Why Law?

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That question came persistently to mind as I read Professor Unger's book. More formally, why is this critical study legal? Professor Unger offers a vision of a better world. The vision is connected to a critique of legal doctrine. The proximity in this book of the critique and the vision suggests that Professor Unger would have the one emerge from the other. Certainly he would have the study and practice of law become the expression of adherence in the vision.

Legal doctrine, law schools, and the practice of law hardly seem, in their bounded sphere, fertile ground for utopian political vision. It is true that in a broad sense “laws” are the embodiment of the collective exercise of political power. As such, laws are the basic terms of our society. Any political theory would be legal in this sense. But laws in a narrower sense are the starting point of Professor Unger's excursion. He means laws as they are directly involved in adjudication; the laws that law students parse and lawyers invoke.

Laws operate at retail through a loose-knit conceptual aggregate known optimistically by legal academics as “doctrine.” Doctrine presents itself as a set of rules for deciding disputes in various practical contexts, bound together by broader principles governing the conduct of the disputes themselves. Some pockets of doctrine reflect concerted and programmatic political action, but much of it is the accretion of centuries. Doctrine can be almost infinitely subdivided into patterns, each with its own profusion of maxims large and small. At almost any level of inspection legal doctrine appears as a jumble of recipes, rules, meta-rules, exceptions, principles, meta-principles, and pseudo-principles, patched together with rhetorical epicycles to make the pieces fit.

Professor Unger's critique of legal thought aims at what he

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calls "objectivism" and "formalism"—notions that legal doctrine has an inevitable moral or analytical foundation rooted either in the world or in its own first principles. The criticism is entirely plausible, even tonic, but is hardly earth-shattering. Formal doctrine, if we mean by that an immutable and self-evident set of rules derived from first principles, fell of its own weight several generations ago and was moribund long before that. Since Bentham revealed the practical and conceptual non sequiturs on which Blackstone’s complacency rested, there have been few academic defenders of the formal certainty of law. Attacking formal doctrine on this front is a little like attacking Ptolemaic astronomy.

Passing through a critical dissection of several pockets of legal doctrine, Professor Unger moves to a vision of a new political and social order. I had no immediate sense as I read this book of a necessary connection between these two phases of Professor Unger’s thought.

Professor Unger does, to be sure, find in legal doctrine pervasive reflections of "social division and hierarchy" (his terms for those elements of class and status in our society that act as barriers to self-realization). But since he views division and hierarchy as universal flaws in our institutions, evidence of them in the law school curriculum does not, of itself, account for making the study of legal doctrine the fulcrum for a visionary reconstruction of the world. Division and hierarchy could be found and attacked anywhere with equal plausibility. Professor Unger finds in the division of labor itself, for example, a main cause of our fragmented selves.

Even Professor Unger appears to be nearly agnostic on the necessity of his vision’s connection with his critical traversal of doctrine. It does not trouble him to be so. He is sketching a possible world, not a necessary one. He is a prophet who does not know whether there will be a Messiah.

This suggests one immediate answer to the question "why law?". It is there. Prophets too need a venue. There are many law schools and even more law students, lawyers, courts, and judges. In this populous field many float without moorings, at least intellectually. Precisely because legal doctrine is so indeterminate, it can accommodate a host of "alternative" ideas without clear priority or intellectual distress. Fields that have greater conceptual necessity are not usually so ecumenical. Astronomy faculties do not teach and study both the Aristotelian and Newtonian strands. I know of no mathematics faculty that has made "diversity" a goal.

The price of admission to the legal intellectual universe—and it is not very steep—is that you have to talk to some extent about
law. A critique of legal thought serves this end perfectly well and, given law’s gerrymandered intellectual contours, one can always be mustered. Professor Unger’s method is dialectical; the amoeba-like quality of legal thought makes it a ready rhetorical target. By setting legal doctrine as the first leg of his antithetical structure, he sets the stage to move almost anywhere. As it turns out, the missile thrown at legal doctrine is deflected from the collision to land on a re-creation of the political self. This is as much a function of its own initial thrust as of any particular feature of the ideas with which it collides.

