

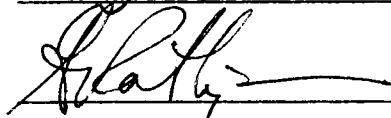
To the Graduate Council:

I am submitting herewith a thesis written by Margaret I. Lovell entitled "Roberto Mangabeira Unger: Drawing Some Implications from a Social Theory with a Special Emphasis on Issues in Medical Ethics." I recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Arts with a major in Philosophy.



Glenn C. Graber, Major Professor

We have read this thesis
and recommend its acceptance:



Accepted for the Council:



Vice Chancellor
Graduate Studies and Research

Thesis
80
.L694
cop. 2

ROBERTO MANGABEIRA UNGER: DRAWING SOME IMPLICATIONS FROM
A SOCIAL THEORY WITH A SPECIAL EMPHASIS ON
ISSUES IN MEDICAL ETHICS

A Thesis
Presented for the
Master of Arts
Degree
The University of Tennessee, Knoxville

Margaret I. Lovell

June 1980

3041865

ACKNOWLEDGMENTS

I would like to express my deep appreciation to Dr. Glenn Graber whose discussions, commentary and unconditional support was beyond that which is expected of a thesis chairperson. I would also like to thank Drs. Rem Edwards, Betsy Postow and Greg Rathjen for the patience, support and helpful comments and criticisms given to me while they served as members of my thesis committee. I also would like to express my deep appreciation to Dr. Charles Reynolds--friend, boss and mentor--who, in his courses on Rawls, legal philosophy, an independent studies course on Unger, as well as in many discussions, encouraged me to develop many ideas in this thesis.

I particularly want to thank my husband, Ralph Lovell. His love, support, encouragement and tolerance of chaos while this thesis was being written gave me the time and energy to complete this and achieve other goals as well, while not sacrificing a stable and happy marriage. I would like to express my appreciation to other family members as well, especially my parents, whose unfailing support and love in troubled times and pride in my accomplishments immeasurably influenced my return to academic life.

I also want to express my thanks to Allyson Lunden--friend, ally, fellow student and a fine typist/editor. Finally, I want to thank Dr. Gary Klukken whose friendship and guidance eased the difficult process of finishing this project.

ABSTRACT

The purpose of this essay was to explore the post-liberal social theory of Roberto Mangaveira Unger and to investigate its applicability to the discipline of medical ethics. Unger claims that he has developed a methodology which serves as a tool not only for the criticism of liberal social theory, but also for the development of a post-liberal theory of society, one which reasserts the tie between philosophy and social theory. As a result, the focus of this study was on his methodology.

The first part of this task was to delineate Unger's methodology. Since he claims that he uses a variation of Weber's typological method, an extended comparison was made between Weber's theory of types and Unger's variation. The major difference between the two methodologies is that Weber's approach is nominalistic with no metaphysical elements, while Unger's approach deliberately re-introduces the metaphysical component. While Unger's approach thus avoids some of the problems of the typological method (i.e., he develops a systematic hierarchy of types), and, like Weber's, invites the use of a cross-disciplinary as well as a cross-cultural approach, it was found that the major problem of the typological method--that this methodology creates unwarranted anti-theses and dichotomies--has not been resolved by Unger. This was shown both in his critique of liberalism and in his constructive social theory.

Unger's critique of liberalism was investigated in two areas--ethical theory and legal theory. In examining Unger's discussion of the liberal theories of ethics, it was found that his use of the typological method indeed creates unwarranted dichotomies. His use of the pure types of these theories leaves no basis for the modifications made by other

philosophers. This was shown to be especially true in Unger's treatment of deontological ethics where Unger uses Kant but ignores Rawls, whose theory attempts to avoid the very problems in Kant that Unger criticizes in his treatment of the morality of reason.

In Unger's treatment of legal theory, the same methodological problem was apparent. This was pointed out by describing the theories of H. L. A. Hart and Ronald Dworkin in relation to Unger's types of legal theories. First of all, as Unger sets up the types of liberal legal theories, it was apparent that neither Hart's nor Dworkin's theories fulfilled the criteria for Unger's pure types. Yet because of Unger's delineation of the pure types, he would be forced to conclude that neither theory is coherent since each attempted to accommodate the very problems to which adherence to the pure type would lead. For example, Dworkin's theory, which is an excellent example of a theory of substantive justice (one of Unger's types), is grounded in principles, and as a result, seems to avoid the pitfalls of other theories of substantive justice which are grounded in values. Yet by grounding his theory in principles, Dworkin falls victim to the antinomy of rules and values in Unger's theory. The problem is exacerbated, Unger claims, by the fact that this type of theory has disastrous consequences for the nature of law. But Dworkin's use of principles seems to avoid those consequences. As a result, the antinomy set up by Unger's criteria for the pure types is unable to accommodate a sophisticated legal theory like Dworkin's and sets up what seems to be unwarranted antitheses as well.

