

COMMONSENSE REASONING, SOCIAL CHANGE, AND THE LAW

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Social theories are not of much use unless they advance in some respect our understanding of the social world. In striving for such insights, social theories come in two types. Some attempt to construct admittedly simplified models of social relations from a few specified principles. In using a limited set of principles, such theories risk producing models that are not descriptively comprehensive or even plausible.¹ In fact, they may only describe and explain a limited region of social behavior.² The payoff for taking this risk, however, is that such models are better able to predict specific patterns and behaviors. Observation of actual social relations can then be used to test those predictions. Through such prediction and observation, these theories provide insights into the operation of actual social relations.

The other type of social theory has a more grandiose aim. Its goal is to provide a complete or comprehensive description and explanation of social relations—a story³—that is superior to any other explanation. Such theories are often intended to be normative as well as positive; that

¹ “[A] model, persuasively to present an idea-structure as a possible linkage-format for descriptions of a given subject matter, *must* differ from the subject matter. If it were not different, the original structure would itself be observationally obvious to everyone who confronted the descriptions, or at least as obvious as in the model.” N. HANSON, *OBSERVATION AND EXPLANATION* 79 (1971). “[B]y completely eliminating *all* differences between the model and the original state of affairs one ends up destroying the very thing the model was meant to achieve—namely, the provision of an ‘awareness of structure’ absent from the original confrontation with a complex of phenomena.” *Id.* at 81.

² Robert Merton’s idea of social theory of the middle range sacrifices comprehensiveness for explanatory power. See R. MERTON, *On Sociological Theories of the Middle Range*, in *ON THEORETICAL SOCIOLOGY* 39, 51-52 (1967); R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 3, 9 (1949).

³ I am tempted to say “myth” in the anthropological sense of a story that presents both a “model of” and a “model for” society. See Geertz, *Religion as a Cultural System*, in *ANTHROPOLOGICAL APPROACHES TO THE STUDY OF RELIGION* 1, 3-4 (M. Banton ed. 1965) (culture as whole performs normative and explanatory functions). *Politics* has many of the aspects of a cultural symbol system: it not only provides its readers with a description and explanation of the world, but also presents a world toward which readers should strive. Cf. K. MANNHEIM, *IDEOLOGY AND UTOPIA* 56, 59 (L. Wirth & E. Shils trans. 1936) (total conception of ideology: “reconstruction of the systematic theoretical basis underlying the single judgments of the individual” in particular social grouping).

is, in addition to explaining the world, they suggest how the world should be reconstructed. They strive to describe and explain every facet of social life in order to present a new and attractive view of social relations that will educate the reader.⁴

Obviously, the complexity of social life alone makes the complete achievement of this ambition impossible. Theories of this second type, however, assert that their outlines of the description and explanation are complete and that filling out the theory is a noncontroversial, ministerial task. The measure of the success of such theories is not their preciseness or predictive power, or the specific insights they provide, but rather their overall plausibility or persuasiveness as comprehensive pictures of the social world.

Roberto Unger's *Politics* is clearly a theory of this latter type.⁵ A magisterial sweep through a vision of a new world that seeks to fulfill human potential and desire, it attempts to blend a positive analysis of society with a normative program for social change. Its purpose is to persuade and prompt.⁶ Because any study of such ambitious scope must of necessity treat numerous difficult issues with extremely broad strokes,⁷ it is easy to criticize any number of Unger's propositions for their lack of

⁴ Critical theory, as described by some, has these characteristics. See Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 765 (1987) (critical theory has goal of enlightenment and emancipation, not development of series of true propositions; is self-referential; and is confirmed by self-reflection) (citing R. GEUSS, THE IDEA OF A CRITICAL THEORY 55-95 (1981)).

⁵ The three volumes of *Politics* are the culmination—for now—of Unger's developing social theory and of his practical experience in Brazilian politics and reform. See also PASSION; *The Critical Legal Studies Movement*. *Politics* is a development of the themes outlined by Unger in his address to the Conference on Critical Legal Studies in March 1982 held at the Harvard Law School and published in revised form as *The Critical Legal Studies Movement*. Unger's earlier work has the same transformative inspiration. KNOWLEDGE AND POLITICS at 15-16.

⁶ See, e.g., SOCIAL THEORY at 9 ("A final aim of [Social Theory] is to enlist the reader's help in the theoretical campaign this work initiates.").

⁷ In producing a study of this type, Unger seems to ignore the import of one of his own aphorisms: "Any complete story about nature and society lacks the compelling character of the most compelling local narratives." SOCIAL THEORY at 83. A significant strain of thought within the critical legal studies movement shares this concern. See, e.g., Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 773 (1985) (local critiques to be preferred); Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW 281, 290 (D. Kairys ed. 1982) (social analyst should work not at level of large-scale social theory but in smallest routine interactions of daily life); Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1684 (1982) ("Speculative inquiry, however, is prey to ensnarement in historical circumstance, an ensnarement that destines most theory to oscillate between phantasmic utopia and peregrine detail."); D. Trubek, "Critical Empiricism" in American Legal Studies: Paradox, Program, or Pandora's Box? 37 (July 1986) (unpublished paper presented at Cardozo School of Law summer workshop and at Conference on American and German Traditions of Sociological Jurisprudence and Critical Legal Thought, July 10-12, 1986) (on file with *Northwestern University Law Review*) ("[O]ne gets a better, more complete understanding of social life if one tells thick stories about something concrete than if one seeks to make broad generalizations, or seek for deep, determining forces.").

development, their vagueness, or their arguable inaccuracy.⁸ Moreover, *Politics*' internal logic may not be as tight as we would wish.⁹

Taken as a whole, however, *Politics* presents a possible and even attractive story of a better social and political life. Such a theory should be judged by its overall plausibility and persuasiveness, rather than by a standard that requires precise modeling and the generation of falsifiable predictions.¹⁰ The appropriate question, in my view, is whether *Politics* presents a view of the world that comports with our present understanding of the way that world operates, while at the same time providing us with new insights into social relations.¹¹ I will evaluate *Politics* using this standard.

I do this by prising out and examining one of the central concepts on which Unger's story rests. That concept is the idea of "formative context." A formative context, Unger's version of social structure, is vaguely and functionally defined as the "set of basic institutional arrangements and shared preconceptions"¹² within which routine or every-

⁸ For example, Unger does not explain his preference for democratic control of the shifting of resources over an entitlement or rights approach such as the one offered by Richard Epstein. See R. EPSTEIN, *TAKINGS* 12-14 (1985). Moreover, Unger is extremely vague about the criteria for the allocation of shares of the revolving capital fund among entrepreneurs. See FALSE NECESSITY at 493-95; see also *infra* note 143. Although I did not comb the three volumes of *Politics* for arguable inaccuracies, the work is bound to have a few, although probably fewer than this article.

⁹ *Politics* is certainly subject to the same types of criticisms that reviewers have leveled at *Passion*. See, e.g., Boyle, *Modernist Social Theory: Roberto Unger's Passion* (Book Review), 98 HARV. L. REV. 1066, 1077 (1985) (Unger's use of "convergence" concept unable to bridge Humean fact/value dichotomy: "Unger is simply more convincing when he concentrates on experience and on the politics of everyday life, rather than on the formal logical categories for producing truth."); Weinrib, *Enduring Passion* (Book Review), 94 YALE L.J. 1825, 1835 (1985) (circularity in idea of revisable contexts).

¹⁰ In fact, if the latter were the standard, *Politics* does not get out of the starting gate. I am sure that many will dismiss *Politics* under this latter standard as another general, vague, unhelpful, and long-winded social theory that presents only the writer's musing and dreams of a better world. I prefer to suggest where I think the theory goes astray even as a theory of the second type.

¹¹ See Boyle, *supra* note 7, at 736 ("[T]hese theoretical problems and philosophical contradictions are only relevant in so far as they reflect (and reflect back upon) our basic experiences of social life.").

¹² SOCIAL THEORY at 62. The institutional arrangements are organized according to more or less explicit or articulated norms. FALSE NECESSITY at 58. The shared preconceptions are the models of "what relations among people should be like in different domains of social existence." *Id.* A formative context is neither a natural object nor a mere mental prejudice: instead, Unger asserts, "The primary sense in which a social structure exists is practical. It exists both because and in the sense that people cannot easily disturb it in the course of their ordinary activities." FALSE NECESSITY at 61.

Unfortunately, this is as precise as Unger ever gets in defining his central concept. His later analysis of general social and economic structures such as petty commodity production and empowered democracy as formative contexts suggests that formative contexts are society-wide social structures. However, he never attempts a more specific definition.

The oft-noted lack of clarity in the writing of scholars such as Unger who are schooled in the continental tradition has been explained as a politically motivated reaction against the prevailing "paradigm of 'proper' philosophical expression." Balkin, *supra* note 4, at 745 n.6 (citing Sturrock,

day social disputes are waged and settled.¹³ His positive claim about formative contexts is that they vary in their resistance to change. The normative counterpart to this descriptive proposition is that those formative contexts which are more open to change should be preferred. Unger thinks that through this concept, *Politics* presents a new and more promising version of the traditional social theoretic concept of social structure, a version that in turn provides a blueprint for a better society.

I find that Unger's analysis of formative contexts and the implications of that analysis for understanding social change lack plausibility and provide little insight into social life. While the concept of formative contexts can be criticized from a number of angles,¹⁴ my criticism is that Unger's concept of formative contexts rests on an inadequate or implausible microsociological theory—that is, a theory of the relations among individuals within a society. My central thesis is that Unger's microsociological theory cannot support his program because it causes him to underestimate the immutability of formative contexts. In making this argument, I elaborate Unger's idea of formative contexts first by tracing the problem it is designed to solve, and then by illuminating the microsociological theory that animates it. Finally, I suggest an alternative microsociological theory and use it to draw some conclusions both for the overall prospects of Unger's program and for law.

I. FORMATIVE CONTEXTS: REVISABLE SOCIAL STRUCTURES

The concept of formative contexts is Unger's preferred conceptualization of social structure. Because every social theory includes some

Introduction to STRUCTURALISM AND SINCE 16-17 (J. Sturrock ed. 1979)). Unger's lack of precision, however, may be epistemologically based. Unger may believe that any more definitive statement would be a distorted description of this essentially protean idea. A detailed definition would give the reader a false sense of stability. To the extent that Unger's theory is intended as a comprehensive explanation, this point has some validity. However, his failure to specify the meaning of formative context certainly makes his theory less useful as a social theory in the first sense I identified above.

¹³ For some time, Unger has been approaching social theory through the somewhat amorphous concept of "context." Both *Passion* and *The Critical Legal Studies Movement* essays rely on the concept as the centerpiece of their analyses. See *The Critical Legal Studies Movement* at 649 ("Formative contexts . . . represent frozen politics: they arise and subsist through the interruption and containment of fighting over the basic terms of collective life."); *id.* at 665 ("[T]here are practical and imaginative structures that help shape ordinary political and economic activity while remaining stable in the midst of the normal disturbances that this activity causes."); *PASSION* at 5-15 (definition of context).

¹⁴ The use of the concept has been criticized as vacuous and chameleon-like. See Weinrib, *supra* note 9, at 1840-41; Note, *Roberto Unger's Theory of Personality, Law, and Society: Critique and Prospect for a Revised Methodology*, 35 *CINN. L. REV.* 423, 433 (1986); R. Garet, *Human Nature as Self-Transformability* 78-92 (Sept. 1986) (unpublished paper presented at Columbia Law School Legal Theory Workshop) (on file with *Northwestern University Law Review*). Unger speaks about contextualism, but rejects the Wittgensteinian idea of context. *PASSION* at 11; see Yablon, *Law and Metaphysics* (Book Review), 96 *YALE L.J.* 613, 623-24, 631 (1987).

idea of social structure¹⁵—whether it is system, social habit, institutional structure, mode of production, or social role—different theories often compete over the definition, description, and precise contours of the idea. A particular theory's position on the nature of social structures depends on which of two great meta-issues the theory focuses upon. Very often, a particular theory addresses one issue to the relative exclusion of the other.

The first meta-issue is the question, "How is social order possible?"¹⁶ For theorists concerned with this issue, social order is produced by identifiable or discoverable processes that hold society together. Social structure is either the skeleton that provides social order with its cohesion or the persistent result of cohesive forces. Some thinkers in this group see an inherent conflict between human nature and social structure or order.¹⁷ Others are more agnostic about the existence of this conflict

¹⁵ The term "social structure" has had as many meanings as there have been sociologists and anthropologists to use it. The heyday of the term was the late nineteenth and early twentieth centuries, when sociologists analyzed societies using an analogy to the morphological structures of living things or, later, the organic functions of biological entities. See L. COSER, *MASTERS OF SOCIOLOGICAL THOUGHT* 28, 91 (1971) (Auguste Comte sought social physics, while Herbert Spencer examined progressive differentiation of structures and functions); A. RADCLIFFE-BROWN, *On the Concept of Function in Social Science*, in *STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY* 178, 178 (1952) ("The concept of function applied to human societies is based on an analogy between social life and organic life."); *id.* at 179 (structure is distinguished from functioning of structure). See generally E. EVANS-PRITCHARD, *SOCIAL ANTHROPOLOGY* 50 (1951) (idea of structure and function can be traced back to Montesquieu: "he speaks of the *structure* of a society and the *rappports* between its parts"). More recently, sociologists relying on the early work of Durkheim and Mauss on social classification, E. DURKHEIM & M. MAUSS, *PRIMITIVE CLASSIFICATION* (R. Needham trans. 1963) (originally published in 1903), and on the structural linguist Ferdinand de Saussure, F. DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* (C. Bally & A. Sechehaye eds., W. Baskin trans. 3d ed. 1966), have called on the idea of linguistic structure to provide content to the term. See, e.g., C. LEVI-STRAUSS, *Structural Analysis in Linguistics and in Anthropology*, in *STRUCTURAL ANTHROPOLOGY* 31 (C. Jacobson & B. Schoepf trans. 1963).

¹⁶ E.g., E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 61 (G. Simpson trans. 1933) (role of division of labor "is not simply to embellish or ameliorate existing societies, but to render societies possible which, without it, would not exist"); G. HOMANS, *THE HUMAN GROUP* 90-91 (1950) (adaptation of social group to external environment); Parsons & Shils, *Values, Motives, and Systems of Action*, in *TOWARD A GENERAL THEORY OF ACTION* 47, 197 (T. Parsons & E. Shils eds. 1951) ("Internal differentiation, which is a fundamental property of all systems, requires integration. It is a condition of the existence of the system that the differentiated roles must be coordinated either negatively, in the sense of avoidance of disruptive interference with each other, or positively, in the sense of contributing to the realization of certain shared collective goals through collaborated activity."); see Wallace, *Overview of Contemporary Sociological Theory*, in *SOCIOLOGICAL THEORY* 1, 41 (W. Wallace ed. 1969) (functional imperativist social theories directed to explaining how social systems persist). The more modern and microsociological schools of social choice and ethnomethodology are preoccupied with the same question: How is collective action or a social sense of order produced? E.g., H. GARFINKEL, *STUDIES IN ETHNOMETHODOLOGY* (1967); R. HARDIN, *COLLECTIVE ACTION* (1982); J. MITCHELL, *SOCIAL EXCHANGE, DRAMATURGY AND ETHNOMETHODOLOGY* (1978).

¹⁷ See, e.g., T. HOBBS, *THE LEVIATHAN* 63-65 (M. Oakshott ed. 1955) (London 1651); S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* 44 (J. Strachey trans. & ed. 1961) ("it is impossible

and the source of social strains.

Theorists addressing the second meta-issue ask what is the basis of social change. They focus on the relation between the individual and the social order in their search for that basis.¹⁸ Although the reasons for the existence of the social order are not always self-evident, they are considered to be unproblematic once they have been isolated; the real focus of interest is on how that order affects—usually negatively—the individual, and on how that effect can be altered.¹⁹

Although it seems obvious that both questions should be central to any adequate social theory, few theorists have expressly addressed, much less answered, the questions together in a convincing fashion. Unger is not an exception: for him, the idea of social order once it is understood is unproblematic, almost self-evident. The predominant thrust of *Politics* is to answer the second question: What is the nature of the relation between the social order and the individual, and how can it change? That answer, however, rests on an implicit theory of the nature of social order.

A. The Nature of Social Order: The Naturalistic Premise and Modern Social Theory

In *Social Theory*, the first volume of *Politics*, Unger locates his idea of formative contexts in the modern history of social thought. He introduces the concept to criticize two variants of the social theory that he finds prevalent in modern (post-Enlightenment) thought. Modern social theory is defined, according to Unger, by its rebellion against the “naturalistic premise”—the idea that social worlds are neither conditional nor subject to revision by acts of will.²⁰ The modernist insight,²¹ according to Unger, was to realize that social worlds not only constrain individual members of society, but also are created by them and thus are malleable.²² In Unger’s view, however, neither version of modern social theory carries this insight far enough:²³ in fact, both actually regress to quasi-naturalist positions.