It is a defining element of radical movements to tear down the world before building it anew. Marxism demands revolution and the dictatorship of the proletariat before the advent of pure socialism. For Professor Unger these stages have become largely internal. From the assault on legal doctrine comes “negative capability,” which frees our awareness from the corrosions of social division and hierarchy. From the rubble of doctrine comes a regeneration of self. This is a cultural revolution. When we are individually liberated, we will be so collectively as well. We will have new lawyers before we have new law.

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There is another, more important reason why law is made to serve as Professor Unger’s rhetorical foil—and that is an attitude toward scarcity.

Scarcity is the central fact to which all political and economic thought responds. Everything worth having, and ultimately time itself, is scarce. Humans have been, in the aggregate, prodigiously successful in dealing with physical scarcity. There are five billion people who have colonized every corner of the globe, the vast majority of whom have enough to eat and are in a position to reproduce. No other species on earth has ever made this large a dent in scarcity. Beyond physical scarcities, though, are psychic scarcities. Those who have wealth want love, and those who have both want more. As an element in human life, scarcity is like entropy in nature. We can extend ourselves and push it back a bit, but in the end it asserts itself. Inroads against scarcity are molecular, temporary, and are met with a new sense of scarcity.

While everyone must deal with scarcity, it is more poignant for some than for others. Some, like Emma Bovary, feel the gap between aspiration and reality particularly intensely. There is a long tradition of utopian and revolutionary thought in which scarcity is both a scandal to be proclaimed and a dragon to be slain.
The repeal of scarcity is a periodic element on the millenial agenda. Both Christianity and Marxism, the two most widespread "official" world views, promise eventual victory over scarcity.

Scarcity is more strongly perceived in relative than absolute terms: those for whom scarcity weighs the most heavily often find inequality to be its most scandalous element. Rousseau found in the simple fact of inequality incontrovertible evidence of the corrupting effect of society on a fundamentally evenhanded state of nature. As an avowed visionary, Professor Unger also wants to remove the weight of scarcity from human shoulders. I should add that nowhere does he say so explicitly. I don’t believe that the word "scarcity" ever appears in his book. Rather, he ignores it to death, repealing it _sub silentio_. In this, it is like the dog that did not bark: the most important element on the scene. For Professor Unger, the evils to be rooted out are social division and hierarchy—the sources of scarcity that appear as inequality. It is no accident that Professor Unger questions the division of labor. The division of labor is a response to physical scarcity, and has succeeded in reducing it massively. But it also has in it the seeds of status and hierarchy and a host of psychic scarcities.

Law’s connection to scarcity gives color to the study of law as a starting point for reshaping the world. In its day-to-day operation, law is the most visible element of society's accommodation to scarcity. Through legal rules and the interventions of lawyers and courts, collisions both of things and of interests are resolved. Law divides and parcels out, does not create. Law is scarcity’s natural habitat. Lawyers are at best managers of scarcity, and at worst profiteers.

There is one class of people—economists—for whom scarcity is, if not a positive good, a given to be accepted with equanimity. Peaceful coexistence with scarcity is the economist’s stock in trade.

Because of their fundamentally different attitude toward scarcity, those who would import economics into legal thought are Professor Unger’s natural adversaries. Professor Unger’s main critique of legal doctrine is addressed to “formalism” and “objectivism”; he dismisses the law and economics school as a simple variant of these intellectual postures. In fact, the economic approach belongs to neither. The economic school does not look to classical canons or to the inner logic of doctrine to explain the course of the laws. To this extent, the economists will agree with Professor Unger that classical doctrine is neither persuasive nor even relevant as an account of our legal system.

But the economic school also finds in the microscopic develop-
ment of laws a largely rational response to scarcity. Viewing the constant contest of positions in legal proceedings as a market, the economists conclude that the outcomes tend overall toward efficiency. No one court may pursue efficiency systematically, or even know of it. But the cost of protracted misallocation creates pressures over time toward rules that preserve wealth. And this is in contrast with the broader political covenants of our society, which arise in markets where the cost and difficulty of measuring misallocation in advance of action are so much greater that wealth-destroying bargains are able to arise and persist over time. To these observations about the legal system, the economic school adds the obvious prescription that where pockets of law that destroy wealth are found, they should be corrected in favor of efficiency. If proponents of an economic approach are right and the laws that emerge from the process of adjudication do in fact embody a rational accommodation to scarcity, then the indeterminacy perceived by Professor Unger in their operation disappears.