Unger's development of his constructive theory was examined as well. Although he unfolds his theory consistently with his methodology,

it was found that the problems that were present in Unger's critical work, i.e., the creation of unwarranted dichotomies, now appeared when his methodology was used as a tool for applying his ethical theory to issues in medical ethics. Unger's ethic of sympathy was developed for use in the cases of consent and refusal of treatment. Three interwoven strands were delineated in this ethic of sympathy--autonomy, reciprocity and shared values. Yet these strands fragment when one of them becomes the focus of the conflict. Certainly decisions can be made using both the ethic of sympathy and the methodology; but it was found that the decision-making process would be very complex. As a result of continuing methodological problems and of the complexity of the decision-making process, the author concluded that, while Unger's theory is promising, he has not yet developed a typological method clearly superior to contemporary methods and theories; nor is his theory capable of either criticizing liberal social theories or constructing a post-liberal theory easily applicable to contemporary problems in medical ethics and other areas.

TABLE OF CONTENTS

CHAPTER	PAGE
INTRODUCTION.	1
I. UNGER'S METHODOLOGY: A NEW VERSION OF THE IDEAL TYPE	3
A. Max Weber's Methodology	3
B. Unger's Typological Method: The Method of Common Meaning	6
C. Structure in the Method of Common Meaning	11
II. LIBERAL PSYCHOLOGY: UNGER'S CRITIQUE WITH A DISCUSSION OF LIBERAL DEONTOLOGICAL ETHICS.	26
A. Liberal Psychology.	26
B. Morality in Liberal Psychology.	29
C. The Typological Method as a Critical Device	40
III. LIBERAL POLITICS WITH EXAMPLES FROM CONTEMPORARY THEORIES OF JURISPRUDENCE	44
A. Liberal Politics and Its Relation to the Unity of Liberalism.	45
B. Liberal Society: Unger with Examples from Hart and Dworkin	53
C. Some Methodological Considerations.	76
IV. UNGER'S CONSTRUCTIVE THEORY	80
A. Human Nature: The Theory of the Self	80
B. Human Nature: The Political Counterpart to the Theory of the Self.	95
V. IMPLICATIONS FOR THE USE OF UNGER'S THEORY FOR MEDICAL ETHICS.	102
A. Toward a Feasible Normative Theory.	103
B. The Health-Care Professional/Patient Relationship: Sympathy as the Normative Aspect.	106
C. Health-Care Delivery Systems: A Question of Distributive Justice.	129
VI. CONCLUSION.	137
REFERENCES.	139
APPENDIX.	141
VITA.	144

INTRODUCTION

Roberto Mangabeira Unger, in his two books, Knowledge and Politics (1975) and Law in Modern Society (1976), develops a methodology for the total criticism of liberal thought. This methodology is applied not only in his critical work, but also in his delineation of a "constructive" social theory, one that he claims does not accept the basic assumptions of liberalism. Because of the broad range of issues that he addresses and because contemporary fields of study are founded in liberal assumptions, the very heart of Unger's method is cross-disciplinary. Thus, if his method and theory which will be addressed in this essay have any relevance at all, it is not a matter for one discipline to address. We are thus faced with an interdisciplinary task of confronting the unresolved agenda that Unger places before us.

The task seems incoherent if one simply explicates and discusses the issues that Unger raises for they are embedded in his methodology. Thus, the first task of this essay is to delineate Unger's methodology (Chapter I). This will provide a coherent basis for the development and discussion of the issues raised by Unger in both his critical and constructive work. Unger's critical work is divided into two parts. The first part (Chapter II) will examine his criticism of liberal psychology. One classical liberal theory of ethics will be presented for comparison and critical discussion. By doing this, perhaps some of the issues surrounding Unger's work can be clarified. The second part (Chapter III) will focus on the issues raised in Law in Modern Society (1976)--Unger's more complete critique of liberal political

thought. Here Unger's point of view will be examined in terms of two modern legal theories.

The next task is to delineate Unger's constructive social theory (Chapter IV). Yet this theory must also be examined. In this case, the focus will be somewhat different. Rather than compare Unger's theory with that of another, his ethic of sympathy will be developed and tested for coherence by applying it to issues in medical ethics (Chapter V). In all of these cases, of course, the primary emphasis will be on methodological issues. If Unger's methodology is successful as he develops it, he should be able not only to successfully criticize liberal thought, but also to present a coherent alternative.

