But the next two chapters ostensibly deal with the emergence of, and problems with, *societies* with legal orders and *modern society*, in particular. True,

12. *Id.* at 236.

13. *Id.* at 243-68.

14. *Id.* at 267.

15. *Id.* at 267.

at the conclusion there is a discussion of social theory and its problem, but it is not clear whether, or how, the note was paid off. Has Unger confused the problems of social theory with those of society? Is his rigid conceptual framework merely a veil of order which, when pierced, reveals that large parts of the corpus are incidental or irrelevant to the development of his main thesis? If so, on fair ground, what is Unger doing in chapters two and three that bears on the solution of social theory's difficulties?¹⁶

It is this writer's view that in these two chapters, Unger is *social-theorizing* or *doing social theory* as a *means* of generating a view of human nature that an adequate social theory needs to solve its problems. This explains why, in chapters two and three, Unger is investigating various kinds of social life or societies through the vehicle of their laws. But even the explanatory power of this hypothesis, which seems the most cogent means of portraying Unger's work as an integrated effort, still leaves the reader wondering about particular features of Unger's analysis.

It does not explain how his discussions concerning the problems of society and their possible resolution bear directly on his goal of uncovering for social theory a view of human nature. Nor does it aid in a clear understanding of why the particular view of human nature that Unger finally posits follows from his social-theorizing in the second and third chapters. Now, even if Unger has uncovered a view of human nature that one can reasonably infer from his social-theorizing, he suddenly springs on the reader the conclusion that there are additional problems for social theory besides that of human nature. At most, then, Unger has paid off his note, but he owed the reader more than expected when the promise was made. Why these additional problems were not addressed and why such great effort was expended in detailing the emergence of the forms of society and their problems is not clear.

A more serious methodological problem remains, however, if the view is accepted that Unger was doing social theory to help social theory along. If Unger was social-theorizing to discover a view of human nature to solve the problems of an inadequate social theory that lacks such a view, it can well be asked what kind of social-theorizing he was engaging in. If it

16. Unger's *Knowledge and Politics* was not free of the criticism that it was often obscure as to how conclusions were arrived at or just what should be concluded from the analyses offered. One reviewer, in commenting on Unger's overall aim of providing a total criticism of the liberal state, pointed out: "Unger's 'total criticism' of the liberal state is mysterious. One wonders what is the point of view from which this criticism proceeds. Finally, after some 200 confused and confusing pages, a point of view emerges." Richards, Book Review, 44 *FORDHAM L. REV.* 873, 874 (1976). And another reviewer drew attention to Unger's arguing for apparently inconsistent positions, leading one to wonder what should be concluded. Unger "goes to some trouble to insist . . . that his formulations of the psychological and political assumptions of liberal thought are independent, that the terms of one do not . . . imply the others; he then goes to some length . . . to show that they are in fact interconnected." Neu, Book Review, 54 *TEXAS L. REV.* 441, 449 (1976).

is the inadequate social theory that is wanting in a conception of man's nature, why should one trust its results? And if it is some social theory that is already revised and well equipped with a healthy notion of human nature, why should one think the theory would allow discovery of anything new about human nature; for by hypothesis this theory is adequate. Unger, then, must either claim to be searching for truths about human nature via a faulty social theory or to be using an adequate social theory and thus tacitly admitting that that social theory embraced a cogent view of human nature all along and that he is discovering nothing new with his inquiry. Either situation presents methodological problems of a most serious nature.

Since Unger's methodology is suspect, one can also question any conclusions he draws from it about human nature; and in this lies the second main problem with the work. Even so, one can still ask meaningfully whether the view on human nature itself is viable. Even if the reader may be skeptical of how Unger arrived at the view, is *the concept itself* problematic? Is the illegitimate notion conceptually deformed? Along these lines, one might further observe that Unger leads the reader to believe that his view on the nature of man is unusual and highly complex. He ultimately cojoins two apparently inconsistent views and calls attention to the fact that a *new metaphysics* is needed to make way for such a view. To adequately evaluate the concept and these observations and to determine whether the seriousness of the second problem identified above might be mitigated because of the merit of the view itself, one may here embark upon a tripartite inquiry. First, we ask whether the concept itself is internally consistent; next, whether a new metaphysics is needed to support the view; and finally, does the view ring true?

Consider first the inner dynamics of the view. As already observed, Unger wants to inject some view of human nature into social theory but wants to hold that human nature is not uniform, that it changes according to the social setting, and that it exists only in the social setting—that it has no “supra-historical” existence. He wants to emphasize that all men have social and asocial sides (following Kant) and are permanently faced with coming to grips with nature, others, and work but also that (following Hume) one cannot talk of what man is really like in the abstract, since one always encounters men in particular social contexts. Unger wants to characterize human nature in a general fashion but at the same time hold that there is no such thing as human nature in general existing by itself. But this is not a unique move.