Professor Unger seeks to convert. Conversions, as exemplified by Augustine and Pascal, involve a leap from a condition of irreducible contradiction and frustration. The more total the contradiction of the starting condition, the greater the dialectical momentum for the leap. Augustine and Pascal do not prove God, but the convert is made to want to escape this life in God’s direction. Professor Unger’s assault on legal thought is similarly conceived. It is designed to make us want something better. Professor Unger’s view and the economic approach to law are natural forensic opposites, just as Descartes’ analytic discursions were anathema to Pascal. Economists thrive at margins. Professor Unger seeks to jump orbits. A view that recognizes an underlying coherence in our legal system, coupled with a plausible direction in which to nudge it when it lacks coherence, removes the essential motivation for Professor Unger’s leap. Professor Unger therefore rejects the economic approach, as he must. He does so swiftly and epithetically, his rejection being more a premise than a conclusion. Marginal improvements in the present human condition are not what he is after.

Professor Unger’s thought and style have antecedents more immediate than Augustine and Pascal, in the counterculture and New Left of the 1960s. If one had to find a central theme in that particular blend of political disaffection and romantic yearning, it would be that the law of scarcity had been repealed. The production of wealth was to be a spontaneous outgrowth of individual and collective liberation. The “greening” of America was upon us.

The counterculture of the 1960s made manifest another way in
which ideology pacifies the problem of scarcity: by becoming an item of consumption in itself. Radical visions serve as antidotes to scarcity by making one feel better about oneself. Political conviction was an element of the new consciousness through which people felt themselves morally better than their bankrupt forbears. But visionary intensity proved hard to sustain when its power over self wore off. And in the end, the 1960s laid bare the scarcity of genuine revolutionary possibilities rather than their immanence—as is vividly revealed in the brief history of the New Left. Between roughly 1965 and 1971, the New Left went through the same stages as the French Revolution between 1789 and 1794. But the New Left was out of power. It was consuming its own revolutionary fervor and itself.

What remains of the visionary intensity of those times has retreated to the universities, which is its normal place of hibernation between worldly outpourings. Perhaps more than law itself, law school is a plausible setting for Professor Unger’s excursions. Law students are better consumers of ideology than their future selves, and can adopt world views on largely aesthetic grounds at no immediate cost. But they will do so only up to the point where the incongruity with one’s future self becomes too great. Law schools are places where most students either gain entry to the middle class or consolidate their connection with it. The space left open for vision is bounded.

Professor Unger has adapted his visionary style to this terrain. The vision is advanced by small subversions of the system and “destabilization” rather than revolutionary outbreak. Radical fervor has become “negative capability”—the capacity to respond critically to the intellectual corruptions wrought by social division and hierarchy. This is not as much a program as a state of mind. Indeed, if the inner revolution is the one that counts, someone embracing Professor Unger’s outlook could plausibly pursue conventional success, while retaining just the degree of uneasiness necessary to confirm moral awareness. Stronger commitments to this thought are possible, to be sure, but the minimalist version will attract the largest constituency.

My two responses to the question heading this review seem nearly to have merged, which suggests that my thoughts in response to Professor Unger’s book have reached their natural limits. I should, before closing, reveal my own biases, although I have doubtless entirely tipped them by now. Legal studies strike me as unlikely terrain for a regeneration of society or ourselves. I cannot imagine that law is where the boundaries of scarcity will be pushed
back on a large scale, especially if legal doctrine turns out to be merely a facade. The work of lawyers is too derivative of broader political covenants. The most lawyers can do is iron out the lumps that occur as we fit our lives into social and economic shapes consistent with our protean political consensus. If you try to make law do more, such as ushering in a new consciousness, it will do less. Lawyers' gains over scarcity are bound to be molecular.

There are occasional molar gains, but they are fortuitous rather than programmatic. As an aside to his main work of saving souls, Pascal invented the adding machine. Human consciousness became a larger space when Schubert composed his C major string quintet a few weeks before he died. Neither was a lawyer.