CHAPTER I

UNGER'S METHODOLOGY: A NEW VERSION OF THE IDEAL TYPE

In Knowledge and Politics (1975), Unger develops his methodology for his total criticism of liberal thought. This methodology is refined in Law in Modern Society (1976). It is a descendant of Max Weber's comparative method which is based upon a theory of ideal types. Thus in order to understand Unger's method, it is first necessary to come to an understanding of the purpose and constraints of Weber's methodology. After a discussion of the typological method in Weber's theory, we can turn to Unger's use of this method. It will be shown that Unger moves beyond the constraints of Weber's methodology in order to facilitate his criticism of liberal thought. The final section of the chapter will deal with the structure within the method as Unger uses it--i.e., Unger's general system of types and the application of this system.

A. Max Weber's Methodology

There are two excellent secondary sources which give a clear and intelligible delineation of Weber's methodology: (a) Gerth's and Mills' introduction to From Max Weber: Essays in Sociology (1958), and (b) Talcott Parsons' introduction to Max Weber: The Theory of Social and Economic Organization (1947). Thus Weber's statements will be interpreted in the context of these two essays.

The notion of the ideal or pure type is fundamental to an understanding of Weber's purpose. He states:

For the purposes of a typological scientific analysis it is convenient to treat all irrational, affectually determined elements of behaviour as factors of deviation from a conceptually pure type of rational action. . . . The construction of a purely rational course of action . . . serves the sociologist as a type ('ideal type') which has the merit of clear understandability and lack of ambiguity. By comparison with this it is possible to understand the ways in which actual action is influenced by irrational factors of all sorts, such as affects and errors, in that they account for the deviation from the line of conduct which would be expected on the hypothesis that the action was purely rational (Parsons, 1947:92).

On the basis of this statement by Weber, a number of remarks about the ideal type are possible. First of all, as Parsons notes, the type "is not merely an abstraction, but a particular kind of abstraction. It states the case where a normative or ideal pattern is perfectly complied with" (Parsons, 1947:12). Parsons also notes that this notion of a type is general in that it describes a typical course of action, not an individual one (Gerth and Mills, 1958:59). Although the type is normative, it is only normative in terms of its being ideal or rational--i.e.,

. . . the construction of certain elements of reality into a logically precise conception. The term 'ideal' has nothing to do with evaluations of any sort. For analytical purposes, one may construct ideal types of prostitution as well as of religious leaders (Gerth and Mills, 1958:57).

Weber distinguishes basic types of actions which "are construed operationally in terms of a scale of rationality and irrationality. A typological device rather than a 'psychology' of motivations is thus described" (Gerth and Mills, 1958:57). Gerth and Mills state these gradations concisely:

Characteristically he rated as the most 'understandable' type those actions which are in the nature of rational expediences, and of which the conduct of the 'economic man' is a prime example.

Less 'rational' actions are typed by Weber in terms of the pursuit of 'absolute ends,' as flowing from affectual sentiments, or as 'traditional.' Since absolute ends are to be taken as 'given' data by the sociologist, an action may be rational with reference to the means employed, but 'irrational' with respect to the ends pursued. 'Affectual' action, which flows purely from sentiment, is a less rational type of conduct. And finally, approaching the 'instinctual' level, there is 'traditional' conduct: unreflective and habitual, this type is sanctified because it 'has always been done' and is therefore deemed appropriate. . . . It has correctly been observed that the basic types of social structure that Weber uses-- 'society,' 'association,' and 'community'--correspond closely with his 'types of action'--the 'rationally expedient,' the 'affective,' and the 'traditionalist' (Gerth and Mills, 1958:56-57).

According to Gerth and Mills, Weber uses, in this sense, a nominalist (i.e., devoid of metaphysical content) approach. There is a focus on the rational relation between ends and means as the conduct that is considered understandable (Gerth and Mills, 1958:57). Furthermore, they state that Weber is reluctant to accede either to materialism or idealism, or to structural or ideal principles of explanation (Gerth and Mills, 1958:59). This nominalism also leads into a quantitative method.

For Weber, historical and social uniqueness results from specific combinations of general factors, which when isolated are quantifiable. Thus, the 'same' elements may be seen in a series of other unique combinations. . . . He does not say that quality can be 'reduced' to quantity: indeed, as a nominalist, he is quite sensitive to the qualitative uniqueness of cultural reality and to the qualitative differences resulting from quantitative changes (Gerth and Mills, 1958:59).

Ultimately, however, Weber's method is comparative. Gerth and Mills claim that the nominalism which leads to the quantitative approach and the ideal type (which avoids the psychological approach to motivation) are linked to the comparative method. "This method implies that two constellations are comparable in terms of some feature common to them both. A statement of such common features implies the use of

general concepts" (Gerth and Mills, 1958:60). Described in this manner, ideal types can be seen as the "tools with which Weber prepares the descriptive materials of world history for comparative analysis. (They) vary in scope and in the level of their abstraction" (Gerth and Mills, 1958:60).