Under one variant, which Unger identifies as “positivist social sci-

to overlook the extent to which civilization is built up upon a renunciation of instinct”); M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* 1-2 (1971) (conflict of self-interest and achievement of social good causes only small groups to emerge).

¹⁸ See, e.g., 1 & 2 M. WEBER, *ECONOMY AND SOCIETY* (G. Roth & C. Wittich eds. 1978); A. GIDDENS, *THE CONSTITUTION OF SOCIETY* (1984).

¹⁹ See, e.g., J. ROUSSEAU, *THE SOCIAL CONTRACT* 49 (M. Cranston trans. 1968) (Paris 1762) (“Man was born free, and he is everywhere in chains. . . . How did this transformation come about? I do not know. How can it be made legitimate? That question I believe I can answer.”).

²⁰ *SOCIAL THEORY* at 19-23.

²¹ Unger previously analyzed “modernist” theory in *PASSION* at 33-36.

²² *SOCIAL THEORY* at 1 (“Modern social thought was born proclaiming that society is made and imagined, that it is a human artifact rather than the expression of an underlying natural order.”).

²³ See *id.* at 23-24, 87.

ence,"²⁴ the predominant problem is the first meta-issue: how is social order possible. In Unger's account of positivist social science, social order is constituted by an endless stream of problem solving or interest accommodation activity.²⁵ Particular results of this activity, when viewed in the aggregate, make up the social order. Some positivist explanations tend to downplay the constraining influence of the social order and reinforce familiar, almost naturalistic, beliefs about society.²⁶ The social and institutional background to human activity is rarely brought under critical light. In other positivist accounts, the number of possible outcomes of problem solving or interest accommodation is thought to be limited by "[i]nflexible economic, technological, or psychological imperatives."²⁷ This version of positivist social science presents the world as constituted by an a priori set of features from which individuals cannot escape.

The second variant of modern social theory, which Unger labels "deep-logic theories,"²⁸ addresses more directly the relation between the individual and society and the problem of social change. It expressly acknowledges that constraining social contexts exist and goes on to argue that they change through history. These social contexts, according to Unger's exposition of deep-logic theories, stand apart from and order the routines of everyday social life. Each social context has an internal coherence in which each element is inseparable from each other element.²⁹ Deep-logic theories seek meta-principles to explain the transformation between one social context and another. These principles either define a limited set of possible social contexts or describe the necessary evolutionary progression of such contexts.³⁰

Both versions, according to Unger, hedge on their rejection of the naturalistic premise.³¹ Versions of positivist social science that refuse to

²⁴ Unger cites the following as representative: D. EASTON, *THE POLITICAL SYSTEM: AN INQUIRY INTO THE STATE OF POLITICAL SCIENCE* (1953); M. FRIEDMAN, *CAPITALISM AND FREEDOM* (1962); D. NORTH & R. THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* (1978); Solow, *Alternative Approaches to Macro-Economic Theory: A Partial View*, 12 *CAN. J. ECON.* 339 (1979). *SOCIAL THEORY* at 235-36. Unger's broad-brushed descriptions of these two variants are, of course, open to challenges of both miscategorization and misunderstanding. I recount them because of the light they shed on Unger's own views.

²⁵ *SOCIAL THEORY* at 130.

²⁶ *Id.* at 131.

²⁷ *Id.* at 135.

²⁸ Unger cites the following as representative: M. WEBER, *supra* note 18; M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (T. Parsons ed. 1958); K. MARX, *THE GERMAN IDEOLOGY* (C. Arthur ed. 1970); K. MARX, *Introduction to a Critique of Political Economy*, in *THE GERMAN IDEOLOGY* 124 (C. Arthur ed. 1970). *SOCIAL THEORY* at 229-30.

²⁹ Unger gives as an example Marx's idea that each mode of production is an indivisible and repeatable type. *SOCIAL THEORY* at 90-91.

³⁰ *Id.* at 91-92.

³¹ *Id.* at 93 ("In all these ways the deep-structure tradition hedges on the repudiation of the naturalistic premise.").

examine the institutional background implicitly take that background as natural and given. Other versions of positivism more expressly point to naturalistic limitations located in biological or psychological traits. The quasi-naturalism of the deep-logic theories is more subtle. It rests on the idea that there is some natural logical progression or natural set of types of social order.

B. *The Idea of Formative Context*

Unger wants to “take the antinaturalistic idea of society to the extreme,”³² by developing his notion of formative context. A formative context or an “institutional and imaginative structure of social life,” as he sometimes describes it, produces and sustains “a system of social roles and ranks” for members of the society. Formative contexts also yield “a detailed set of practical and discursive routines,”³³ which put in place “a particular version of society.”³⁴ Unger relies on the concept of formative context to perform the yeoman’s work in his theory.

1. *The Descriptive Function.*—First, the concept is intended to provide an adequate descriptive device. In constructing his concept of formative context, Unger accepts the deep-logic theories’ distinction between formative context and everyday routines of conflict that occur within the boundaries of a formative context. The formative context defines the nature and limits of the routine activities of daily life.³⁵ These routines are recurrent patterns of economic, political, and governmental activities and disputes that make up the stuff of everyday life, the most important of which are the conflicts over the allocation and control of resources and other people.³⁶ Although these activities and disputes are often turbulent, they are “structure-preserving routines”³⁷ that rarely challenge the validity of the formative context itself. To a great extent, the formative contexts are “the hardest of social facts . . . in the sense that they are both the most resistant to transformation and the richest in the range of their

³² *Id.* at 86; cf. KNOWLEDGE AND POLITICS at 1-3 (seeking total critique).

³³ FALSE NECESSITY at 59.

³⁴ *Id.* at 58.

³⁵ “All sustained practical activity takes for granted certain terms of the access that people have to one another: material, cognitive, emotional. These assumed terms appear most decisively as established powers and rights. Such rights and powers draw the outline within which people can make claims upon one another’s help.” SOCIAL THEORY at 19.

³⁶ FALSE NECESSITY at 58 (“By far the most important of the routines it shapes are the conflicts over the possession and mastery of the resources that establish the terms of people’s access to one another’s labor and loyalty and that enable the occupants of some social stations to control the activities of the occupants of other social stations.”); see *The Critical Legal Studies Movement* at 586 (“The ultimate stakes in politics are always the direct practical or passionate dealings among people. The institutional order constrains, when it does not actively shape, this microstructure of social life.”).

³⁷ FALSE NECESSITY at 60.

effects.”³⁸

Unger departs from the deep-logic theories, however, in his view that a formative context has no indivisible or repeatable identity as does a Marxian mode of production. Everything in the social order is malleable, or in his oft-employed and colorful phrase, “up for grabs.” Certain elements of the order can change without concomitant changes in other elements.³⁹ In fact, Unger views this path of change as a formative context’s normal mode of change.⁴⁰

The path also does not follow any preordained route. Unger rejects the view of deep-logic theories that there are meta-principles governing how formative contexts change. Societies do not proceed along a predetermined evolutionary scale of types nor are they selected by some master principle from a limited list of types. Societies move both up and down any scale one can put together; through mixture and cross-fertilization, the number of possible types of social order is limitless.

This is not to say that social change is a completely stochastic process. Unger asserts that some changes are more likely to occur to a particular formative context than others.⁴¹ Each formative context “results from a particular, unique history of practical and imaginative struggles.”⁴² A move from formative context *A* to formative context *B* may be more probable than a move from *A* to formative context *C*. Still, such changes are not predetermined, and more importantly, there is no guarantee that any particular societal change will be for the better. In the end, there is no social teleology.

2. *The Normative Function.*—This lack of teleology does not mean that one formative context is no better than another for Unger. In fact, the whole normative effect of Unger’s theory rests on the denial of this type of social-order relativity.⁴³ Formative contexts differ in terms of their relative entrenchment: that is, they differ in the extent to which they “resist challenge, revision, and even identification in the course of

³⁸ *Id.*

³⁹ *Id.* at 64 (“[F]ormative contexts can be changed piece by piece. They need not be dealt with on a take-it-or-leave-it basis and replaced as indivisible units, in the fashion of modes of production in Marxist theory.”).

⁴⁰ He calls this type of change “revolutionary reform”:

Such partial substitutions amount to revolutionary reforms as opposed to either reformist tinkering within a formative context (e.g., one more move in a well-established reform cycle) or the revolutionary substitution of an entire social framework (a limiting case never more than approximated by any real-world situation). The view developed in this book sees revolutionary reform as the normal mode of context change.

Id.

⁴¹ *Id.* at 36 (“Each formative context not only reproduces certain routines but also makes certain trajectories of context change more accessible than others.”); see *PASSION* at 10 (“[C]ontexts of representation or relationship differ in the severity of the limits they impose upon our activity.”).

⁴² *FALSE NECESSITY* at 34.

⁴³ *Cf.* Weinrib, *supra* note 9, at 1825-26 (prescriptive role of contextuality in *Passion*).

practical and argumentative routines.”⁴⁴

Those differences, for Unger, separate the more from the less preferred forms of social life. The formative contexts to be preferred are those that are most open to change, those that will permit individuals full freedom to make a better society.⁴⁵ Such formative contexts have the most “negative capability,” which he defines as the softening of the contrast between context-preserving and context-transforming activities.⁴⁶ Individuals should strive to establish formative contexts that are easily revisable and that will not imprison them in their own creations. *Politics* presents and argues for the best model of formative contexts—empowered democracy—in order to cause its general acceptance.⁴⁷

C. *Microsociological Foundations*

The engine behind the move from an inferior to a superior formative context is the activity of the individual. That activity is also the locus of the normative preference for formative contexts with more negative capability. According to Unger, formative contexts change when the routine conflicts among individuals over the control and allocation of resources escalate into conflicts that challenge the very framework of the disputes.⁴⁸ Those escalations arise when members of society break out of normal and routine limits that the existing formative context imposes on ways of perceiving the world and on the scope and extent of acceptable conflict.

This conception of change in formative contexts rests on a particular microsociological theory. By microsociological theory, I mean a theory

⁴⁴ FALSE NECESSITY at 59; see PASSION at 10 (“But it may be loosened. For contexts of representation or relationship differ in the severity of the limits they impose upon our activity.”).

⁴⁵ See PASSION at 9-11, 27, 264-66.

⁴⁶ FALSE NECESSITY at 35-37.

⁴⁷ Substantial portions of *Politics* are dedicated to presenting the formative context of empowered democracy from a variety of perspectives. See FALSE NECESSITY at 395-570. Empowered democracy is a revision of an historical formative context of petty commodity production.

⁴⁸ A serious question that Unger never addresses, much less answers, is, what is the test of the difference between context-reproducing and context-transforming disputes? Context-reproducing activities are “certain practical activities or conceptual activities” that “go all the way from group rivalry and party politics to moral and legal controversy” and that “constitute the most important of the routines shaped by a formative context; they renew its life and connect it with the concerns of everyday life.” *Id.* at 34. Unger acknowledges that most routine conflicts take “[t]he ordinary modes of exchange and attachment, dependence and dominion . . . as given” terms of the formative context. SOCIAL THEORY at 19. He states, however, that “[a]t any moment people may think or associate with one another in ways that overstep the boundaries of the conditional worlds in which they had moved till then.” *Id.* at 20. Of course, to the extent that formative contexts have high levels of negative capability, the difference between context-reproducing and context-transforming disputes is imperceptible. See FALSE NECESSITY at 36. “No stable, clearcut, and rigid line separates the routine from the subversive.” *Id.* at 34. At some level of negative capability, the isolatability of a formative context would evaporate. Unger, of course, given his theoretical method, see *supra* text accompanying notes 4-6, has little need to provide distinguishing criteria as long as this description is persuasive.

that answers the first meta-issue of social theory, a theory of the production of social order.⁴⁹ Although most social theories concerned with macrosociological issues such as the allocation of political power and economic rights simply assume such a theory, Unger's microsociological theory is reasonably explicit. Throughout *Politics*, he frequently refers to the microsociological elements underpinning his concept of formative contexts, some of which were developed in *Passion*.

1. *The Opposition Between the Social and the Individual.*—Unger's microsociological theory posits a stark opposition between individuals interacting with each other and formative contexts. Although all human activity necessarily takes place in a social context⁵⁰ and “[c]onditionality is never overcome,”⁵¹ formative contexts essentially constrain individuals and their activities.⁵² They coerce individuals, reduce their options, direct their activity, and even determine their perception of the social world.⁵³ Much of the activity that takes place within a formative context

⁴⁹ Here, microsociological refers to the level of analysis rather than to a particular theory. The reference is to the behavior of entities such as the individual or a member of a society rather than to the behavior of larger institutional entities such as firms, the state, voluntary associations, or social class. Unger's formative context is a type of institutional entity or a set of discernibly similar social practices that exist across a span of time and space and that has a systemic form. A. GIDDENS, *supra* note 18, at 24. In much social theory, “society” is the institution that is the focus of attention. G. SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* 9 (K. Wolff trans. & ed. 1950) (“[T]he interactions we have in mind when we talk about ‘society’ are crystallized as definable, consistent structures such as the state and the family, the guild and the church, social class and organizations based on common interest.”). Underlying that institution is the interaction of individuals in that institution which both determines and is determined by the institution. *Id.* at 9-10.

In order to define the objects of study, I employ a version of methodological individualism. The version, however, is extremely formal and takes no position on the substantive content of the concept of an individual. It brackets off any resolution of the question of whether the individual or the social is prior to the other. Its function is to provide an ostensive definition of the subject matter under study. Of course, discrete microsociological theories supply the substantive content. Utilitarians see the individual as a bundle of preferences and a utility-maximizing drive that implements the preferences. Freudians view the individual as the locus of several psychodynamic structures and drives. Other theorists assert the priority of the social and treat the individual as the product of intersubjectivity. See Schutz, *Scheler's Theory of Intersubjectivity and the General Thesis of the Alter Ego*, 2 *PHIL. & PHENOMENOLOGICAL RES.* 323 (1942).

⁵⁰ See *PASSION* at 7-8 (“Nor, contrary to those who dismiss the seriousness of contextuality, can any activity go forward without selecting from the indefinitely large range of possible frameworks the one that it will tentatively take for granted.”).

⁵¹ *Id.* at 10; see *SOCIAL THEORY* at 18.

⁵² In this respect, they bear affinity to Durkheimian social facts. See Brubaker, *Rethinking Classical Theory: The Sociological Vision of Pierre Bourdieu*, 14 *THEORY & SOCIETY* 745, 752 (1985). Durkheim identified social facts as phenomena separate from psychological facts or physical facts. Social facts are akin to moral facts: they coerce and constrain individuals in society. E. DURKHEIM, *THE RULES OF THE SOCIOLOGICAL METHOD* 10, 14 (S. Solovay & J. Mueller trans., G. Catlin ed. 1966). Durkheim's stark characterization of social facts may in part be due to the entrepreneurial goal of establishing a new and separate science of society on positivist grounds. *Id.* at xlix.

⁵³ This insight is not new, and has a great deal of currency within Unger's own critical legal

“can be explained as the product of the institutional and imaginative context (order, structure, or framework) within which routine activities and conflicts occur.”⁵⁴ Formative contexts are external to and alien from individual interaction.

2. *The Presocial Element.*—Because of this, formative contexts are never adequate to the possibilities of the individuals who reside in them. For Unger, there is always some human activity and interaction that is prior to and independent of any particular context. Human activity can never be completely bound by any particular social context, and no social context is ever an adequate expressive vehicle for all human activity.⁵⁵ The individual is never completely defined by or at home in any social order.⁵⁶ “Nothing can entirely reduce us to the condition of puppets of a formative context or of the laws and constraints that might generate a limited set or a compulsive sequence of such contexts.”⁵⁷ There is an element of irreducible human freedom.⁵⁸

This radical disjunction between interaction among individuals and the coercive formative context is the source of the distinction between “context-preserving” and “context-transforming” interactions among individuals. Most human activity is of the context-preserving type. It is routine and largely determined and constrained by the formative context. Because of its derivative stature, it is artificial and less authentic, although necessary.⁵⁹

studies movement. James Boyle points to the basic tension that runs through all critical legal studies movement work: the tension between structuralist and subjectivist perspectives. Boyle, *supra* note 7, at 766-68. Duncan Kennedy’s concept of fundamental contradiction, which he claims animates liberal legal consciousness, is a version of this way of looking at the world. Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFFALO L. REV. 205, 211 (1979). Peter Gabel is probably the most articulate spokesperson for the view that social structure coerces and represses individual activity. Gabel, *Reification in Legal Reasoning*, 3 RES. L. & SOC. 25, 28-29 (1980).

⁵⁴ FALSE NECESSITY at 4.

⁵⁵ See PASSION at 9 (“There is no past, existent, or storable catalogue of social worlds that can incorporate all the practical or passionate relationships that people might reasonably, realistically, and rightly want to strike up.”).

⁵⁶ See *id.* at 26 (“the idea that man is never at home in the world: that nothing but another homeless person can satisfy the unlimited demands of his spirit.”).

⁵⁷ FALSE NECESSITY at 34-35; see Note, *supra* note 14, at 433.