Hume, among others, reacted against the “state of nature” theories of the seventeenth and eighteenth centuries that tried to describe what man's real essence is by appealing to his behavior in a context prior to civil society even though the reader never sees nor has seen such a state of nature actually existing. But he did not feel constrained to withhold comments on man's nature nor should he have. The following propositions

provide a basis for explaining why Hume and Unger can consistently hold the views they do:

- (1) We allow as fact about man's nature that which is independent of what we can observe or have observed.
- (2) We allow as facts about man's nature *only* that which we can observe or have observed.
- (3) The evidence points to nothing as constant about the nature of man.
- (4) The evidence points to some common features about man.

Propositions (1) and (2), it should be noted, are statements concerning the epistemic framework or guidelines within which any inquiry concerning human nature might proceed. Proposition (1) allows one to say that the nature of man is good, or evil, or irrational despite clear counter-vailing evidence gleaned from present or past observations. State-of-nature theorists might proceed in this manner. Proposition (2) constrains the investigator to limit his data to observables and to construct a theory that does no more than to save the appearances. Propositions (3) and (4) are conclusory and judgmental with regard to the results of inquiry. One could reach either conclusion from his orientation in (1) or (2).

Unger probably would accept proposition (2) and reject (1). The paths of propositions (3) and (4) are then open to him. He takes (4). As already indicated, proposition (4) is a possible conclusion to reach when employing the methodology set out in (2). Hence, there should be no cause for any disquiet in his endorsing a view that entails committal to propositions (2) and (4).

From the above it is clear that it is permissible to hold, as Unger does, that one can speak of man's nature while holding that such is always embodied within particular social contexts; his notion is internally consistent. But what of a metaphysical position to support the view? Is some new metaphysics needed as Unger asserts? Already available to Unger are the following metaphysical positions, stated here quite simply. Nominalism, as applied here, would portray human nature, with features ABCD, as existing only as $A_1B_1C_1D_1$, $A_2B_2C_2D_2$, $A_3B_3C_3D_3$, and so on, depending on whether one is dealing with social context₁, or social context₂, or social context₃, and so on. Human nature, defined by properties ABCD, does not exist in any abstract sense. Another view, Platonic realism, would require saying that properties or universals such as ABCD are given an ontological status independent of any particulars. ABCD exists as an abstract entity quite apart from any particular existing things, such as societies, that might display these features. Aristotelian conceptualism is a third position where the universal, ABCD, exists but is always embodied in particulars and never exists in any abstract mode as it did under the doctrine of realism. Unger seems to choose this last option. The "universal is viewed as an actual being that can neither exist apart from a particular manifestation

nor be reduced to any one embodiment."¹⁷ He actualizes the universal (human nature) but allows its existence only in particular instances, societies.

If Unger can be seen as taking an Aristotelian position, the obvious inference is that a new metaphysics is not required. If for some reason the reader is willing to accept Unger's assertion that a new metaphysics is needed, he is forced to wait and see both *why* a new metaphysics must be constructed, *i.e.*, in what consists the inadequacy of conceptualism, and *what* this new metaphysics will look like.

In considering the merits of the substance of the view, one asks whether it is accurate or true or cogent? The notion Unger argues for glosses over relevant human traits and ultimately short-changes man. Rather than supplying a view of man that recognizes him as the only being that can formulate and execute sophisticated plans to effect what he hopes and desires, and avoid what he fears and dislikes, rather than developing man as one who can alter, manipulate, even fundamentally restructure his environment for his own purposes and who has and can continue to build up an impressive storehouse of ideas for these purposes — all of which is needed to adequately account for the history and advance of civilization — Unger gives us a niggardly and impoverished account of man that barely recognizes his abilities and highlights a few features that suggest a passive being subject to the vicissitudes of the march of history. Witness how Unger speaks of modern society; faced with its problems, modern society is undergoing a dialectic. Unger mentions the uncertainty of the outcome and points to two models with which one might predict the resolution. But note that there is never any indication of what man should do to solve the problems of modern society. Societies have problems that *are resolved*, but men are not portrayed as beings that recognize such problems and *solve* them.

This concludes the deliberations on Unger's concept of human nature, viewed in its own right independently of how it was arrived at. It seems that the most one can say to lessen initial reservations about the view is that it does appear to be internally consistent. That perhaps one should be charitable toward the view because the extant metaphysics are inadequate to ground it theoretically does not seem to be a legitimate request when one finds evidence that there does seem to be an adequate metaphysical theory. As for the substance of the all-important view of human nature, it is found to be incomplete. And this seems to be symptomatic of the entire work. Features that Unger seems to consider well settled and complete are never addressed. One wants to know more about the derivation of the view on human nature and specifically how it rests on and was inferred from his analyses in chapters two and three. One wants to know just why his view of human nature is not enough to cure social theory of its ills as is contended at the outset. One wants to know why it is so certain

17. UNGER at 261.

that there is no adequate metaphysics for the view; why Unger's analysis precludes a richer view of man's nature; and, perhaps ultimately, precisely why the study of the rise of legal orders and the role of law in modern society should operate as the chief paradigms of inquiry to provide the essentials of what one needs to know about the human condition.

Caveat emptor.