His concern with specific historical problems and his interest in a comparative sociology of a generalizing nature are thus related: the difference between them is one of emphasis. By the use of a battery of ideal types, he builds up a conception of a particular historical case. In his comparative studies, he uses the same ideal type conceptions, but he uses history as a storehouse of examples for these concepts. In short, the respective research interest--in elaborating a concept or in constructing a historical object--determines his procedure (Gerth and Mills, 1958:60).

This brief explanation of Weber's methodology is sufficient for the purposes of comparing it with Unger's delineation of the typological method. No actual criticism of the implications of the uses of Weber's method as it stands have been alluded to or undertaken, since that will be more useful in the context of the changes which Unger makes.

B. Unger's Typological Method: The Method of Common Meaning

The role of the "type" in Unger's method of common meaning is important. He states that it is the "crucial device for the reconciliation of systematic and historical understanding" (Unger, 1976:259)--i.e., the reconciliation of systematic theory and historiography. He states:

The type is a meaningful whole and the unity of its elements is a unity of sense rather than of logic or causation. The basis or justification of the typological method is therefore the tendency of social phenomena to cluster into meaningful wholes. These totalities are just as real as the units of action-belief out of which they are made (Unger, 1976:259).

Now for Unger, there are levels of abstraction or generality for types as well. The most general level are the forms of social life. Types of organization, according to Unger, are joined into the more comprehensive forms of social life with types of law and of consciousness (Unger, 1976:259).

Each of them represents a unique interpretation of what it means to be human. Each confronts its individual members with the recurring demands of human existence, but each presents these in a special way and limits the resources of matter and of thought that can be used to meet them (Unger, 1976:259).

Up to this point, there is a remarkable similarity to Weber's methodology. This similarity is based upon a similarity between Unger's notion of meaning and Weber's conception of understanding in terms of the ends of conduct or action. Unger states:

The method of common meaning redefines the terms of the debate by viewing the smallest unit of social study as a certain correspondence between belief and conduct rather than each one alone. This correspondence is called meaning. The intelligibility of human conduct presupposes that action can be understood by reference to ideas about the ends an individual pursues and about the conditions that serve or impede the attainment of those ends (Unger, 1976:246).

The similarity of approach between Weber and Unger is best exemplified by the treatment the two men give the topic of closed and open societies. According to Weber, the distinction is as follows:

A social relationship, regardless of whether it is communal or associational in character, will be spoken of as 'open' to outsiders if and in so far as participation in the mutually oriented social action relevant to its subjective meaning is, according to its system of order, not denied to anyone who wishes to participate and who is actually in a position to do so. A relationship will, on the other hand, be called 'closed' against outsiders so far as, according to its subjective meaning and the binding rules of its order, participation of certain persons is excluded, limited, or subjected to conditions (Parsons, 1947:139).

Unger, in describing and contrasting the three forms of social life--the tribal, the aristocratic, and the liberal--speaks also of the notion of human association in this context of closed and open relationship--but in terms of a group.

At the heart of the difference in the way insiders treat each other and the way they deal with strangers lie two utterly different kinds of social relations. Insiders do not recognize strangers as persons with whom they share anything important in common. In contrast, the members of the group believe themselves tied together by a deep and lasting communal bond. Typically, this bond rests both on a natural fact and on a sharing of common beliefs or ideals. The natural fact is the fate of being born into a family, a territory, a religion, or a race. But this predetermined circumstance is important only insofar as it contributes to a mental experience, which is the very core of tribal community. . . . (Unger, 1976:142).

According to Unger, the nature of the social bond "draws our attention to the fundamental correspondence between the ways in which social relations are in fact ordered and men's images of self and others" (Unger, 1976:139). Although one talks about insiders and the others talks about a closed relationship, the result is similar. The bond--the nature of that bond, its apprehension by the members of the group--is an important concept. For example, both see the family as characterized by a closed relationship, as well as by commitment to certain values--i.e., a religion shared by a group. What is important is the thesis of common meaning, a method of understanding, shared by both Weber and Unger.

On the other hand, Unger moves beyond the limitations of the typological method as set by Weber. As a nominalist, Weber makes no metaphysical distinctions. Gerth and Mills state this explicitly:

His attachment to Western positivist thought is shown in his scorn for any 'philosophical' or 'metaphysical' elements in the social sciences. He wants to give these sciences the same matter-of-fact approach with which the natural sciences approach nature (Gerth and Mills, 1958:59).