⁵⁸ If Unger is serious about taking “the antinaturalist idea of society to the extreme,” SOCIAL THEORY at 86, this assertion of an apparently natural element of human freedom that exists apart from any particular social context is puzzling. My analysis below is an attempt to suggest that even individuals’ sense of human freedom is a social product that can be explained and understood only by reference to social factors.

⁵⁹ Unger does not at any point refer to the alienated nature of this routine interaction, although that theme is implicit. Peter Gabel’s work develops this theme explicitly. See Gabel, *supra* note 53, at 27 (“[T]he social body of a collectivity becomes the expression of a *gap* that gives reality the feel of pseudo-reality”); cf. P. Gabel, *Ontological Passivity and the Constitution of Otherness Within Large-Scale Social Networks* (unpublished paper presented to Columbia Legal Theory Workshop, Mar. 17, 1986) (on file with *Northwestern University Law Review*) (all interaction based on role or social structural position is alienated).

Incidents of context-transforming interaction occasionally irrupt into this mundane and routine world. Such irruptions are “both exceptional and transitory.”⁶⁰ Human activity of this type, as one would expect given Unger’s views on the path of formative context change, “is not itself governed by a system of lawlike constraints and tendencies.”⁶¹ Unlike routine activity, it is free from and outside the system, and takes its cue from no particular formative context. There is always this presocial element in human activity. In Unger’s scheme, this interaction among individuals is prior to the formative context.⁶²

The actual source and nature of this activity is obscure.⁶³ In *Passion*, Unger suggests that such activity arises out of the practical and passionate dealings and associations of individuals with each other outside of or apart from routine, context-determined activity.⁶⁴ These insights or visions of new forms of human association are generated by a type of presocial interaction among free individuals.⁶⁵ Because they are presocial, they are unmediated and unconstrained by formative contexts. Although transitory, they are the sources of true creativity and human fulfillment.⁶⁶ They are most often expressed in direct and unmediated social interaction such as in love and other close interpersonal

⁶⁰ SOCIAL THEORY at 21. Individuals cannot operate for long outside of a formative context. “Either [the context-transcending activity] fails and leaves the preestablished context in place, or it generates another context that can sustain it together with the beliefs or relationships allied to it.” *Id.*

⁶¹ FALSE NECESSITY at 4. Unger eschews entanglement with ultimate metaphysical controversies about free will and determinism. *Id.* Although his “framework-revising freedom” may be “illusory” from some philosophical perspective, such a perspective, he suggests, does not respect the freedom that is our “everyday experience.” *Id.* at 5. The puzzle posed by these perspectives, he asserts, “represent[s] a permanent insult to societies whose official culture claims to base fundamental social arrangements upon the wills of free and relatively equal citizens and rightholders rather than upon blind drift or coercive authority.” *Id.* So much for the relevance of philosophical “puzzles.”

⁶² See PASSION at 95-96, 267.

⁶³ See *supra* note 48 (Unger never explains how to distinguish this activity from context-reproducing activity).

⁶⁴ He refers to “the experience of mutual longing rather than that of participation in a division of labor or a tradition of shared discourse.” See PASSION at 22.

⁶⁵ See *id.* at 24. This is akin to the idea of undistorted communication or ideal speech employed by Habermas. Habermas, *Toward a Theory of Communicative Competence*, in RECENT SOCIOLOGY NO. 2: PATTERNS OF COMMUNICATIVE BEHAVIOR 115, 143 (H. Dreitzel ed. 1970) (“a number of symmetrical relations for the ideal speech situation. Pure intersubjectivity is determined by a symmetrical relation between I and You (We and You), I and He (We and They).”); see Boyle, *supra* note 7, at 753 (“Habermas uses this meta-epistemology to justify political choices between alternative types of rationality.”).

⁶⁶ See PASSION at 268 (“Our most credible experience of a foundational reality is our experience of the quality of the personal.”). This romanticization of pure intersubjectivity is a theme in other critical legal studies movement writings. Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 3-4 (1984) (“unalienated relatedness” and “intersubjective zap”); Gabel, *supra* note 53, at 26-27; P. Gabel, *supra* note 59, at 143.

encounters.⁶⁷

3. *Maps for Social Change.*—When these irruptions of pure interpersonal interaction disrupt the course of ongoing routine and practical activity in a formative context, they cast a new light on existing formative contexts. Through this context-transcending activity, individuals⁶⁸ press against the limits imposed by formative contexts.⁶⁹ In Unger's view, "[a]t any moment people may think or associate with one another in ways that overstep the boundaries of the conditional worlds in which they had moved till then."⁷⁰ Context-transforming activity apparently involves a heavy conceptual element: it is the capacity of individuals to think of new worlds or formative contexts before they exist. "[T]he power of insight outreaches all the storable contexts of thought."⁷¹

Whether Unger refers to such irruptions as visionary⁷² or as internal developments,⁷³ they provide the needed Archimedean point from which to criticize the existing formative context and to define objective criteria

⁶⁷ See *PASSION* at 95-100, 221-24; see Note, *supra* note 14, at 440.

⁶⁸ At times, Unger seems to suggest that formative contexts may revise themselves. For example, he suggests that "each of these context-reproducing activities can escalate under favorable circumstances into context-disturbing conflicts." *FALSE NECESSITY* at 72. However, I believe that such talk is simply a feature of the undefined character of his notion of the nature of the agency of social change.

⁶⁹ See *PASSION* at 53-57 (heroic ethic); cf. Rosen, *Intentionality and the Concept of the Person*, in *NOMOS XXVII: CRIMINAL JUSTICE* 52, 69-70 (J. Pennock & J. Chapman eds. 1985) (romantic image of self: "This romantic self may be seen as given its greatest chance for development if freed from the oppression of civilization, inhibitions, or social convention . . .").

⁷⁰ *SOCIAL THEORY* at 20; see *PASSION* at 9.

⁷¹ *SOCIAL THEORY* at 20; see *PASSION* at 35 (second element in modernism is "the belief that no institutional order and no imaginative vision of the varieties of possible and desirable human association can fully exhaust the types of practical or passionate human connection that we may have good reason to desire and a good chance to establish."). This idea is akin to the proposition that human language is never completely adequate to express human experience. See M. MERLEAU-PONTY, *Indirect Language and the Voices of Silence*, in *SIGNS* 39, 43 (R. McCleary trans. 1964) ("[T]he idea of complete expression is nonsensical.").

⁷² *FALSE NECESSITY* at 359-60. "Our thinking about ideals becomes visionary or external to the extent that it holds up a picture, however partial or fragmentary, of a radically altered scheme of social life and appeals to justifications that do not stick close to familiar and established models of human association." *Id.* at 359. Visionary thought can come from either "the philosopher who ascribes normative force to a conception of personality or society, to a method of choice that supposedly relies on no such conception, or even to an entire metaphysical or religious picture of the world," or "the political prophet who evokes a reordered social world in which all major forms of individual and collective self-assertion may be promoted and all our practical and passionate connections may be cleansed of some of the perils that make us shrink from them." *Id.*; see *The Critical Legal Studies Movement* at 580.

⁷³ *FALSE NECESSITY* at 355-58.

Internal argument forswears the search for ultimates. It takes place within a tradition of accepted moral and political ideas largely defined by a scheme of models of human coexistence, made actual by institutional arrangements and social practices The interlocutors in an internal controversy probe the uncertainties, the ambiguities, and the tensions in the imaginative world defined by their shared points of departures. . . . Such disagreements over the scope and the practical form of received models of association expose tensions within these models

for the selection and implementation of better formative contexts. Such activity is the source of genius or the divine inspiration that provides the possibility of a better social order:⁷⁴ for Unger, it is an irruption of the sacred into the profane.⁷⁵

What does this privileged vantage point prescribe? Although the precise contours of a particular formative context cannot be stated a priori, the best formative context, according to Unger, is one that is consistent with this interpersonal subjectivity.⁷⁶ The formative context that allows this subjectivity to flourish and that is least resistant to changes demanded by this subjectivity is to be preferred over all others. "The vision offered by this program is that of a society in which people are more fully empowered through the development of institutional arrangements that both diminish the gap between framework-preserving routine and framework-transforming conflict and weaken the established forms of social division and hierarchy."⁷⁷ Such a formative context would be the next best thing to a purely "natural context."⁷⁸

The microsociological theory underlying Unger's idea of formative contexts is distinctly charismatic.⁷⁹ It rests on the ability of certain indi-

that may previously have been concealed and force us to choose the direction in which we want to develop each model.

Id. at 356; see *The Critical Legal Studies Movement* at 580.

⁷⁴ Cf. Boyle, *supra* note 7, at 737 (doing social theory leads to feeling of empowerment).

⁷⁵ The microsociological model employed by Unger is similar to that used by so-called "phenomenologists of religion." Such "phenomenologists" view religion as the irruption of the sacred through the fabric of a profane world, causing a reordering of that world. M. ELIADE, *THE SACRED AND THE PROFANE* 21 (1957) (religious experience involves "hierophany" or "the break effected in [homogeneous] space that allows the world to be constituted, because it reveals the fixed point, the central axis for all future orientation"); see also P. BERGER, *A RUMOUR OF ANGELS* (1969); R. OTTO, *THE IDEA OF THE HOLY* (2d ed. 1952); Bellah, *Christianity and Symbolic Realism*, 9 *J. SCI. STUDY RELIGION* 89 (1970). Unger's description in *Passion* of the heroic ethic contains this same idea of context-breaking. *PASSION* at 53-57.

⁷⁶ See *PASSION* at 192-93 ("An order must be invented that, considered from one standpoint, minimizes the obstacles to our experiments in problem-solving and in accepted vulnerability and, viewed from another perspective, multiplies the instruments and opportunities for its own revision.").

⁷⁷ *FALSE NECESSITY* at 362. Empowerment, according to Unger, comes in three varieties: the first is "the development of our practical capability through the openness of social life to the recombinational and experimental activities of practical reason"; the second is "more complete and deliberate mastery over the imaginative and institutional contexts of our activities"; and the third is "our success at escaping both submission and isolation and in diminishing the conflict between . . . our need to participate in group life and our effort to avoid the dangers of dependence and depersonalization that accompany such engagement." *Id.* at 363.

⁷⁸ *Id.* at 362.

⁷⁹ According to Weber, charisma is

a certain quality of an individual personality by virtue of which he is considered extraordinary and treated as endowed with supernatural, superhuman, or at least specifically exceptional powers or qualities. These are such as are not accessible to the ordinary person, but are regarded as of divine origin or as exemplary, and on the basis of them the individual concerned is treated as a "leader."

1 M. WEBER, *supra* note 18, at 241. Weber's conception of charisma has been viewed as psychologi-

viduals to break through the existing formative context and thus revise it. The source of changes in formative contexts is the moments of interpersonal subjectivity that are presocial. In sum, the microsociological paradigm of *Politics* posits a presocial force rooted in intimate interpersonal relations that is directed and constrained by social structure, but that is not constituted by it and that periodically irrupts to revise it. This quasi-religious force presents to the world new models of human association or of formative contexts. It is the core of his answer to the second meta-issue of social theory: the problem of social change.

D. Social Change Through Rational Persuasion

Unger never explicitly discusses how the new models suggested by these irruptions are to be implemented in social relations. Although copious pages are spent discussing vague outlines of his idea of empowered democracy as a desirable formative context,⁸⁰ he is strangely silent⁸¹ on the actual mechanisms of social change.⁸² Unger, however, does seem to have a model of implementation in mind. His extensive statements about the programmatic nature of *Politics* and his attempt to outline and justify his preferred formative context—empowered democracy—suggest that his is a model predicated on rational persuasion.⁸³

The model has its roots in the microsociological theory I outlined

cal. Shils, *Charisma, Order, and Status*, 30 AM. SOC. REV. 199, 201 (1965). In fact, it is actually a thoroughly sociological concept. As he carefully illustrates, charisma is an artifact of a social reaction to an individual. "It is recognition on the part of those subject to authority which is decisive for the validity of charisma." 1 M. WEBER, *supra* note 18, at 242. And "[i]f proof and success elude the leader for long, if he appears deserted by his god or his magical or heroic powers, above all, if his leadership fails to benefit his followers, it is likely that his charismatic authority will disappear." *Id.*

⁸⁰ FALSE NECESSITY at 395-570.

⁸¹ Unger is very good at explaining how attempted programmatic social changes have failed. In doing so, he appeals to structural constraints on both action and understanding. See SOCIAL THEORY at 67-79 (1985 Brazilian example). The same reasons that Brazilian experiments failed, however, may adversely affect the experiment he proposes.

⁸² One model that could be derived from his microsociological ideas is that the new social order will be put into place by some type of Weberian charismatic leader. That leader will provide the blueprint for the new world that will be accepted by the populace as a visionary and divine pronouncement.

In traditionalist periods, charisma is *the* great revolutionary force. . . . Charisma . . . *may* effect a subjective or *internal* reorientation born out of suffering, conflicts, or enthusiasm. It may then result in a radical alteration of the central attitudes and directions of action with a completely new orientation of all attitudes toward the different problems of the "world."

1 M. WEBER, *supra* note 18, at 245. The new world will be implemented simply because it is an irruption of the presocial. Unger's view, if I have successfully described it, is more complex. It requires members of society not simply to accept the visionary's views as correct, but to undergo a similar visionary process.

⁸³ It could be that, despite his statements to the contrary, Unger is not actually concerned with changing minds. *Politics* often seems to take the form of "church chat": "[I]ike most other CLS people when talking utopia, Unger seems to be preaching to the converted." R. Bossert, *The Utopian Promise of Critical Theory in Legal Studies* 21 (unpublished paper, Jan. 13, 1987 draft) (on file with *Northwestern University Law Review*).

above. According to this model, *Politics* is the first and most difficult step in accomplishing the transformation of society. It takes a visionary to step outside of his or her current formative context and create a picture of a better way to organize social relations, a better formative context. All that is apparently required is that a few gifted individuals attain those moments of vision. Clearly, *Politics* is intended to be such a vision.

Once this is done, the resulting picture will offer a rationally persuasive critique of the current formative context, prompting the other individual members of society to step outside of their formative context into the presocial and pure realm of authentic interaction among free individuals.⁸⁴ In that realm of interaction and communication undistorted by the current formative context, the desirability and correctness of the new model will be obvious. The preferred formative context will be accepted by society quickly and without extensive controversy.⁸⁵

The essential assumption behind this model of implementation is that a new vision of formative contexts can be persuasively transmitted through rational argumentation and demonstration.⁸⁶ The necessary and sufficient condition for social change is a type of consciousness-raising or liberation from social conditions that thwart adequate rationality. "We can change our situation in the course of trying to understand it."⁸⁷ At the heart of Unger's extremely optimistic view of radical social change⁸⁸ is the idea that we are all philosophers who can and must bracket off or stand back from the current formative context and our participation in it,

⁸⁴ This presumably is the power of criticism to alter lives that members of the critical legal studies movement claim for their work. See, e.g., Boyle, *supra* note 7, at 715, 737 (Unger's work is extraordinarily powerful despite its flaws). Although Unger has stated that a doctrinal breakthrough will not produce revolution in social life, *The Critical Legal Studies Movement* at 646; see KNOWLEDGE AND POLITICS at 103 (revision of ideas does not give them force), the overall thrust of his approach, as I understand it, is that such a breakthrough will play a central role.

⁸⁵ Behind this idea is the psychoanalytic notion that analysis can remove the layers of distortion imposed through psychosocial development. Boyle, *supra* note 7, at 753 (Habermas and analogy to psychotherapy); Habermas, *supra* note 65, at 143-44; Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 610 (1984) (psychoanalytic lifting of delusion in grand theory). However, rational analysis in the Freudian sense is never the ultimate victor. In much modern liberal theory, there is a similar notion of the possibility of undistorted dialogue or communication that can provide a moral foundation for the liberal state. B. ACKERMAN, SOCIAL JUSTICE (1982); M. PERRY, MORALITY, POLITICS, AND LAW (forthcoming 1989).

⁸⁶ Boyle, *supra* note 7, at 746 (*Verfremdung* or exegesis can make belief structure visible and thereby destroy it); cf. Gabel, *supra* note 53, at 30 (through stating law, judges are able to restore equilibration in popular but false consciousness). But cf. KNOWLEDGE AND POLITICS at 103 (revision of ideas does not give them force).

⁸⁷ PASSION at 52.

⁸⁸ Unger is not alone in this optimism. Many more mainstream liberal thinkers express the idea that it is simply the existence of removable obstacles that prevents correct and true positions on social issues. See *supra* note 85 (possibility of undistorted deliberation). This position is shared by republican and deliberative liberals searching for a moral Archimedean point. Cf. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1155 (1986) ("This understanding is extremely optimistic about the effects of public deliberation.").

and examine it with help from his social theory.⁸⁹

Once a member of society has reached this Archimedean point of undistorted communication and understanding, Unger assumes that the correctness and desirability of the new formative context will be apodictically clear, or at least will become apparent after a period of democratic deliberation. A proper understanding of society leads naturally and effortlessly to changes in society.⁹⁰ No coercion or force will be needed to bring about the new world. Indeed, a striking feature of *Politics* is the lack of any discussion of the role of violence or coercion in social change, even though *Politics* recognizes the role of violence in maintaining formative contexts.⁹¹ Unger's thesis regarding social change comes down to a form of moral rationalism: he believes that it is possible under the proper conditions to convince others of the correctness of a moral position through rational argumentation.⁹² And he believes that once persuaded, people will then act on that position.