Unger claims, on the other hand, that this is Weber's greatest methodological mistake. He states at one point:

Weber fails to grasp the relation of the methodological issue of types to the metaphysical problem of the orders of ideas and of events, and therefore lacks a clear account of the connection among the elements of a type (Unger, 1975:309-310).

Unger assimilates this criticism of Weber's use of the method into his own typological method. In Law in Modern Society (1976), he begins this assimilation of metaphysics and the typological method with his concept of human nature. Unger has a two-part thesis about the relationship between human nature and the most general types of social order.

The first notion holds that there exists a limited fund of problems and possibilities of human association. Each form of social life is defined by the way it responds to the problems and pursues the possibilities. The fact that the fund is limited makes comprehensive theory and universal comparison possible. This principle, however, seems incompatible with the other half of my thesis: that the forms of social life are constituents and re-creators, rather than just examples, of human nature (Unger, 1976: 260).

Now Weber would accept the first half of Unger's thesis. There is nothing really controversial about it in the context of a typological method. The second half of this thesis, however, contains Unger's metaphysical claim--a claim he is able to make because he feels that he has shown that there is no real incompatibility between the two parts of his thesis.

The way to reconcile these two equally important ideas is to conceive of human nature as an entity embodied in particular forms of social life, though never exhausted by them. Consequently, humanity can always transcend any one of the kinds of society that develop it in a certain direction. Nonetheless, human nature is known, indeed it exists, only through the historical types of social life.

Yet as human nature is affected by the rich diversity of social forms, it keeps its own identity. The source of this unity is the permanent problem of man's relationship to nature, to others, and to his own work. The transformation of society may change the emphasis given to different parts of this predicament, the depth of our insight into it, or the extent to which its internal conflicts are resolved. But it cannot modify the structure of the situation (Unger, 1976:260-261).

In Law in Modern Society (1976), Unger singles out what he calls the "tension between the requirements of personal autonomy and of community, a tension exemplified by the interplay of principles of social order and by the antagonistic forces at work within each mode of social life" (Unger, 1976:261).

The link to Unger's metaphysical claim is his doctrine of universals and particulars. Although he states that the metaphysics has not yet been worked out, the doctrine of universals and particulars would be a beginning point for such a delineation. His relation of the notion of human nature and the forms of social order to this doctrine show the beginnings of such a metaphysical methodology.

The universal is human nature or the structural constraints on a person's relationship to nature, to others, and to himself; the particulars are the forms of social life and the individual personalities by which that humanity is represented and through which it is built. Here the universal is viewed as an actual being that can neither exist apart from a particular manifestation nor be reduced to any one embodiment. Its unity lies in the constantly developing set of its incarnations (Unger, 1976:261).

In the same way, Unger claims, the problem of types (abstractness) and systematic theory must be resolved. The type, in either of its forms--

the theoretical construct or the social reality--"would have to be seen as the representation of a coherent set of possibilities and problems. The ultimate type is human nature itself" (Unger, 1976:261). Thus Unger admittedly wants social science to move back to philosophy as well as politics.

For Unger, social science must accept the concept of human nature. As he puts it, it must

. . . take a stand on issues of human nature and human knowledge for which no "scientific" elucidation is, or may ever be, available. And it must acknowledge that its own future is inseparable from the fate of society. The progress of theory depends upon political events (Unger, 1976:267).

Thus he wants a movement which is opposite to that which has taken place in the history of the social sciences. It is time again for metaphysics and politics to be united with social theory. The methodology behind this is the typological method, a method that in Unger's view needs the metaphysical base from which it has been separated. This is his contribution; does it work?

C. Structure in the Method of Common Meaning

Three issues must be considered here. First of all, type theory is considered a cumbersome theory since it is usually non-systematic. Unger confronts this problem by constructing a hierarchy of types. Secondly, like that of Weber, Unger's approach is cross-disciplinary. An example of this is his application of type theory to the discipline of religious studies. Finally, Unger's methodology lends itself to a cross-cultural approach. Much of this paper will focus on liberalism.

It is necessary to show that Unger's method is applicable to other social orders as well.

A Hierarchy of Types

A problem is inherent in the typological method. Parsons criticizes the method as used by Weber as structureless and ad hoc. A coherent generalized system is difficult to develop (Parsons, 1947:28).

Type concepts can readily be formulated ad hoc for innumerable specific purposes and can have limited usefulness in this way. This does not, however, suffice for a generalized system. For this purpose they must be arranged and classified in a definite order of relationship. Only then will they have highly generalized significance on either a theoretical or an empirical level. Such systematization cannot, however, be developed on an ad hoc empirical basis. Logically it involves reference both to considerations of extremely broad empirical scope and to comprehensive theoretical categories (Parsons, 1947:28).

Now Unger certainly is trying to develop a coherent generalized theory which is based on the typological method. As will be seen in the following passages, he does, in fact, overcome the problems of developing such a method. The structure of types is hierarchical. In Law in Modern Society (1976), he delineates his methodological position in which the highest "type" is human nature itself. It is the universal element in his theory of types. It is affected by the forms of social life which constitute and re-create human nature. This is consistent with his "doctrine" of universals and particulars. Its power and uniqueness is its tie to a metaphysical position, one that he admits is incomplete, but which he has begun to give substance and form.

Unger also has a second order of types. Here the forms of social life may be viewed in terms of two elements, both of which are needed

to constitute an understanding of the whole. These are types of consciousness and order which he discusses quite extensively in Knowledge and Politics (1975).

Social consciousness . . . disrespects the contrast of fact and value, for it is placed, like a horizon, at a level at which the distinction between understandings and ideals vanishes. And it poses the issue of ambiguity of meaning; the relationship between the significance of the dominant conception of mind and society to those who entertain it and its meaning for those who, without adhering to it, want to understand it.

Other characteristics of social consciousness result from the principle of totality. Two of these characteristics are particularly important: the unitary and the social nature of consciousness (Unger, 1975:148-149).

Furthermore, Unger postulates that there is a dominant consciousness in every social situation. This is related to the form of social life in that its two criteria include active mental experience and a

. . . dominant form of social order that arranges individuals and groups similarly to the ways in which the type of consciousness pictures their relations. This is the sense in which one can speak of a tie or appositeness or common meaning between consciousness and order (Unger, 1975:149).

Order is, according to Unger,

. . . the external, observable form of society. . . . Every principle of social order . . . is a hypothetical rule for the disposition of individuals and groups in social life. It can be viewed as the actualization of a general conception of social life. In this sense, it has a meaning. Thus, one can connect and compare it with different kinds of social consciousness according to the principle of appositeness or common meaning (Unger, 1975:150).

In one sense, however, Unger's development of his method is ad hoc. It is difficult to discern the application of his methodology throughout much of the text of his books. The topic of method is not really confronted and explicated until much critical work has already been completed. Thus, for example, in Knowledge and Politics (1975), Unger

begins his extensive methodological discussion after his delineation of the postulates of liberal thought. What then, are these postulates? Are they third-order types? The postulates as delineated certainly fit into the conceptual mode of types. They can be analyzed through the modes of social consciousness and social order. Or are these postulates the second-order modes of social consciousness and order? Much analysis would have to be done to answer these questions. However I intend to leave them unanswered for the most part. The important point is that Unger does attempt to set up a generalized coherent typological method. It may be that the coherence would be more apparent if he had actually worked out his metaphysical basis for his method. But that is another task.

The Cross-Disciplinary and Cross-Cultural Approach in Unger's Methodology

One of the most fascinating aspects of the study of Unger's works is the cross-disciplinary approach he takes to his subject matter. Ethics, metaphysics, social theory, legal theory, religion--all are relevant areas of study for Unger. Indeed, this is only a partial list of the disciplines which are relevant to Unger's work. Some examples of the approach Unger takes to these disciplines will be given--but, for the sake of simplicity, I will remain within the context of one discipline, that of religion. Out of these examples will emerge the unfinished agenda for this discipline in Unger's theory.

1. Transcendence and immanence--ideal types and religion. Some of the richest examples of Unger's use of religion and religious concepts take place when he is developing the features of social organization and the elements of culture in the context of the foundations of law in Law in Modern Society (1976). Unger's thesis is that a legal order (the notion of law under liberalism) is a rare phenomenon. Two cultural conditions must be present: interest group pluralism and a "reliance on a 'higher' universal or divine law as a standard by which to justify and to criticize the positive law of the state" (Unger, 1976: 66). In the context of this second criterion, Unger analyzes the concept of natural law. He states:

Natural law consists of principles that combine prescription with description and apply universally to all societies. It has some of the features of custom: a disregard for the fact-value distinction and a claim not to be a product of human deliberation. Yet it differs from custom in the generality of its formulation, in the universality of its alleged scope of application, and in the scholarly or religious character of the authority upon which it is based (Unger, 1976:76).

One of the conditions of origin of natural law is the experience of cultural diversity (Unger, 1976:76). Another is the emergence of a transcendent religion. According to Unger, a transcendent religion is one in which there is a belief about a personal deity who created the world.

The characteristic dichotomy of transcendent religion is that between God and the world. Because the world was made, rather than generated, it does not fully share the sacred or divine nature of its author. Nevertheless, the lawful universe betrays the hand of the divine lawgiver (Unger, 1976:77).