II. COMMONSENSE REASONING

If this view of the nature of formative contexts is adequate, why has

⁸⁹ James Boyle suggests that social theory has this effect:

If one takes this general belief in immanent critique and connects it to a supposedly impractical set of ideas such as social theory, a strange thing happens. The more one "does" social theory and reads hard books, the more one comes to believe that it is actually useful and liberating to find out about the philosophical structures behind the richly textured justifications for "the way things are" in every area of social life. Even when this belief is discounted by the inexorable tendency to rationalize the worth of one's own activities, an unmistakable feeling of empowerment remains.

Boyle, *supra* note 7, at 737.

⁹⁰ In sketching a grand theory of municipal law, Gerald Frug seems to make the same assumption that the mere presentation of the theory causes its acceptance. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1149-50 (1980); see R. Bossert, *supra* note 83, at 16 (Frug's argument assumes its acceptance); cf. Sunstein, *supra* note 88, at 1136 ("If nonautonomous preferences of these various sorts were changed through a collective process of discovering and countering the distortions that underlie them, it would be proper to say that freedom was promoted rather than undermined as a result.").

⁹¹ The apparent absence of coercion in the adoption of a new formative context does not continue in its operation. Unger's ideas about rules of capital allocation and about immunity rights both presume some coercive enforcement power in the new society. See FALSE NECESSITY at 508-39. Perhaps, such coercion is needed only when humans fall back to the mundane existence within a formative context.

⁹² While the foundation of this belief is obscure, I use the term "rationalism" because I think that his view must be based on the idea that there are certain truths about the world that are universal and that these truths can be communicated through rational discourse. See Williams, *Rationalism*, in 7 THE ENCYCLOPEDIA OF PHILOSOPHY 69, 69 (P. Edwards ed. 1967) ("the power of a priori reason to grasp substantial truths about the world"). Unger has been said to represent the rationalist strand of the critical legal studies movement. Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 332 n.2, 337 n.17 (1987). Certainly, he is not in the same nihilistic league with Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 8, 61-62 (1984); see Olson, *Nihilism*, in 5 THE ENCYCLOPEDIA OF PHILOSOPHY, *supra*, at 514, 515 ("[T]he term [nihilism] is widely used to denote the doctrine that moral norms or standards cannot be justified by rational argument.").

there not already been a great movement toward empowered democracy or some variation of it?⁹³ The answer, I believe, is that formative contexts or social structures⁹⁴ are far more recalcitrant than Unger would have us think.⁹⁵ This is not a quibble with his characterization of the mutability of one or another particular existing formative context. It is instead an argument that his account of the genesis and functioning of formative contexts is unpersuasive.

I agree with Unger that we are all philosophers, but in a very different sense. Unger's microsociological model is descriptively inadequate in that for the most part it ignores the role of everyday routines in social life.⁹⁶ For Unger, everyday routine activity is either uninteresting context-preserving activity or highly interesting but rare context-transforming activity. Because of this, Unger overestimates the mutability of formative contexts and misunderstands the sources of social cohesion and change. Assessing the concept of formative contexts using a different microsociological theory—one that is concerned with routine activities—illuminates these problems in a more interesting way, and suggests why Unger's account is less than persuasive.⁹⁷

⁹³ One answer might be that until *Politics*, no philosopher or political theorist has provided the necessary story or vision for this transformation. Of course, although Unger's work makes a contribution to the reformist tradition, he would be the first to admit that it is not entirely novel. In *Passion*, he expressly draws on the Christian tradition's notion that men have fallen or become alienated from the natural state. *PASSION* at 24-25 (homelessness of man).

⁹⁴ I will use Unger's phrase "formative contexts" instead of the more generally employed "social context" or "social structure," in part to avoid the terminological debates and baggage of the latter terms.

⁹⁵ Boyle makes a similar point:

What I *am* saying is that it is a mistake to confuse the neat Spinozan lattice of an argument about legitimation with the dense tangle of our actual experience of social life. It is ridiculous to believe that one could disrupt the massively entrenched set of power relations and collective fantasies that "constitutes" repression in our society simply by attacking one of the more formalized and abstract fantasies and claiming that the rest are "dependent" on it. The lines of logical entailment are not the threads that hold together the patchwork of social reality.

Boyle, *supra* note 7, at 772. I am trying to identify the threads that hold the formative context together.

⁹⁶ This criticism is not new, nor even new within the critical legal studies movement. See, e.g., Boyle, *supra* note 7, at 773, 775; Gordon, *supra* note 7, at 281; D. Trubek, *supra* note 7, at 37. My criticism presents, I believe, a different angle.

⁹⁷ In this analysis, I am drawing on a body of microsociological theory that explains social order by examining its social creation in the routine and everyday interactions between individual members of society. I rely on symbolic interactionism, an offshoot of American Pragmatism, e.g., G. MEAD, *MIND, SELF AND SOCIETY FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST* (1934); Blumer, *Sociological Implications of the Thought of George Herbert Mead*, 71 *AM. J. SOC.* 535 (1966); see P. ROCK, *THE MAKING OF SYMBOLIC INTERACTIONISM* (1979) (relation between pragmatism and symbolic interactionism); dramaturgical approaches, e.g., E. GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959); social phenomenology, e.g., E. HUSSERL, *PHENOMENOLOGY AND THE CRISIS OF PHILOSOPHY* (Q. Lauer trans. 1965); A. SCHUTZ, *THE PHENOMENOLOGY OF THE SOCIAL WORLD* (G. Walsh & F. Lehnert trans. 1972); and ethnomethodology, e.g., H. GARFINKEL, *supra* note 16; A. CICOUREL, *COGNITIVE SOCIOLOGY* (1972). See generally P.

A. *Everyday Routine and Formative Contexts*

In Unger's world, formative contexts have independent existences: although they are revisable by members of society, they stand apart from and constrain the pure, authentic activity of those individuals. They stand as alien forces that frustrate true and authentic human activity. In contrast, I suggest that formative contexts are not external constraints on individuals in the Durkheimian sense. Rather, they are constantly produced, altered, and maintained by the routine efforts of individual members in society attempting to come to grips with the world as it is presented to them. It is useful⁹⁸ to see them as models or theories of the world employed as resources by members of society in negotiating their daily lives—including their economic and political struggles.⁹⁹

1. *Pragmatic Philosophizing.*—On this view, each person is a philosopher,¹⁰⁰ but not in the academic or Ungerian sense. Each is engaged in efforts to spin and employ pragmatic theories of the operation of the world that will help in negotiating the problems and puzzles posed by daily existence. While these theories are quite different in scope from the visionary ideas that Unger and his social actors embrace,¹⁰¹ they are far more ubiquitous and important in the constitution of society.

This process of coming to grips with the world can be called typification.¹⁰² Individuals approaching practical problems attempt to de-

BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966) (synthesis of Marxist and social phenomenological approaches to problem of social order).

⁹⁸ I am proposing a simplified model of social relations to advance understanding. See *supra* text accompanying notes 1-2. I do not assert that the model provides a comprehensive description of social relations; instead, by postulating that members of society solely seek to understand their world in a pragmatically efficient manner, I hope to generate insights about the idea of a formative context.

My approach is related to but distinguishable from the intellectualist approach in social anthropology. See, e.g., Horton, *African Traditional Thought and Western Science* (pts. 1 & 2), 37 *AFRICA* 50, 155 (1967). Such an approach attributes to actors a drive to formulate coherent and systematic world views. The social scientist's function is then to find and understand the internal coherence of such world views. See C. GEERTZ, *THE INTERPRETATION OF CULTURES* (1973); P. WINCH, *THE IDEA OF A SOCIAL SCIENCE* (1958); Winch, *Understanding a Primitive Society*, 1 *AM. PHIL. Q.* 307 (1964). Unger's approach might be seen as related to that of the anthropological intellectualists.

My view is that social actors theorize only to the extent actually required by the circumstances and do not search for consistency between theorizing episodes unless it is pragmatically required. This may result in individuals holding internally contradictory views and in the prevailing formative context lacking the type of systematicity and coherence that Unger attributes to it. Cf. Gellner, *Concepts and Society*, in *RATIONALITY* 18, 33 (B. Wilson ed. 1970) (critical analysis of aspects of contextual approaches that attribute excessive consistency to use of concepts by actual social actors).

⁹⁹ See A. GIDDENS, *supra* note 18, at 23 (structure "refers not only to rules implicated in the production and reproduction of social systems but also to resources").

¹⁰⁰ Cf. M. WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 29 (1987) ("[W]e are all interpreters of the morality we share.").

¹⁰¹ See *infra* notes 127-34 and accompanying text (difference between scientific and commonsense theories).

¹⁰² See A. CICOUREL, *Interpretive Procedures and Normative Rules in the Negotiation of Status*

velop routine methods for conceptualizing and handling such problems. They achieve this by characterizing a current experience as an occurrence of a familiar type of experience—that is, by categorizing it as of a specific type and as explainable by reference to a theory about that type.¹⁰³ A readily available commonsense theory “has the crucial effect of simplifying experience to manageable proportions. . . . The complexity of reality is drastically reduced by having a small window for viewing it.”¹⁰⁴ Order is imposed on what could otherwise be seen as a stochastic series of events.¹⁰⁵

To take an obvious example, if I am approached on a public street by an individual who appears disheveled and who is babbling incomprehensible sentences, I am likely to categorize that experience as one involving a mentally disturbed person whose condition is explainable by the presence of mental “disease.” I may not know precisely what “disease” he has or what his long-term prognosis might be. It is sufficient for my practical purposes that I am able to understand this experience in that way, predict from that understanding this person’s short-term behavior, and adjust my behavior accordingly. Although this process of typification is more noticeable in unusual situations,¹⁰⁶ it is essential to everyday life. Routine and habit¹⁰⁷ are the stuff that makes the world turn; without them, we would be forced to think from scratch on each occasion.¹⁰⁸

and Role, in *COGNITIVE SOCIOLOGY* 11, 35 (1972) (citing A. SCHUTZ, *COLLECTED PAPERS II: STUDIES IN SOCIAL THEORY* 29-30 (A. Brodersch ed. 1964)) (typifications include “typical human motivations, goals, and action patterns. It also includes knowledge of expressive and interpretive schemes, of objective sign-systems and, in particular, of the vernacular language.”); A. SCHUTZ, *supra* note 97, at 81-86 (interpretive schema).

¹⁰³ Peter Gabel, despite his antagonism toward the reification of experience, may agree that a certain amount of reification is necessary to social life. See Gabel, *supra* note 53, at 36 (temporary and conscious use of reification is not “troubling”).

¹⁰⁴ D. HEISE, *UNDERSTANDING EVENTS* 8 (1979) (function of definition of situation).

¹⁰⁵ See P. MCHUGH, *DEFINING THE SITUATION: THE ORGANIZATION OF MEANING IN SOCIAL INTERACTION* 83-92 (1968) (emergence of order from initial definition of situation).

¹⁰⁶ Examples of typification have been studied in a number of occupational settings. See, e.g., A. CICOUREL, *THE SOCIAL ORGANIZATION OF JUVENILE JUSTICE* xviii, 243-91 (1976) (juvenile probation officers rely on commonsense understanding of juvenile delinquency to categorize juvenile behavior and to determine appropriate response); Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 *AM. SOC. REV.* 699 (1967) (police rely on understanding of setting to categorize events and to determine appropriate response); Cain, *On the Beat: Interactions and Relations in Rural and Urban Police Forces*, in *IMAGES OF DEVIANCE* 62 (S. Cohen ed. 1971).

¹⁰⁷ Cf. Moore, *The Rational Basis of Social Institutions*, 23 *COLUM. L. REV.* 609, 609 (1923) (“A legal institution is the happening over and over again of the same kind of behavior.”); A. GIDDENS, *supra* note 18, at 19 (habit is part of routine). Judge Jerome Frank spoke of habitual preconceptions as necessary to stable life. *In re Linahan*, 138 F.2d 650, 651 (2d Cir. 1943) (Frank, J.).

¹⁰⁸ As Frank says, “[w]ithout acquired ‘slants,’ preconceptions, life could not go on.” *Linahan*, 138 F.2d at 651.

2. *Formative Contexts as Stocks of Knowledge.*—What makes this effort manageable is that individuals have a reservoir of types and theories available to them for use in daily life. Individuals' resources of this type are their "stocks of knowledge"¹⁰⁹—that is, their accumulated sets of understandings about the world.¹¹⁰ These sets of understandings provide each individual with resources to negotiate daily life.

The resources are of several types. First, individuals can rely on their own experiences. A past response that was used in a similar situation is always a likely model for the response now. Second, individuals have available to them a range of described experiences and ideas that are communicated to them by others—in particular by family, friends, and associates. The actual experience of any individual is quite limited, and he or she must rely on the aggregate experience of those close to him or her.

Not only do people draw on their own experience and on the experiences of those close to them, but, more importantly for social theory, they can and do draw on extant theories of different types circulating in their wider social group.¹¹¹ For example, common pictures of criminals inform individuals about people so classified.¹¹² Another example is the commonsense understanding of life in socialist societies. People routinely discuss political questions by relying on understandings about Soviet and eastern European life of which they have neither first-hand nor testimonial evidence.¹¹³

Of course, people and sociologists can consciously reject received

¹⁰⁹ An individual's stock of knowledge is his or her core of accumulated experience. See A. SCHUTZ, *supra* note 97, at 77, 80-82.

¹¹⁰ *Id.* at 183 ("[A]ll experience . . . of contemporaries is predictive in nature. It is formed by means of interpretive judgments involving all my knowledge of the social world.")

¹¹¹ "People readily accept definitions of situations provided verbally by others." D. HEISE, *supra* note 104, at 6. "The fact that much of the time—perhaps most of the time—people are operating with situational definitions that have been provided by others implies that all people probably do not give equal attention to problems of defining situations." *Id.* One experiment found that "subjects accepted the experimenter's suggestion that they would experience meaningful psychotherapy via an intercom, and they held to this definition of the situation until overwhelmed by the meaninglessness of random responses from the machine." *Id.* (citing P. MCHUGH, *supra* note 105, at 66-67, 109-110).

¹¹² "[T]he layman's understanding of deviance is based on the more visible types that are classified and presented to him every day. Pressed to explain the *fact* of deviation, he will probably redirect the question by talking about the *type of person* the deviant is thought to be: brutal, immature, irresponsible, vicious, inconsiderate, degenerate." Cohen, *Introduction*, in *IMAGES OF DEVIANCE* 9, 10 (S. Cohen ed. 1971); see H. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 185 (exp. ed. 1966); D. MATZA, *BECOMING DEVIANT* 80-81 (1969); McHugh, *A Common-Sense Conception of Deviance*, in *DEVIANCE AND RESPECTABILITY* 61 (J. Douglas ed. 1969), reprinted as *A Common-Sense Perception of Deviance*, in *RECENT SOCIOLOGY* No. 2: *PATTERNS OF COMMUNICATIVE BEHAVIOR*, *supra* note 65, at 152.

¹¹³ The recent miniseries, *Amerika* (ABC television broadcast, Feb. 1987), is a stark example. The effect of the series' message relies on a conception of life under socialism that is shared by a significant segment of the American population.

commonsense pictures of criminals. Certainly, the criminals themselves often do.¹¹⁴ The point is that many people have no occasion or need to examine the received picture thoroughly. Such reliance on commonsense understanding is essential for most meaningful social interaction to occur. Without it, planning action, making decisions, and even conversation would be impossible.¹¹⁵

3. *Merger of the Moral and Empirical in Commonsense Reasoning.*—Commonsense understandings or ideas are often evaluative propositions; pragmatic or commonsense theorizing rarely distinguishes between moral and empirical conclusions in the way more academic discourse does. Moral propositions are treated no differently than empirical propositions; moral prescriptions are considered to be empirical features of the world. Prohibitions such as “do not murder” and “drive only on the right” do not have to be defended by complex moral argumentation. They simply are part of the world, or at least part of the relevant world.¹¹⁶ Commonsense theorizing provides a natural morality grounded in the way things are thought to be.

Thus, all individuals engaged in routine social activity are guilty, in Unger’s sense, of adhering to a faulty naturalistic premise. For most relevant practical purposes in everyday life, individuals do merge the “is” and the “ought,” and at least tacitly assume that there is no other way the world could be ordered.¹¹⁷ As it turns out, the naturalistic premise,

¹¹⁴ But David Matza suggests that persons labeled as criminals and deviants by society frequently begin to see themselves as such. D. MATZA, *supra* note 112, at 165-80.

¹¹⁵ Nancy Pennington and Reid Hastie have suggested that in deliberating, jurors construct stories as a method of organizing and evaluating the evidence. The construction of the story depends significantly on jurors’ commonsense understandings of the way people behave in given situations. These understandings are the jurors’ “world knowledge.” Pennington & Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCH. 242, 247 (1986); N. Pennington & R. Hastie, A Cognitive Theory of Juror Decision Making: The Story Model 19 (unpublished paper presented at Columbia Legal Theory Workshop, Mar. 2, 1987) (on file with *Northwestern University Law Review*).

¹¹⁶ While the prohibition against murder may be an empirical human universal, the prohibition against driving on the left clearly is not. Individuals are certainly aware that in other countries the convention is reversed. But for everyday activity, the two prohibitions function in similar ways. For all practical purposes, murder and driving on the left are not viable options for the solution of practical problems.

¹¹⁷ Unger’s work, in fact, is a more abstract effort to merge the “is” and the “ought.” An adequate description of the way the world is put together is believed to suggest ways in which it could be reformed. Cf. Boyle, *supra* note 9, at 1071-72 (*Passion* is “rebellion against hegemony of fact/value dichotomy”). Unger’s effort is not unique. Much of nineteenth-century social theory—whether the positivism of Auguste Comte or Karl Marx’s theory of history—described as fact an evolutionary process that governs society and that dictates a more desirable state of affairs. Much legal scholarship, I believe, also shares this general trait: studies of the existing are often believed to ground prescriptive visions. See D. Van Zandt, *The New Legal Realism: The Empirical and the Moral in Legal Scholarship* (unpublished manuscript) (on file with *Northwestern University Law Review*), printed in abbreviated and edited form in Van Zandt, *The New Legal Realism*, YALE L. REP., Spring 1987, at 2.

in addition to being an intellectual sin of certain pre-Enlightenment thinkers, is also a consistent tendency of all but the most reflective and Humean individuals.

This prescriptive feature of the process suggests that the particular stock of knowledge available to individuals not only aids them in negotiating daily life, but also directs their activity along defined courses. Stocks of knowledge present a necessarily limited range of theories and types for understanding the world and planning activities.¹¹⁸ In this respect, stocks of knowledge are formative contexts in Unger's sense: they close off and make unavailable certain options.¹¹⁹ To a certain extent, they do constrain individual activity.

But that is not a complete understanding of formative contexts. Formative contexts more accurately can be seen as the general stocks of knowledge available to all individuals in the social group under observation. Formative contexts are the aggregate products of individuals' pragmatic theorizing in managing their daily lives. They emerge from the flux of social interaction and activity. They are a resource available to individuals in the social group that facilitate the negotiation of everyday activity

4. *Evidence and Validity.*—Individuals do not, however, accept the validity of formative contexts or the commonsense understandings that constitute them uncritically. The constituents of formative contexts or stocks of knowledge are routinely and repeatedly tested pragmatically by experience. Every time an idea or understanding enables a person to make sense of a situation or to accomplish a goal, it is a piece of evidence of its validity. Although these tests are not controlled experiments,¹²⁰ as with any scientific theory, the more problems the formative context solves, the firmer is the individual's acceptance of it.¹²¹

¹¹⁸ A common metaphor to explain this idea is that of a tool: formative contexts limit an individual's action in the same way that a gardener's available tools limit his or her options. For example, a garden hoe is only useful for chopping clumps of dirt and for some rather gross scratching. When the hoe is not needed, the gardener switches to another tool. In the same way, individuals can switch among elements of the formative context.

¹¹⁹ Unger discusses the limiting case of "social closure" in which a formative context makes society invulnerable to struggles over the basic terms of existence because of the oligarchy effect (some groups have privileged access to power and to material supplies), the identity effect (individuals cannot distinguish their self interest from that of the group), and the survival effect (the practical arrangements of society determine the terms on which elementary needs can be met). *SOCIAL THEORY* at 49-52. "In such a circumstance people lack any ready way to imagine transformation." *Id.* at 41.

¹²⁰ Anecdotal evidence plays a major role in people's understandings of their society. The most obvious examples are the use of oral stories, tales, and myths. Individuals routinely accept as highly probative evidence that would constitute hearsay. *MCCORMICK ON EVIDENCE* § 245, at 728 (E. Cleary 3d ed. 1984) (courts frequently admit hearsay evidence because of its reliability).

¹²¹ No justification or validation can ever be absolute. See Peller, *The Metaphysics of American Law*, 73 *CALIF. L. REV.* 1152, 1261 (1985) (cannot justify set of categories through which we inter-

This pragmatic verification does suffer from a confirmatory bias. Individuals prefer to fit a new bit of experience into their preexisting theories of the world.¹²² A rule of economy of philosophizing lies behind this bias: individuals engage in only as much novel theorizing as is needed to bring the new experience under a familiar category.¹²³ Individuals react rationally to the constraints of their situation.¹²⁴ Because the purpose of the theorizing or typification process is to provide theories and methods for negotiating life, efficiency considerations dictate that any proof be only to a reasonably useful level of certainty. Thus, individuals seek to validate their commonsense ideas to the extent that they will be accurate for all foreseeable practical purposes.¹²⁵ If the new experience does not fit neatly, individuals will engage in complex elaborations before they will relinquish their theory.¹²⁶

B. Commonsense Versus Scientific Theories

Unger attributes to formative contexts the same high degree of co-

pret legal or social world); Yablon, *supra* note 14, at 633 (Kripkean indeterminacy is idea that "no particular action can ever be justified as following or not following the rule"). Commonsense understandings are similar to Michael Walzer's moral prohibitions that are not "discovered or invented but rather . . . [emerge from] the work of many years, of trial and error, of failed, partial, and insecure understandings." M. WALZER *supra* note 100, at 24.

¹²² See D. HEISE, *supra* note 104, at 8 ("People have a strong disposition to retain a definition once it has been adopted."); Snyder, *When Belief Creates Reality*, 18 *ADVANCES IN EXP. SOC. PSYCH.* 247, 248 (1984) (attribution theory); *id.* at 257-61 (people act in ways that confirm their preconceptions of others by inducing confirmatory behavior in others). Peter McHugh found that his subjects expended cognitive effort to bolster their current definition of the situation unless that definition became completely untenable. P. MCHUGH, *supra* note 105, at 108.

¹²³ This process bears some similarity to the psychological method of problem solving called "satisficing." See Simon, *A Behavioral Model of Rational Choice*, 69 *Q.J. ECON.* 99 (1955).

¹²⁴ Rationality here is given Max Weber's meaning of means-ends rationality. Given a specified level of information, members act rationally to achieve pre-given goals when they choose the means that minimize the costs or efforts expended in the action. 1 M. WEBER, *supra* note 18, at 5 (*zweckrational*). Of course, the available information may be inaccurate or inadequate when viewed from a more comprehensive perspective. Moreover, the information set includes those understandings of the way the world works which are unexamined in the particular episode of commonsense reasoning at issue. These caveats gut the concept of rationality of much of its substantive content. Cf. J. ELSTER, *SOUR GRAPES* 10 (1983) (thin rationality is "nothing but consistent preferences and [anticipation of] consistent plans"). By fiddling with the information set available to the social actor, the observer can conclude that any action is rational or irrational. See *supra* note 98.

¹²⁵ From a different and more comprehensive perspective, these ideas may not be accurate. They are simplifying devices that may lead to systematic errors in perception and action. See Tversky & Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 3 (D. Kahneman, P. Slovic & A. Tversky eds. 1982), reprinted from 185 *SCIENCE* 1124 (1974).

¹²⁶ P. MCHUGH, *supra* note 105, at 92-111 (attempts to bolster and elaborate current view before surrendering); cf. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 35-42 (1962) (normal science is period of puzzle-solving or period of attempts to fit experimental results into currently prevailing paradigm).

herence¹²⁷ that philosophers and scientists attempt to achieve in their theorizing. His approach assumes that individuals comprehend the prevailing formative context at a level of abstraction similar to his own. His social theory is designed to break down and replace the current formative context with his preferred formative context of empowered democracy. One systematic theory is to replace another through moral persuasion.

If the above sketch of a microsociological theory is persuasive, however, it suggests that individuals do not see themselves as confronted by a constraining and all-inclusive formative context. Nor do they strive for or believe that they operate with a systematic, coherent theory of the world that interprets and guides all activities.¹²⁸ The commonsense understandings or theories that individuals formulate and use differ in several respects¹²⁹ from more philosophical and scientific theories about the world.¹³⁰

First, the orientation of individuals in generating commonsense understandings is vastly different. Whereas the individual acting in the world theorizes for the purpose of solving a practical problem, the philosopher-scientist may be seeking a broader perspective. He or she is not attempting to manipulate the environment to obtain a particular result, but is instead attempting to understand how that environment works.

Even when the philosopher-scientist appears to be engaged in minute problem solving, his or her orientation is still different. In such cases, he or she seeks to fill in a particular gap or to test a particular result of a more general theory that attempts to explain a whole set of phenom-

¹²⁷ Unger's criticism of deep-logic theories is that they assume that a formative context is indivisible; that is, that each element is necessary to the identity of the whole. See SOCIAL THEORY at 90-91. Although he eschews that idea, he still maintains that formative contexts have a systematic coherence.

¹²⁸ I do not attribute to Unger the assertion that individuals have this level of coherence and systematicity in their everyday thought. The point of my discussion is that theories, highly abstracted from everyday routines, have less ability to alter social arrangements than Unger implies they do.

¹²⁹ The differences between commonsense and philosophic-scientific theories that I identify in this section are matters of degree rather than quality. See Schutz, *Common-Sense and Scientific Interpretation of Human Action*, 14 PHIL. & PHENOMENOLOGICAL RES. 1, 33-34 (1953); Garfinkel, *The Rational Properties of Scientific and Common Sense Activities*, 5 BEHAV. SCI. 72, 74-75 (1960), reprinted in H. GARFINKEL, *supra* note 16, at 267-68. At root, attempts by individuals engaged in practical activities and by philosophers and scientists to understand the world are similar and differ only in the interests being pursued. See J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 196 (1971) (knowledge-constitutive interests).

¹³⁰ Bruce Ackerman's descriptions of both the Ordinary Observer and the Scientific Policymaker fall on the philosophical-scientific side of my distinction. Both attempt to theorize about the world in a relatively abstract, general, and consistent manner—albeit in different ways. The Scientific Policymaker develops his Comprehensive View of the world as a basis for normative prescription, see B. ACKERMAN, *supra* note 85, at 29; the Ordinary Observer seeks to identify the dominant institutions to provide a source for normative prescriptions, see *id.* at 96. Ackerman's concern is with two principled approaches to the resolution of legal issues; my concern in this section is with the difference between commonsense and more abstract philosophical-scientific theories.

ena.¹³¹ By contrast, the pragmatically oriented individual seeks to master a particular practical problem and is not concerned with how the solution to that problem fits into a more general theory. "To master such theory as we have is hard professional work—and unless one intends to become a professional economist [or other type of professional theorist], the practical utility of the training will be dwarfed by its very considerable costs in terms of time, money, and lost opportunity."¹³²

A second distinction related to the first is that the philosopher-scientist wishes to achieve a relatively high degree of systematicity and consistency among the different elements of his or her theoretical structure. Systematicity assures him or her that others can understand how the results fit the theory. The philosopher-scientist also wants others to be able to replicate his or her results. Because of the ordinary individual's interest in pragmatic results, however, consistency and systematicity across time and events are not as relevant. Although everyone may strive for some measure of consistency,¹³³ the orientation toward particular issues and problems will often trump concerns for consistency.

Finally, a philosophical or scientific theory is based on a fuller information set than that employed by individuals facing practical problems. Because of the difference in orientation, the philosopher-scientist seeks out information that pragmatically oriented individuals might forego because it would not marginally improve their decisionmaking process. There is still information selection in philosophical and scientific theorizing, but because of differences in purpose the efficient level of information gathering is higher. By contrast, the individual engaged in the type of theorizing I am describing sets out to acquire only the information that is required to solve the problem at hand.¹³⁴

¹³¹ See T. KUHN, *supra* note 126, at 35-42.

¹³² B. ACKERMAN, *supra* note 85, at 91.

¹³³ L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE 18 (1957) (drive assumed in cognitive dissonance theory). Festinger's major empirical application of the theory of cognitive dissonance examined situations in which inconsistencies were brought unavoidably to the attention of the individual. When the flying saucers did not land with people from another sphere, the belief that they would was sorely tested. L. FESTINGER, H. RIECKEN & S. SCHACHTER, WHEN PROPHECY FAILS (1956). Thus, only the relevant inconsistencies were subjected to the hypothesized drive for cognitive consistency.

¹³⁴ I have treated the differences between commonsense and philosophical-scientific theorizing as if they formed a sharp dichotomy. In doing so, I have been using a simplifying model for the purposes of exposition. The two types of reasoning do not differ in any strong qualitative fashion. In fact, a major theme in the ethnomethodological tradition is that social scientific ideas are merely elaborated commonsense theories, see H. GARFINKEL, *Common Sense Knowledge of Social Structures: The Documentary Method of Interpretation in Lay and Professional Fact Finding*, in STUDIES IN ETHNOMETHODOLOGY, *supra* note 16, at 76, 100-02, and that each individual in society is a practicing—if untrained—sociologist; see A. CICOUREL, *supra* note 106, at 331-36; H. GARFINKEL, *What is Ethnomethodology?* in STUDIES IN ETHNOMETHODOLOGY, *supra* note 16, at 24-31 (practical sociological reasoning); Garfinkel & Sacks, *On the Formal Structures of Practical Actions*, in THEORETICAL SOCIOLOGY 337 (J. McKinney & E. Tiryakian eds. 1970) (formulation of accounts by social actors).

The point of this discussion is that individuals rarely deal with a formative context in the way a social theorist does. They employ the discrete commonsense theories and ideas that constitute it; they develop elaborations and applications of those ideas. On occasion, they do step back from their everyday activity and attempt to formulate a story about the formative context as a whole, but that is uncommon and of not much import for everyday practice.

C. *Resistance to Change*

To this point, it might appear that the microsociological view I am pursuing demonstrates that formative contexts are actually more malleable and less resistant to change than suggested by Unger's theory. Because they are not external to individuals, but are constant and routine products of individuals' activities, they should be revisable at will. This conclusion, however, ignores the roots of formative contexts in routine life.

Current social arrangements are not social structures that have been pressed on an unwilling populace that is waiting to be liberated. More importantly, they are not the product of some collective faulty reasoning that the haves have been able to impose on the have nots. Instead, they are the product of complex social processes in which individuals have tried to deal with and understand their world as individuals and as a group.¹³⁵ As such, they have a plausibility and familiarity based on the empirical experiences of individuals. Formative contexts are not external or alien to individuals; indeed, it is precisely because formative contexts are individuals' own products whose pragmatic utility is constantly reaffirmed through daily use that they take on a correctness or plausibility that is difficult to challenge.

To the extent that current formative contexts are the products of routine commonsense theorizing and activity, simple rational argumenta-

¹³⁵ This is not to say that no coercion is involved. Surely, there have been many societies in which coercion is the important cement, although I think there are far fewer in which it is the primary cement. Except on rare occasions, the myth of the foreign liberator riding into the village of happy, adoring villagers released from their chains is just that—a myth. Unless the oppression has been reasonably short in duration, it is likely that people in the village will have accommodated to their oppressors in ways that the liberators will disturb.

Nor is it to say that inequality does not exist. Inequality is rampant in all societies. In most cases, it is regarded as the "natural order": commonsense understandings of the world often include the idea of disparate allocations of resources and rights. See A. RYAN, *PROPERTY AND POLITICAL THEORY* 179-80 (1984) (commonsense theory that mere luck is the cause of disparate allocations). Even when these understandings tend to disfavor inequalities, individuals may prefer them to the perceived—correctly or incorrectly—alternatives of instability or violence. This, of course, says nothing about the ultimate desirability or justifiability of inequality. See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 232-75 (1974); J. ROUSSEAU, *DISCOURSE ON THE ORIGIN AND FOUNDATIONS OF INEQUALITY AMONG MEN* 157, 160 (R. Masters & J. Masters trans. 1964) (Amsterdam 1755).

tion will be unavailing to change them.¹³⁶ Grandiose theories of empowered democracy will be largely unconvincing to individuals because they do not address the practical problems of daily life in any way more satisfactory than the current ideas in use. Moreover, they are at a level of abstraction that is often foreign to the person-in-the-street. Appeals to abstracted reason are inadequate because they are not located or contextualized in any meaningful way. They cannot develop the empirical support that commonsense ideas enjoy from everyday practical activities.¹³⁷

This problem affects many aspects of Unger's program for change.¹³⁸ To take one element of *Politics* as an example, Unger argues that the idea of consolidated property rights should be dislodged from the current structure of formative contexts. Consolidated property rights take all claims to particular divisible portions of social capital or wealth and assign them to one person.¹³⁹ Unger argues that consolidated property rights must give way to a rotating capital fund, which will break up the control of capital into several tiers of capital takers and capital givers.¹⁴⁰ Pursuant to such a fund, the aggregate social capital will be

¹³⁶ Cf. Boyle, *supra* note 7, at 772 ("It is ridiculous to believe that one could disrupt the massively entrenched set of power relations and collective fantasies that 'constitute' repression in our society simply by attacking one of the more formalized and abstract fantasies and claiming that the rest are 'dependent' on it.").