This point can be contrasted with the concept of an immanent religion as delineated by Unger,

In its pristine theological form the religion of immanence denies the distinction between God and the world. It has no cosmogeny of the creation of the world by God, and therefore tends toward the view that the world is eternal and uncreated. Its cosmology refuses to accept the contrast of heaven and earth. Instead, it recognizes a set of sacred objectives or activities within the profane world. Sometimes it goes further and affirms the omnipresence of the divine in all aspects of reality. . . . The divine appears as a particular set of natural and social phenomena, that is, the sacred, or as the world in its wholeness rather than as a supramundane reality (Unger, 1975:158-159).

Unger uses both notions methodologically as types. As such, they have relevance in the conception of a social order.

Transcendent religions are generally salvation-religions according to Unger. As such, they usually contain the notion of an immortal soul. Furthermore, the deity is a personal deity, it deals with human beings in history (Unger, 1976:78). Unger states that the institutions that are part of the legal order are closely connected or correlated with the beliefs of a religion. This is most definitely the case with transcendent religions. Unger claims (characteristically) that a transcendent religion is both a type of consciousness and a form of order. It is

. . . both an outlook and a cluster of institutions, rituals, and differentiated groups. Like all things social, it exists both in the mind and in behavior (Unger, 1976:78).

He thus investigates its relation to natural law in both contexts. As part of consciousness, a transcendent religion has the following links to natural law. First of all, the cosmology which includes the "laws" or regularities of nature implies a design or plan by the deity. The deity also rules the earth in the ancient image of a ruler governing the land.

But once the transition from human to godly law takes place, the conception of human law can never again be the same. Society must now be seen as a part of a cosmic order and its rules as more or less fruitful imitations and conclusions of laws laid down in heaven. These divine precepts preexist any act of human will. . . . Thus there is a higher or natural law distinct from, and superior to, the customs of particular social groups and the commands of earthly sovereigns. Human positive law makes the abstract dictates of the higher law concrete or adapts them to the peculiar conditions of each society (Unger, 1976:79).

As a result of the nature of divine law transcending human will and society, it serves as a justification point, a point from which to evaluate the normative order. This has implications for both generality and autonomy, two of the characteristics of the liberal legal order. In terms of autonomy, standards are universal and objective, and removed from the control of a sovereign or will of the people. In terms of generality, rules must apply to all, and equality of citizenship or the essential worth of human beings becomes an articulate and positive notion.

As a form of order, the institutions of a transcendent religion are also important. There is also a need for mediation of God's word. Unger picks up on Weber's description of the tension between the prophet (the mediator of God's word, dogma) and the stabilizing influence of the priesthood as members of the ecclesiastic institutions. The prophets pose the concept of the ideal in terms of God's plans; the priesthood systematizes the commandments of God.

Thus arranged and interpreted by a specialized priesthood, natural law becomes a well-defined body of sacred law. It is to this body of sacred law and to the institutions, methods, and beliefs which support it that we must often look for an understanding of the secular legal system. As a background to this system and as a source of many of its distinctive features, the sacred law surpasses earlier

kinds of lawmaking. It is the most common example of an organized body of positive law, distinct from the implicit standards of custom as well as from the more or less discretionary commands of bureaucratic regulation (Unger, 1976:82).

However, Unger does not see transcendent religion as a sufficient condition for the development of the liberal legal order. Unger notes many other societies which had transcendent religions and did not develop such a legal system. In particular, he examines Hinduism, Islam and Judaism as three religions of transcendence in societies which do not develop a legal order. Unger does, however, state that a religion of transcendence is a necessary condition for the development of an autonomous system.

One needs to consider the social and the theological factor together, the circumstances of the liberal state as well as the implications of the transcendent religion, to grasp how and why the legal system came into existence (Unger, 1976: 83).

This interplay is developed by Unger in Law in Modern Society (1976).

Unger also uses religion in an historical context. Some examples of this from ancient China and Greece are included in the next section of this chapter. But religion does not stand alone in the historical development of a culture. And it will be seen that the historical context is used by Unger in the development of his larger theory. It may be an example of the interplay of two tensions present in the thought of a society, or it may be used as an example of a contrasting view. Yet religion always plays a significant role.

2. Ideal types as religious concepts. Unger also uses religious concepts in the delineation of his theory of criticism. The notions of transcendence and immanence play a particularly important role in this

respect. As I noted earlier, they function as ideal types in his methodology. Unger postulates this from his conception of religion as a higher order type.

Religion represents the most general expression of the beliefs that nourish and unify the several branches of a type of social consciousness. It exhibits the characteristics of social consciousness in their purest and most complete form. And it is always involved, more or less directly, in every change of social ideals and beliefs. Thus, the religious consciousness deals with the whole of experience.