¹³⁷ A natural experiment that provides a partial test of this proposition is provided by the institution of electoral initiatives. In almost half the states, members of the public can place legislative proposals on the ballot. Allen, *The National Initiative Proposal: A Preliminary Analysis*, 58 NEB. L. REV. 965, 1007 (1979). While numerous initiatives have been proposed and argued for, often with the backing of substantial financial resources, Ronald Allen found that radical changes were rare and the "frivolous or ill-considered measures [were not] enacted with regularity." *Id.* at 1014, 1021, 1030. Successful initiatives usually are the product of long-simmering movements for political reform rather than of new and persuasive argumentation for a novel idea. "[U]sually the voter seems, quite sensibly, to resolve any doubts he has on a particular measure against it." *Id.* at 1036.

¹³⁸ FALSE NECESSITY at 395-570.

¹³⁹ *Id.* at 489-90. Consolidated property rights are the central defining feature of the current economic system and its historically specific definition of the market. They are:

a more or less absolute entitlement to a divisible portion of social capital—more or less absolute both in the discretionary use and in the chain of voluntary transfers by successive property owners. Once this initial identification has been established, the market economy is often further assumed to imply a particular style of industrial organization: the style that puts standardized mass production in the mainstream of industry and flexible production in its vanguard.

Id. at 481.

¹⁴⁰ In Unger's scheme, there will be a central capital fund or "social investment fund" that is "under the control of the central executive and representative bodies of empowered democracy. . . . [I]ts single most important task is to draw the limits of variation within which the competing investment funds must operate." *Id.* at 493. The investment funds are the second tier and are both capital givers and capital takers. *Id.* at 492. They "hold capital from the social fund and give it out to the primary capital takers, who represent the third tier of the economic system." *Id.* The investment funds specialize in a sector of the economy or a particular type of investment and are "semi-independent bodies, much like contemporary central banks or even philanthropic foundations in contemporary Western societies, with their technical personnel chosen by a combination of appointment from above and election from the sectors in which they operate." *Id.* at 495.

allocated, through democratic decisions,¹⁴¹ to those entrepreneurs¹⁴² operating through semi-independent investment funds¹⁴³ who will use it best for a limited period of time.¹⁴⁴

Although the proposal to replace consolidated property rights with rotating capital funds may make some sense,¹⁴⁵ Unger never explains how the proposal is to be implemented. If he were writing on a *tabula rasa*, his ideas would certainly be a possible way to structure an economic system. Unfortunately, we rarely have that opportunity.¹⁴⁶

¹⁴¹ The central democratic institutions exercise their ultimate control over the forms and rates of economic accumulation and income distribution by establishing these funds or by closing them out, by assigning them new infusions of capital or by taking capital away from them, by charging them interest (whose payment represents the major source of governmental finance), and, most importantly, by setting the outer limits of variation in the terms on which the competing investment funds may allocate capital to the ultimate capital takers.

Id. at 491-92. Capital may be transferred between investment funds through market transactions: “[W]ithin certain gross limits, the primary capital takers can buy one another’s resources by offering to pay the capital-auctioning fund more for the employment of these resources than their current users.” *Id.* at 495. Or, capital may be transferred between investment funds on a rotation system. *Id.* at 496.

¹⁴² Unger speaks of “ultimate capital takers,” who are “teams of workers, technicians, and entrepreneurs, who make temporary and conditional claims upon divisible portions of this social capital fund.” *Id.* at 491.

¹⁴³ “The central capital fund does not lend money out directly to the primary capital users. Instead, it allocates resources to a variety of semi-independent investment funds. Each investment fund specializes in a sector of the economy and in a type of investment.” *Id.*

¹⁴⁴ *Id.* at 491-92.

¹⁴⁵ Unger never confronts some of the basic problems involved in a system of collective control over resources. Chief among these is how to ensure that the central capital fund or any decisionmaker up or down the line is acting with society’s best interests at heart rather than his own. Buchanan, *Rent Seeking and Profit Seeking*, in *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* 3, 3-4, 9 (J. Buchanan, R. Tollison & G. Tullock eds. 1981) (“As institutions have moved away from ordered markets toward the near chaos of direct political allocation, rent seeking has emerged as a significant social phenomenon. . . . Rent . . . is an allocatively unnecessary payment not required to attract the resources to the particular employment. . . . [A]ttempts will be made to capture these rents, and resources used up in such attempts will reflect social waste.”).

A second problem has to do with the ability of managers of investment funds to make allocatively adequate decisions. *Cf.* A. RYAN, *supra* note 135, at 172 (central problem not addressed by Marx when he describes abolition of private property is “how will decisions [about resources] be taken?”). One of the merits of a pure private property system is that we protect almost absolutely an individual’s decision about the use of property we have assigned to him and force him to bear the costs associated with that use. Thus, if the use of the property turns out to be less than optimal, the property owner has only himself to blame. *See* Demsetz, *Toward a Theory of Property Rights*, 57 *AM. ECON. REV.* 347, 350 (Pap. & Proc. 1967) (private property rights can force holder to consider costs of action). Unger’s system involves decisionmakers who are neither actively engaged in the productive activity nor directly accountable for allocation errors.

Finally, the complexity of Unger’s system suggests that the transactions costs in deciding, allocating, and monitoring the use of the capital might eat up the entire new value created by the capital. Unger seems oblivious to the fact that democratic deliberation takes both time and money. Simply the opportunity costs of the deliberators’ time are enormous. None of these problems are fatal to a collective system of capital allocation. My point is that they need to be addressed by any proposal as detailed as Unger’s.

¹⁴⁶ *Cf.* Epstein, *Possession as the Root of Title*, 13 *GA. L. REV.* 1221, 1241 (1979) (“The common

The idea of consolidated property rights is thoroughly ingrained in individuals' ideas of the structure of society. The commonsense conception of property as absolute ownership of things is rooted in normal ways of thinking and acting with respect to things. Law professors teaching first-year property courses spend a not insubstantial number of hours convincing their students that property is not a Blackstonian absolute right to a thing,¹⁴⁷ but is only a bundle of socially defined rights vis-à-vis other members of society.¹⁴⁸ Even the Supreme Court occasionally forgets this lesson.¹⁴⁹

Although minor unbundling has always existed and continues to exist,¹⁵⁰ Unger's frontal assault on the idea of consolidated property rights is unlikely to succeed on the basis of rational persuasion alone. People routinely think of and treat material goods, whether personal articles, real estate, or capital, as owned by them.¹⁵¹ This conclusion is not merely abstract theory, but is bolstered and evidenced in everyday activities. Individuals in routine activity treat things as subject to the absolute control of particular persons, and such treatment is consistently validated by the reactions of others and the pragmatic usefulness of the treatment.¹⁵²

law courts, which always began in medias res and which always announced principles that governed particular disputes, never had the luxury of philosophical purity in some original position.”). Epstein seems to treat this argument as lending normative support to his position. My use of the argument is empirical: it helps explain resistance to social change.

¹⁴⁷ 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2 (right of property is “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”).

¹⁴⁸ B. ACKERMAN, *supra* note 85, at 26; Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY 69 (J. Pennock & J. Chapman eds. 1980).

¹⁴⁹ See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162-63 (1980) (unanimous decision) (interest on principal is in its essence property and cannot be taken under any circumstances without just compensation).

¹⁵⁰ Grey, *supra* note 148, at 69-71; see Hohfeld, *Some Fundamental Legal Conceptions as Applied to Judicial Reasoning*, 23 YALE L.J. 16 (1913) (typology of basic jural relations). The study of private property law is at its core a study of the permitted and prohibited ways of dividing and transferring separate rights in land.

¹⁵¹ See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897):

It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.

Although Holmes was speaking in the context of the adverse possession of a particular thing, the argument is generalizable to the whole group of things currently classified as property. People have developed a reliance interest in a set of ways of defining and treating entitlements. Cf. Epstein, *supra* note 146, at 1242 (practical reason for not questioning property rights acquired in past by first occupation is reliance on that system of entitlement definition for extended period of time).

¹⁵² The emergence of the concept of absolute property rights under certain environmental conditions might be explained through evolutionary game theory ideas. See Axelrod & Hamilton, *The Evolution of Cooperation*, 211 SCIENCE 1390 (1981); Hirshleifer, *Evolutionary Models in Economics and Law: Cooperation Versus Conflict Strategies*, 4 RES. L. & ECON. 1 (1982). The iterated actions and reactions of social actors to each other might tend in evolutionary fashion toward the institution of absolute property rights as the equilibrium. As with any evolutionary theory, however, a change

Unger's own Brazil is at present experiencing a difficult situation in which individual citizens are in effect being asked indirectly to transform their consolidated property rights into a type of politically controlled entitlements allocation. Recent government policies, in particular a price freeze announced late last year,¹⁵³ have increased demand for goods far beyond Brazil's ability to supply such goods. One result has been a rapid rise in a previously arrested inflation rate. The practical effect of policy-induced rampant inflation is to convert consolidated property rights in capital or wealth held by Brazilians into wealth over which the central bank and government maintains control.

Many Brazilians of substance have been unwilling to participate in this transformation of their consolidated property rights into a version of a "rotating capital fund," subject to allocation through government monetary policy. Instead, they have converted their wealth into a form—United States dollars or Swiss francs in foreign accounts—that is not subject to central political control: the traditional problem of capital flight.¹⁵⁴ If the government desires to continue its domestic policy, no amount of talk will keep capital flight from occurring; only strict exchange and capital flow regulations backed with the coercive power of the state will do the trick. My argument is not that the change to a rotating capital fund is unwise or that it cannot occur. Rather, I am arguing that such a change is extremely unlikely to occur through the rational persuasion of Brazilian capital owners, and may require the use of coercion. In fact, exchange and capital flow regulations have been regular responses to capital flight in developing countries.¹⁵⁵

Another current example starkly illustrates the same general point. It is easy but unavailing to argue with South African adherents of apartheid about the evils of that system. Painting a picture of a new world—the step to which might even be Pareto-superior, benefitting black and white alike—does not persuade. This is because the practical experience of the typical apartheid adherent is inconsistent with the new picture. That practical experience has been built up through years of commonsense theorizing and action based on those theories, and has been bolstered by economic self-interest as well.¹⁵⁶

Apartheid adherents' theories regarding the superiority of whites

in the environment initiates movement away from the prior equilibrium. So, as land became scarcer and new uses were invented, the evolutionary equilibrium—at least for real estate developers and property lawyers—was altered toward the bundle of rights conception of property rights.

¹⁵³ N.Y. Times, Feb. 16, 1987, at 19, 24, col. 1.

¹⁵⁴ *Id.* at 19, col. 3 (with rise in inflation, government considering strengthening of exchange and currency controls to restrict capital flight).

¹⁵⁵ R. EDWARDS, INTERNATIONAL MONETARY COLLABORATION 449 (1985) (capital controls used "to prevent residents from transferring their savings").

¹⁵⁶ At least in the short-term, discrimination by employers can secure higher monetary profits, Donohue, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1419 (1986), and if the employer is personally indifferent to employing blacks, his total profits—psychic plus monetary—will be signifi-

and their morally justified place in South African society obviously seem (to them) better supported by their practical experience than a picture of a mixed-race society.¹⁵⁷ Moreover, social-psychological factors may cause some blacks to behave in ways that confirm the whites' stereotypical views of them.¹⁵⁸ When added to more recent, ad hoc theories about the communist threat and the inevitable economic collapse that will follow the introduction of black rule, these theories become still more powerful. They will almost certainly be adhered to until either coercion or a sufficient threat of coercion can dislodge them.

Of more direct relevance to Unger's enterprise is the fact that commonsense understandings of perceived economic failures in planned economies—particularly socialist economies—also reflect a resistance to change in formative structures. Two theories are generally available in the current formative context to interpret this perception of failure; both assert and depend on a belief in uniform, immutable human nature. First, socialist economies fail, it is thought, because of the moral inferiority of a centrally planned economy, which removes from individuals the freedom they enjoy in Western economies.¹⁵⁹ The second, and less antagonistic, view is that while a socialized economy may be a meritorious moral goal, it can never be achieved because man is universally self-interested.¹⁶⁰ Such conceptions of human nature are particularly resistant to change.¹⁶¹

Not only will these ideas encourage resistance to socializing the

cantly higher. Gary Becker argues, however, that in the long-term discrimination is inefficient. G. BECKER, *THE ECONOMICS OF DISCRIMINATION* 39-54 (2d ed. 1971).

¹⁵⁷ Paul Gewirtz, in explaining why freedom of choice was not an appropriate rule in the desegregation decisions, refers to distorted attitudes on the part of both blacks and whites caused by "[a] long regime of de jure segregation [that] may skew attitudes, tastes, and perceptions of those exercising choice, and thereby inhibit or channel their choices even though they are now formally free to go to any school." Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 745 (1986).

¹⁵⁸ Snyder, *supra* note 122, at 296 ("As long as people have faith in their stereotypes, they may treat other people in ways that actually elicit from them behaviors that support those stereotypes."); Snyder, Tanke & Berscheid, *Social Perception and Interpersonal Behavior: On the Self-Fulfilling Nature of Social Stereotypes*, in *ATTRACTION: WHY PEOPLE LIKE EACH OTHER* 391 (1984). Cass Sunstein refers to this as adaptive preferences and uses Jon Elster's idea of sour grapes, J. ELSTER, *supra* note 124, at 109-40, to explain the "acceptance of traditional forms of discrimination by its victims, in the context of gender, class, and even race. Acceptance of traditional distinctions tends to reduce cognitive dissonance." Sunstein, *supra* note 88, at 1147.

¹⁵⁹ See Sunstein, *supra* note 88, at 1131-32 (objection from liberty to interference with private preferences: "the government ought not, at least as a general rule, to be in the business of evaluating whether a person's choice will serve his or her interests, or even whether the choice is objectionable, except when the choice causes harm to others").

¹⁶⁰ See *id.* (objection from futility to interference with private preferences: "[I]nterferences with private preferences will be ineffectual, for those preferences will manifest themselves in responses to regulation that will counteract its intended effects.").

¹⁶¹ A. SCHUTZ, *supra* note 97, at 184-85 (ideal types used in daily life are divorced from flow of intersubjectivity).

economy, but they may also explain problems in existing planned economies. It may be that to the extent socialist economies have failed, it is because these pictures of human nature are so thoroughly embedded in the commonsense conceptions of the possibility of society held by citizens of the socialist countries themselves. While the Russian Revolution sought to create the new socialist man, it was insufficiently aware of the strength of individuals' commitment to the old view of human nature. Given Unger's lack of discussion of these issues, he may be repeating the same mistake.

D. Sources of Social Change

I am not suggesting that formative contexts cannot or do not change. Clearly, they do and they do reasonably often. Nor am I claiming that the conception of formative contexts for which Unger presses is necessarily undesirable or pernicious. Unger is right to try to understand the processes of social change and to direct them toward morally preferable states.

My point is that such change rarely occurs from consciousness-raising or from appeals of rational moral persuasion such as Unger's.¹⁶² This is because the individual's sense of social order created through the above described processes is a grounded "rational" sense. People do not accept the current formative context because it is an alien structure forced upon them, or because they reason incorrectly in some absolute sense—that is, because they suffer from some "false consciousness."¹⁶³ They accept it because for most practical purposes it is pragmatically validated for them: it works for most problems they confront in every-

¹⁶² This is a controversial assertion because it implies that the great moral and political thinkers such as Hobbes, Locke, Rousseau, Kant, Bentham, Hegel, and Marx have had less impact on the course of social change than we commonly surmise. Certainly, a claim that they have had no effect would be naive (the Russian Revolution expressly acknowledged its Marxist roots). Such thinkers do provide arsenals of ideas and arguments for the agents of social change. But the effect of such ideas on social change are not direct and not supremely powerful, or so I argue.

¹⁶³ Although Unger's theory is not expressly one of false consciousness, the concept that ideas can cause social change at least shares the structure of false consciousness arguments. Gabel's analysis of the formative context of capitalism certainly asserts that society's members deceive themselves with respect to their true condition. Gabel, *supra* note 53, at 28-29; cf. J. SARTRE, BEING AND NOTHINGNESS 86-116 (H. Barnes trans. 1966) (discussion of bad faith or self-deception).

Sunstein, at points, seems to make the argument that preferences change when people realize through rational deliberation that their initial preferences were unfounded.

[S]ome preferences are objectionable or the product of distorting circumstances, principally in the form of relations of power. Such distortions can, it is thought, be revealed as such through deliberation and debate. . . . A political process that subjects private choices to critical scrutiny will in this sense produce better laws than a process that takes them as exogenous.

Sunstein, *supra* note 88, at 1154. His discussion of the *Lochner* period illustrates this idea of correction in perception. Interestingly, he can point to no deliberative dialogue that marked the change brought about by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Perhaps the coercion of the Roosevelt court-packing threat or the addition of another Roosevelt nominee was the key to the Supreme Court's change of world views.

day life.¹⁶⁴

Social change does occur, however, when the formative contexts, or at least specific portions of them, are no longer adequate for use in accomplishing practical tasks. An obvious source of this inadequacy is the introduction of some factors exogenous to the existing system. Chief among these factors is external coercion. Throughout human history, military and other types of coercion have been used to alter existing formative contexts and impose new ones on societies. In this same category of social change are other factors such as changes in technology, migration of cultures, and events of nature. "News"—the occurrence of random events that members of society could not predict in advance given the available information—is always a factor in the alteration of formative contexts.¹⁶⁵ Individuals must adapt to the exogenous shocks to their world.¹⁶⁶

Change also can be generated internally, but not in the way that Unger would have it.¹⁶⁷ Endogenous change in formative contexts results from the fact that the commonsense theories that individuals generate and employ are not systematic, and are not necessarily consistent with each other or consistent across discrete areas of practical activity. Faced with new experiences, individuals draw upon and adapt theories already extant in their stock of knowledge or formative context. While most adaptations are reasonably consistent with prior social arrangements,¹⁶⁸ lines are often fudged. Formative contexts may provide a model for coping with a problem, but they are also affected by each application.¹⁶⁹ Moreover, because an individual's orientation is normally practical rather than theoretical, adapting a commonsense theory so that it is useful in a particular situation does not cause major concern.

Although this description of endogenous factors is analogous to the analysis of paradigm shifts offered by Thomas Kuhn,¹⁷⁰ the last feature

¹⁶⁴ These are broad generalizations that, again, are part of a simplified model that attempts to shed light on social relations. Surely there are individuals whose compliance has only a coercive source.

¹⁶⁵ The theory of rational expectations has been developed in both microeconomics and macroeconomics. See, e.g., C. ATTFIELD, D. DEMERY & N. DUCK, RATIONAL EXPECTATIONS IN MACROECONOMICS 15-21 (1985). The concept of "news," meaning unpredictable shocks or surprises, forms the basis for the null hypothesis in attempts to predict the movement of flexible exchange rates, a research area almost completely dominated by rational expectations theory. M. MELVIN, INTERNATIONAL MONEY AND FINANCE 133 (1985); Frenkel, *Flexible Exchange Rates, Prices, and the Role of "News": Lessons from the 1970s*, 89 J. POL. ECON. 665 (1981).

¹⁶⁶ See W. OGBURN, SOCIAL CHANGE 200-13 (1922) (hypothesis of cultural lag: culture sphere adjusts to periodic and unpredicted shocks in the material sphere).

¹⁶⁷ Unger has stated that legal doctrine can change through internal development when criticism brings to light conflicting ideals already embodied in the doctrine. *The Critical Legal Studies Movement* at 579-80.

¹⁶⁸ See D. HEISE, *supra* note 104, at 8.

¹⁶⁹ See A. GIDDENS, *supra* note 18, at 25-28 (duality of structure).

¹⁷⁰ T. KUHN, *supra* note 126, at 52-65 (role of anomaly in scientific discovery).

underscores a difference. Scientists are very concerned about maintaining the internal coherence and broad applicability of scientific paradigms. Adaptations of the paradigm raise problems immediately, particularly if they involve drastic reformulations. The need to stretch the paradigm is an early warning sign of the future need for a shift.¹⁷¹

Formative contexts, however, have a great deal more slack or stretching room because individuals are far less concerned with their overall coherence and systematicity. What counts is their pragmatic employability. To the extent that formative contexts work in practice, people have little reason to revise them except for minor tinkering. Of course, at times existing formative contexts begin to fail as resources for action, very often due to changes exogenous to a particular group of individuals. In such situations, alterations or even wholesale substitutions must be made. The point is, however, that social change is driven by changes in the relative usability of formative contexts, not by the presentation of new total ideologies, no matter how attractive they might be.

III. LAW AND COMMONSENSE REASONING

Politics speaks little of the general nature of law and legal rules. The subject of law, however, has certainly been the testing ground for previous versions of the thesis of *Politics*.¹⁷² From his prior work as well as from *Politics*, Unger's idea of the role of law is clear: law presents to individuals as normatively valid a picture of particular forms of human association—in the terminology of *Politics*, a formative context.¹⁷³ “Each type of legal right represents, even in its most formal aspects, the incomplete but significant picture of a certain model of human association.”¹⁷⁴ An important argument of *Politics* is that a system of consolidated property rights presents a particular vision of the nature of

¹⁷¹ *Id.* at 77-90.

¹⁷² See, e.g., LAW AND MODERN SOCIETY; *The Critical Legal Studies Movement*. The criticisms of objectivism and of formalism expressed in his writing on law are not dissimilar to the criticisms of the naturalistic premise in *Politics*. According to Unger, these negative criticisms seem to present the lawyer with “the general choice: either resign yourself to some established version of social order, or face the war of all against all.” *The Critical Legal Studies Movement* at 577. His project for some time has been to transcend this dilemma with a constructive social theory. *Id.* at 588.

¹⁷³ “The starting point of our argument is the idea that every branch of doctrine must rely tacitly if not explicitly upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals.” *Id.* at 570.

The system of rights was meant to exhibit on its surface the gross structure of society Perhaps the most important shift in the history of modern legal thought has been the one that led from this conception to the idea that the constitution and the law should describe the basic possible dealings among people, as property owners and as citizens, without regard to the place individuals occupy within the social order. . . . The critical legal studies movement has committed itself to another change in the conception of the relation of law to society, potentially equal in scope and importance to the shift I have just recalled.

Id. at 585.

¹⁷⁴ FALSE NECESSITY at 513.

democracy and the market in modern society.¹⁷⁵ Law both expresses and enforces the model of human association at the heart of the formative context.

Law also, however, plays a key part in the implementation of Unger's programmatic ideas. Once the system of consolidated property rights is removed, a new system of legal rights must be established both to further and to protect empowered democracy. This system of new legal rights is to be the guardian of negative capability.¹⁷⁶ Law takes on a liberating function: "[l]aw and constitution are now to be seen as . . . the denial rather than the reaffirmation of the plan of social division and hierarchy."¹⁷⁷ The new legal system will create new legal rights that will establish the security of individuals "in ways that minimize both the immunity of institutional arrangements to challenge and conflict and the ease with which some individuals can reduce others to dependence."¹⁷⁸

The law functions differently in these two cases only because it expresses and reinforces different underlying models of human association. The legal system at whose center consolidated property rights reside is

¹⁷⁵ *Id.* at 480-93.

¹⁷⁶ "The ideal aim of the system of rights, taken as a whole and in each of its branches, is to serve as a counterprogram to the maintenance or reemergence of any scheme of division and hierarchy that can become effectively insulated against the ordinarily available forms of challenge." *The Critical Legal Studies Movement* at 585. Unger identifies two "generative principles of a reconstructed system of rights": first, "the security of the individual should be established in ways that minimize both the immunity of institutional arrangements to challenge and conflict and the ease with which some individuals can reduce others to dependence," FALSE NECESSITY at 513; and second, the new legal rights should "suit the obligations of interdependence that characterize communal life," *id.* at 517. Any new rights should provide security to the individual while preventing the petrification of formative contexts, and should foster mutual dependence and vulnerability among individuals.

¹⁷⁷ *The Critical Legal Studies Movement* at 585.

¹⁷⁸ FALSE NECESSITY at 513. The most important of these rights are the market, immunity, solidarity, and destabilizing rights. Market rights are "the rights employed for economic exchange in the trading sector of the society." *Id.* at 520. Immunity rights are rights that "protect the individual against oppression by concentrations of public or private power, against exclusion from the important collective decisions that influence his life, and against the extremes of economic and cultural deprivation." *Id.* at 524. Destabilization rights are the rights that "protect the citizen's interest in breaking open the large-scale organizations or the extended areas of social practice that remain closed to the destabilizing effects of ordinary conflict." *Id.* at 530. They "attempt to deny protection against destabilizing conflict to either institutions or noninstitutional arrangements whenever this immunity to conflict seems to generate stable ties or domination and dependence." *Id.* at 531. Solidarity rights "give legal form to social relations of reliance and trust." *Id.* at 535. They attempt to create "a zone of heightened mutual vulnerability," *id.* at 536, and provide for "the legal protection of claims to abide by implicit obligations to take other people's situations and expectations into account," *id.* at 537. Unger's descriptions of the latter two rights seem to depict general principles, rather than what are commonly understood to be rights. They are at a level of generality that provides little if any information to a judge or actor who is subject to them. They certainly lack clarity in application, which is an important functional characteristic of a right or legal rule; clarity keeps the expenditure of resources to a minimum. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEG. STUD. 13, 23-24 (1985) (lack of clear entitlement leads to expenditures in entitlement determination); Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 76 (1985) (requirement of clear act of possession avoids confusion and resource waste).

based, according to Unger, on a reified concept of market relations. By contrast, the new system of legal rights in an empowered democracy reflects a more open-ended type of formative context. In both cases, however, the functioning of legal rules is the same: they are in the now familiar form of constraints on otherwise free individual activity. They are coercive and external to the individual.

Unger's view of law is merely a recapitulation of his more general view of formative contexts, and the problems that stalk his idea of formative context are also present here. Law is external to and coercive of the individual in any particular formative context; it expresses the generally shared model of human association underlying that formative context. Describing law as merely the expression of human association tells us little and ignores the way law operates in actual society. Unger's desiccated view of law, if accepted, would cause legal scholars to despair of having anything of value to say. The role of law in social change for him is in effect minimal; moreover, his view cannot explain the phenomenon of the relative allegiance of the citizenry to law and differences in the levels of that allegiance. Again, the microsociological theory that animates Unger's views causes him to provide an unpersuasive account of law.

A. *Legal Consciousness*

This is particularly true of the idea of legal consciousness that Unger shares¹⁷⁹ with a number of the scholars in the critical legal studies movement.¹⁸⁰ Of course, attempts to characterize a particular period of legal thinking on a discrete subject can be valuable contributions to our understanding of law and social relations affected by law. Many scholars both within¹⁸¹ and without¹⁸² the critical legal studies movement have provided interesting and relevant accounts of the ideas that judges, legal practitioners, and citizens hold about specific subject matters. Members of social groups and organizations do tend to adhere to similar views of the world and of proper action in that world. Karl Llewellyn's famous study of the warranty of quality¹⁸³ is an illuminating analysis of the ideas

¹⁷⁹ *The Critical Legal Studies Movement*; see KNOWLEDGE AND POLITICS (attempt to reveal deep structure of liberal legal consciousness).

¹⁸⁰ There are as many versions of legal consciousness as there are scholars who employ the term. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1725-40 (1976); Kennedy, *Toward a Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3, 23 (1980) (hereinafter Kennedy, *Legal Consciousness*); Note, *supra* note 7, at 1677-78, 1679.

¹⁸¹ See, e.g., Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 275-80 (1978); Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1515 (1981).

¹⁸² See, e.g., ACKERMAN, *supra* note 85; Grey, *supra* note 148; Llewellyn, *On Warranty of Quality, and Society* (pts. 1 & 2), 36 COLUM. L. REV. 699 (1936), 37 COLUM. L. REV. 341 (1937).

¹⁸³ Llewellyn, *supra* note 182.

of the market and other factors that influenced New York and other judges around the turn of the century. That study of legal consciousness was pitched at a level that yielded results.

As Unger and others sometimes employ it, however, the idea of legal consciousness attributes an implausible degree of coherence and systematicity to the ideas that individuals in a specific historical period carry in their heads. Legal consciousness¹⁸⁴ is portrayed by some as an omnipresent and seemingly systematic set of ideas that reside in the current formative context. Individuals in the legal system are so dominated by this set of ideas that their decisions and actions are unconsciously driven by the legal consciousness. According to Unger, the value of the critical legal studies movement has been to expose the flaws in current unified liberal legal consciousness.¹⁸⁵

The notion of formative contexts as stocks of knowledge suggests that legal consciousness is not as monolithic, systematic, or coercive as Unger and others suggest. To the extent that they claim that individuals or even individual lawyers and judges actually carry around in their heads a complex and systematic set of legal ideas that determine results,¹⁸⁶ their view is implausible. Legal doctrine and some sort of legal consciousness do exist, but they are the products of attempts by legal professionals—judges, lawyers, and academics—to produce a coherent, normative picture of the world that can be used to generate unique and persuasive results in individual cases.¹⁸⁷ They are pragmatically ori-

¹⁸⁴ Kennedy defines consciousness and legal consciousness:

Consciousness refers to the total contents of a mind, including images of the external world, images of the self, of emotions, goals and values, and theories about the world and self. I use the term only in this vague, all-inclusive sense. It defines the universe within which are situated the more sharply-delineated concepts that are the vehicles for analysis.

Legal Consciousness is an only slightly more defined notion. It refers to the particular form of consciousness that characterizes the legal profession as a social group, at a particular moment. The main peculiarity of this consciousness is that it contains a vast number of legal rules, arguments, and theories, a great deal of information about the institutional workings of the legal process, and the constellation of ideals and goals current in the profession at a given moment.

Kennedy, *Legal Consciousness*, *supra* note 180, at 23.

¹⁸⁵ This has been accomplished through criticism of “objectivism” and “formalism” in traditional legal analysis. *The Critical Legal Studies Movement* at 567-76. Critical legal studies scholars claim to have gone beyond the skepticism of the legal realists by demonstrating that liberal legal consciousness rests on untenable visions of human association or untenable social theories. See Tushnet, *Post-Realist Legal Scholarship*, 1980 Wis. L. REV. 1383, 1384-86, 1395-99.

¹⁸⁶ Peter Gabel’s phenomenology of judging seems to suggest this.

[W]e can say that the first movement of the judge’s consciousness is the apprehension of the entire social field as a synthetic activity that moves like a thing; or, in other words, he has a sense of the whole culture all at once that he passivizes into the movement of a quasi-object, such that each discrete situation of facts reveals itself to his mind against the background of the total “factual” context from which the law has emerged. . . . This sense of the normal movement of the total “factual” context, without which it would be impossible to apply the law to any discrete situation, has been interiorized by the judge during the course of his conditioning.

Gabel, *supra* note 53, at 31.

¹⁸⁷ This, according to Bruce Ackerman, is the role of the legal analyst who is an Ordinary Observer: “By definition, an [Ordinary] Observer is not content to isolate one or another pattern of

ented.¹⁸⁸ The systematic liberal ideology that some critical legal studies movement scholars identify as the prevailing legal consciousness just is not as systematic and monolithic as is claimed.¹⁸⁹

The actual production of the more systematic and comprehensive theories of law is controlled by a narrower segment of the population—law professors. Their work is conducted during periods of reflection far from the everyday functioning of the legal system. They are products of an intellectual process¹⁹⁰ directed towards the development of comprehensive or scientific theories of the phenomenon of law as a whole.¹⁹¹ Much critical legal studies' criticism of legal consciousness seems to be criticism directed by one philosophical-scientific theory at another. Although specific characterizations of sets of legal ideas at play in particular areas of the law can be enormously helpful, the concept of an abstract liberal legal consciousness is not particularly useful in the analysis of the actual course of practical legal activity in society. The criticism is at a plane of abstraction far above the commonsense ideas and theories employed by individuals in everyday life, or even by lawyers in practice.

B. Law and Commonsense

Viewing formative contexts as stocks of knowledge available for commonsense reasoning also suggests a more varied and dynamic relation between law and the individual. Law and legal rules always operate against a background of commonsense understandings about the world that constitutes the formative context as a stock of knowledge. Law is

institutionalized expectation; he is searching instead for the single pattern of practice that may be called *the* dominant one in a given social system." B. ACKERMAN, *supra* note 85, at 95.

¹⁸⁸ At least since the legal realists, any other view of legal consciousness is implausible. Even prior to the realists' analysis, however, it is extremely unlikely that any participants in the legal system were unconsciously driven by a monolithic legal consciousness of the type Unger describes. Langdellian orthodox legal theory was probably viewed by most practitioners with bemusement; it was criticized by scholars. See, e.g., Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 19 (1924); Holmes, *supra* note 151, at 457.

¹⁸⁹ I do not deny that there are assumptions about the world that are socially shared and that rarely enter into individuals' discursive consciousness. See A. GIDDENS, *supra* note 18, at 42-45. However, these are the ideas that form the stock of knowledge that have been built up and that individuals draw on as a resource. They are not a preexisting system imposed from without.

¹⁹⁰ Anthony Giddens distinguishes between practical and discursive consciousness in a way relevant to my point. Practical consciousness is the "reflexive monitoring of conduct by human agents" engaged in pragmatic activity. *Id.* at 44. Discursive consciousness is the ability of an individual "to give a coherent account of one's activities and the reasons for them." *Id.* at 45. Clearly, opinion writing is also a product of discursive consciousness.

¹⁹¹ The Langdellian model of legal doctrine is the most obvious example. It described law as an independent science in which a set of interrelated and systematic general principles were to be discovered by examination of prior case law. See Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 11 (1983). It, however, is not the only example. Policy science, Lasswell & McDougall, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943), law and economics, R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986), and critical legal studies are all efforts seeking organizing principles and explanations.

both a product of and a resource for the process of commonsense reasoning of individuals in society. It forms part of their stocks of knowledge, it provides a set of devices for the negotiation of problems in the world, and it can be employed to impose change on others. My remaining remarks are directed at suggesting the complexity of the relationship between law and commonsense reasoning.

1. *Law as a Product of Commonsense Reasoning.*—Law can be seen as an expression or product of commonsense reasoning. Legal rules, of course, are produced in our society by the activity of specific subgroups. Most individuals do confront the law as something not created by them. Judges, administrators, and legislators are each in the business of promulgating rules and declaring what the law is. Although legal rules can be seen as an expression of the sovereign will, as suggested by the positivists,¹⁹² or as the idiosyncratic whims of judges, as some legal realists seem to assert,¹⁹³ it is also possible that legal rules are formulations derived from the decisionmaker's commonsense theories of the world.¹⁹⁴ This is true regardless of whether one believes that the legislative product is the result of the activity of self-interested utility maximizers¹⁹⁵ or of more republican-minded public servants.¹⁹⁶

2. *Commonsense Roots of Legal Rules.*—A legislator's or judge's choice of a legal rule reflects an estimation that the rule is consistent with his or her view of the world. For example, a legislator's evaluation of the potential effectiveness of a new sanction will be based in large part on his or her own understanding of what motivates individual behavior. Although legislators occasionally do call for and claim to rely on "scientific studies" of social problems, the promulgation of most legal rules is based on commonsense judgments about the world. Moreover, those

¹⁹² J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (rev. ed. 1970) (London 1861-63); see H. HART, *THE CONCEPT OF LAW* 18-25 (1961).

¹⁹³ J. FRANK, *LAW AND THE MODERN MIND* 160-61 (rev. ed. 1970).

¹⁹⁴ Karl Llewellyn effectively demonstrated that judges faced with cases on the warranty of quality relied on their understanding of the nature of the market. Llewellyn (pt. 1), *supra* note 182, at 723 ("court's background picture of transactions 'of this type'"); cf. Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 *STAN. L. REV.* 591, 671-72 (1981) ("dominant legal thought is nothing but some more or less plausible common-wisdom banalities, superficialities and generalities"); Gabel, *supra* note 53, at 39 (law is conceptual representation of normal functioning of capitalist system).

¹⁹⁵ Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 *HARV. L. REV.* 4, 15 (1984) (laws designed to serve private, not public, interests); McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 *J. LEGAL STUD.* 101, 102-03 (1987) (legislators as well as their constituents are rent-seekers).

¹⁹⁶ Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 31 (1985) (republican legislators can "escape private interests and engage in pursuit of public good"); see Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 *COLUM. L. REV.* 223, 250-54 (1986) (practice of statutory interpretation in which judge seeks public goal has effect of reducing effectiveness of private interest legislation).

judgments often frame the problem itself. As a practical matter, legislators and judges must deal with presented issues immediately and do not have the luxury of waiting for systematic studies.

Reliance on commonsense ideas about the world goes beyond judgments about the means-ends rationality of possible legislation. Legislators also rely on commonsense judgments about what is best for society—judgments about the ends of legislation—judgments that at root are moral judgments. Thus, prohibitions on drug use and prostitution are based at times on commonsense conclusions about the likely consequences of these activities that supposedly demonstrate their inherent wrongness. Such prohibitions are not bald assertions of moral positions, but are seen by legislators and judges to be well-founded, “valid” notions of the proper way for the world to be regulated.

An example that crops up frequently in judicial opinions in contract and property cases is the use of the commonsense idea of “bargaining power.” A wide variety of rules are justified as attempts to rectify situations of alleged unequal bargaining power.¹⁹⁷ There is a shared commonsense judgment that unequal bargaining power often exists and must be accounted for. Bargaining power may be a useful concept for any number of reasons,¹⁹⁸ but its theoretical underpinnings are neither mentioned nor, most likely, understood.

3. *The Commonsense Roots of the Acceptance of the Law.*—The acceptance of legal rules by individuals is widespread. Although certain rules do not muster a general consensus and therefore cause much debate,¹⁹⁹ most legal rules enjoy almost unanimous support or at least indifference. This is in large part a function of the fact that the commonsense theories that legislators and judges employ in promulgating the rules are essentially uncontested (in the practical sense of that term²⁰⁰) in society at large. In fact, legislators and judges count on this uncontestedness to assure the workability of the rules they promulgate. This uncontestedness derives not from the coercive nature of a formative context or from the ignorance of the populace, but from the often demonstrated

¹⁹⁷ In property law, bargaining power crops up frequently in landlord-tenant law. *See, e.g., Green v. Superior Court*, 10 Cal. 3d 616, 625 n.9, 517 P.2d 1168, 1173 n.9, 111 Cal. Rptr. 704, 711 n.9 (1974); R. POSNER, *supra* note 191, § 4.7, at 101-05.

¹⁹⁸ Bargaining power may have any of a number of substantive meanings. It may express a social decision about the allocation of entitlements and the distribution of wealth. Or it may be a response to situations that society believes are consistently characterized by irrational bargaining by one class of parties. Finally, it may refer narrowly to situations in which competition is limited.

¹⁹⁹ Obvious examples include the death penalty, legalized abortion, and prohibition of marijuana use.

²⁰⁰ Of course, many rules rely on theories that can be and are contested theoretically. A rule is in the practical sense uncontested when individuals in the course of their everyday activities do not view it as problematic.

utility in daily life of these commonsense theories about the world and the legal rules they support.

When a legal rule does deviate from commonsense understandings, it fails to gain support. The legal rule may simply lie dormant,²⁰¹ or reform movements may arise to redress the perceived divergence between the rules and the reformists' understandings of the world.²⁰² Jury nullification is an obvious instance in which a deviation of legal rules from commonsense understanding results in nonacceptance of the legal rules. Reacting to a situation in which they thought that judicial decisions were lagging behind social practice, Roscoe Pound and certain legal realists argued that law should be corrected to conform with commonsense understandings and ways of conducting affairs.²⁰³

4. *Functions of Law.*—If law relies on these collectively shared commonsense judgments about the world that constitute the formative context, then why do we have legal rules at all? If law is only a formulation or expression of these commonsense ideas that everyone should accept, then the coercive force of law would seem to be superfluous. Individuals, however, see the need for legal rules in two areas: to deter faulty judgments about the proper course of action and to provide resources for the negotiation of practical problems.

²⁰¹ Legal rules that deviate from common understandings may not be employed if the costs of ignoring them are not high. Robert Ellickson's study of Shasta County found that the formal legal rules regarding liability for straying cattle were largely irrelevant to the loss allocation practices of county residents. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 672-73 (1986).

²⁰² See J. GARFIELD, *SYMBOLIC CRUSADE* (2d ed. 1986) (temperance movement); H. BECKER, *Moral Entrepreneurs*, in *OUTSIDERS* 147, 162 (1973) ("Rules are not made automatically. Even though a practice may be harmful in an objective sense to the group in which it occurs, the harm needs to be discussed and pointed out.").

Reform movements can be seen as collective attempts to produce legal rules or entitlements and are governed by the production function for the creation of rules or entitlements. When the aggregate benefits to be derived from a change or new entitlement exceeds the costs of creating and enforcing that new entitlement, then the reform movement will arise and succeed. See Anderson & Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163, 165 (1975) (as with any productive activity, amount of investment in establishing and protecting property rights depends on marginal benefits and costs to investors of allocating resources). Even if a legal rule is out of step with commonsense understandings, there will be no change if the marginal benefits of investing in a change do not exceed the marginal cost.

This may explain Ellickson's Shasta County finding. See *supra* note 201. There, county residents saw nothing to gain from altering the legal rule because the benefits of the alteration would not exceed the costs of the alteration, particularly since they had in operation a satisfactorily functioning loss-allocation mechanism.

²⁰³ Pound, *The Need for Sociological Jurisprudence*, 19 GREEN BAG 607, 608 (1907); see also Douglas & Marshall, *A Factual Study of Bankruptcy Administration and Some Suggestions*, 32 COLUM. L. REV. 25 (1932). The Uniform Commercial Code is probably the most ambitious example of this type of reform; the leader of the reform was Karl Llewellyn. See W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 313-21 (1973).

a. **Detering Mistaken Judgment.**—First, although individuals' commonsense judgments about the world seem obvious and natural to them, they are keenly aware that not everyone shares those views and that some might act to take advantage of another's compliance. Thus, legal rules backed by the coercive power of the state are necessary to catch or deter the socially incompetent.²⁰⁴ The "socially incompetent,"²⁰⁵ it is thought, are those who are unable or unwilling to accept the ideas about the world shared by substantial numbers of individuals.

In addition, individuals also believe that some people belong to subcultures whose understanding of the world departs in important relevant respects from their own. Members of these subcultures may take actions inconsistent with more widely shared notions, thereby undermining the formative context and causing disputes. For example, most people's initial reaction to "free riders"—those who exploit others' compliance to their own personal advantage—is that the free riders are morally wrong and that their judgment is somehow flawed. Legal sanctions, people believe, correct "incorrect" free rider and subcultural judgments by increasing the costs of noncompliance and thus making clear the correctness of the generally shared commonsense idea.

Related to this is the fact that individuals also see coercive legal rules as a way to bind themselves against performing acts inconsistent with their general view of the world.²⁰⁶ Although an individual may agree that the commonsense judgment expressed by a legal rule is correct, he or she realizes that situations arise in the course of daily life in which there is the potential for faulty judgment or the temptation to deviate from the general judgment. Legal rules backed by sanctions assure an individual that he or she will be less likely to deviate from the preferred view of the world. Again, the coercive legal rule makes the original commonsense judgment more convincing by depreciating the alternative.

b. **Resources for the Negotiation of Practical Problems.**—Legal rules also provide individuals with resources for going about their daily activity and negotiating practical problems. First, they provide information believed to be reliable about the likely reaction of others. An individual can expect that his counterpart in any transaction will adjust his

²⁰⁴ The economic view of the criminal law as deterring attempts to bypass the market is a formalized version of this commonsense theory. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985); Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1126 (1972); see Klevorick, *On the Economic Theory of Crime*, in NOMOS XXVII: CRIMINAL JUSTICE 289 (J. Pennock & J. Chapman eds. 1985).

²⁰⁵ My use of the conclusions "socially incompetent," "incorrect," and "inaccurate" does not represent my judgments, but descriptions of judgments that individuals do make. "Competence" and "correctness" are qualities that depend entirely on the benchmarks used.

²⁰⁶ J. ELSTER, ULYSSES AND THE SIRENS 37 (rev. ed. 1984); Sunstein, *supra* note 88, at 1140.

behavior so that it conforms to legal rules. This, of course, derives from the fact that legal rules are often based on commonsense ideas about the world. A commonsense theory about a particular transaction enables someone holding the theory to predict the behavior of others. If that theory is backed by a legal rule, the predictive value of the theory is enhanced.

Not only do legal rules provide information about daily life interactions, but they also provide a structure or framework that facilitates transactions.²⁰⁷ Contract law, domestic relations law, and securities laws concerning corporate tender offers all set the background against which parties to such transactions can interact.²⁰⁸ Such rules reduce the costs of transacting by permitting parties to agree on certain allocations without discussion. Again, this function is successful only to the extent that the legal framework is consistent with commonly shared understandings of the way in which such transactions should occur.

C. Law, Social Change, and Coercion

To this point, I have stressed ways in which law and legal rules rest on commonsense understandings of the world. However, as Unger suggests, law also plays a role in changing formative contexts. In some cases, law is an attempt to alter commonsense ideas of the world in specific areas. Law can be in tension with commonsense theories about the world; it can be an attempt by the legislature or the courts to alter such theories. In this form, law is an ideology imposed from without that seeks to raise the costs of nonadherence so that individuals will alter their pictures of the world and comply.

A common arena for this function is in the actual coercion of one subgroup of society by another. A standard pattern is the imposition of an alien ideology by one geographic group on another. The Civil Rights Act of 1964²⁰⁹ was such an attempt and a reasonably successful one: it imposed a new idea of race relations on a recalcitrant population.²¹⁰ Law in this vein does not seek to persuade, but to coerce. Thus "free choice" was not a viable method of instituting school desegregation in the South,

²⁰⁷ Stewart Macauley has demonstrated how the legal framework of contract law is a resource that business people can call on in governing their commercial interactions, but a resource rarely used. Macauley, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). Egon Bittner's study of peacekeeping also illustrates this function of legal rules as a resource. Bittner, *supra* note 106, at 710.

²⁰⁸ See Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 959-77 (1979). This is not to say that the particular institutional structure established by a set of legal rules is necessarily the best.

²⁰⁹ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (1982 & Supp. IV 1986)).

²¹⁰ See Sunstein, *supra* note 88, at 1153-54 (laws prohibiting race and gender discrimination based on idea that preference for discrimination is product of distorted preference formation); Donohue, *supra* note 156, at 1411 (critics of Title VII view it as legislative effort to shape private preferences).

and the law performed a coercive function in mandating desegregation.²¹¹

In other cases, law is designed to “correct” “inaccurate” commonsense ideas held by some segments of the population.²¹² Laws such as pollution and helmet statutes, often justified as efforts to force individuals to internalize the externalities of certain activities, are attempts to cause individuals to alter their sense of the proper way to behave. By forcing individuals to adopt new ideas of the world or to incorporate new information into their decisionmaking, such laws attempt to change the institutional structure of society. They affect each individual’s decisionmaking process by altering the starting positions and available means.

Of course, it may be that coercive laws of this sort never succeed in altering individuals’ commonsense theories of the world, but instead are effective simply because they make noncompliance unacceptably costly. The line between mere incentives and coercive alterations of commonsense theories of the world is not clear cut. For example, tax law changes seem to be an area in which only behavior is highly responsive to changes in the law. On the other hand, the civil rights laws have apparently helped to change a whole population’s view on proper race relations, even though resistance remains. Although sudden nonenforcement of antidiscrimination laws might result in a small increase in discrimination, the effect would not be as radical as the change in investment habits that would result from a repeal of the federal tax exemption for interest on state-issued obligations.

IV. CONCLUSION

These insights about law are not particularly new. Many of the legal realists were deeply concerned with the interaction of law and commonsense ideas.²¹³ Karl Llewellyn was probably the most explicit and persistent.²¹⁴ Underhill Moore’s studies examined the interaction of law, behavior, and postulated commonsense explanations of adaptation to law.²¹⁵ This tradition saw law’s effectiveness as in part dependent on commonsense understandings of the world, and on the established rou-

²¹¹ Gewirtz, *supra* note 157, at 741-49.

²¹² Sunstein assumes that there is a correct rational analysis that is facilitated by legal regulation. See Sunstein, *supra* note 88, at 1154-57.

²¹³ See *supra* note 194.

²¹⁴ Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 462-63 (1930) (realistic jurisprudence must be concerned with “folk-law-in-action” and with what lay people believe law should be); Llewellyn (pt. 1), *supra* note 182, at 723 (“court’s background picture of transactions ‘of this type’”).

²¹⁵ Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609 (1923) (habitual belief and behavior constitute institutions); Moore & Hope, *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L.J. 703, 705 (1929) (prediction of judicial decisions from standard practice in banking community); Moore & Callahan, *Law and Learning Theory: A Study in Legal*

tines of everyday practical activity. The realist tradition, however, is often forgotten even by those who locate their legacy in it.

My suggestion is that Unger's notion of formative contexts ignores these insights to the detriment of the plausibility of his theory. I agree with him that social change and transformation are very often desirable, and I may even agree with some of his suggestions. But social change, as one notably successful revolutionary theorist realized,²¹⁶ never springs full-blown from a comprehensive theory. Nor does it come at the end of a deliberative conversation, no matter how arduous and authentic. The new world, if it is to come, must come from changes in the way people view and understand their everyday practical activity. And such changes are unlikely without a bit of force.²¹⁷

Control, 53 YALE L.J. 1, 61 (1943) (development of commonsense theories to explain alteration in parking and traffic behavior caused by changes in regulations).

²¹⁶ V. LENIN, WHAT IS TO BE DONE 212-20 (1973) (first published in Russian in 1902) (immediate calls for spontaneous "attack" to be rejected in favor of "an organization of revolutionaries").

²¹⁷ Lenin believed that the suppression of internal dissent was essential if the revolution was ever to succeed. *See id.* at 173 ("[Members of revolutionary organizations] have not the time to think about toy forms of democracy . . . , but they have a lively sense of their *responsibility*, knowing as they do from experience that an organization of real revolutionaries will stop at nothing to rid itself of an undesirable member."); V. LENIN, THE STATE AND REVOLUTION 107 (1973) (first published in Russian in 1917) ("[D]uring the *transition* from capitalism to Communism suppression is *still* necessary; but it is now the suppression of the exploiting minority by the exploited majority. A special apparatus, a special machine for suppression, the 'state,' is *still* necessary, but this is now a transitional state.").