As a mode of reflection about the world, it is inseparable from a way of life in the world. Neither the type of reflection nor the way of life can be comprehended apart from each other. The contrast of understanding and evaluation is foreign to the religious consciousness, for its beliefs about the world are simultaneously descriptions and ideals (Unger, 1975:157-158).

The concepts of transcendence and immanence are manifestations of this religious consciousness. As pure types, no religion manifests them completely. They can be and are secularized by modern society. Transcendence is secularized when the

. . . distinction between heaven and earth is transformed into the contrasts of culture and nature, and state and society. The opposition of soul to body becomes that of reason and desire (Unger, 1975:161).

Immanence also has its secular counterpart:

It would repudiate the contrast of the universal and the particular elements in personality and, together with that contrast, the dichotomies of culture and nature, state and society, reason and desire (Unger, 1975:179).

According to Unger, neither secular version can survive without some sort of return to the religious conception of these types. Both types of religiosity must be reconciled. "Thus, the problem of the nature of God is involved in the evaluation of the issues raised by the emergent consciousness, and especially in the idea of a union of immanence and transcendence" (Unger, 1975:181). In his criticisms of liberalism, his

delineation of modern states, and in his constructive theory, the concepts of immanence and transcendence are a recurring theme.

These examples of Unger's approach to the notion of religion lead to the final part of this section, the unfinished agenda inherent in the cross-disciplinary approach. Again, this will be developed in the context of religion. Religious Studies as a discipline needs to examine Unger's theory. Elucidation of important points in his theory is needed. What are the deeper implications of religion as an ideal type in the context of Unger's use of it as a mode of consciousness? Is Unger being unrealistic in his notion of a conception of religion which is more of a union between transcendence and immanence? How can such a union be an intelligible conception of the good as Unger defines it? Finally, in terms of theology, can some answers be given to Unger's questions about God?

The idea of a union of immanence and transcendence or of a universal being who knows and determines all particulars without destroying their particularity is the idea of God. Four main questions arise with respect to the idea of God: whether the same being is meant by the different senses given to the name of God; what attributes God would have if He existed; whether He exists; and how His perfection could respond to man's imperfection (Unger, 1975:291).

Unger gives his answers (Unger, 1975:292-295). Are they intelligible?

The Normative Order--An Example of the Cross-Disciplinary and Cross-Cultural Approach

Before going into the relationship of knowledge to the normative order, it is necessary to introduce another "type" in Unger's system, the normative order itself. This concept is not a substitutive term for ethics, nor is it purely a stylistic or aesthetic device. Unger

uses this concept as delineated by Parsons in The Social System (1968) (see Appendix A, #1). In Law in Modern Society (1976), Unger (who is applying his methodology developed in Knowledge and Politics (1975)) focuses on the legal aspect of human existence leading him to claim that "(f)or the purposes of my argument, it will almost always be possible to use the concepts of law and of normative order synonymously" (Unger, 1976:57). Unger does, however, recognize the fact that:

Many things besides law may fit into the category of normative order; for example, a society's religion and art. To the extent that law can be differentiated from these other aspects of normative order, it is distinguished by its primary emphasis on externally observable behavior and on the use of secular sanctions to penalize or redress deviant conduct (Unger, 1976:57).

This point is vitally important. Indeed for Unger, the position of religion in society has a significant impact on and is interrelated with the legal system developed by the particular society. The normative component in art plays an important role in Unger's explanation of both his hypotheses regarding modern societies and his methodology. The role of religion as part of Unger's typological method has already been seen. Unger is certainly not as explicit about the role of art in the normative order, but he makes enough reference to art so that it is intelligible. Here, however, his claim is that law, religion and/or aesthetics are all important components of the concept of normative order.

Unger is most explicit about the relationship between knowledge and the normative order when he develops his criticism of liberalism (the subject of the next two chapters). He states that liberalism "is a ruling consciousness as well as a metaphysical theory" (Unger, 1975:24-25)--but "all theory begins and ends in the clarification of immediate

experience" (Unger, 1975:24). This fundamental premise in Unger's criticism indicates the intrinsic relationship between knowledge and a normative order. Experience validates theories of nature--scientific hypotheses

. . . must ultimately be validated by their ability to explain what can be seen and touched even when they depart most radically from the common sense view of things. . . . This reflective experience is what I have called consciousness (Unger, 1975:24).

Consciousness plays an important role in all theories--especially those of mind and society. In these theoretical aspects, consciousness takes on the face of moral sentiments which "define the ideal of our place in reality" (Unger, 1975:24). Liberalism, for example, is defined by the moral sentiments as an "awareness of a radical separation between the self and nature, between the self and others, between the self and its own roles and works" (Unger, 1975:25). Liberalism presents, for Unger, a radical split between the actual and the ideal, between what is and what ought to be.

But the concept of normative order is a type for Unger. As such, it can be used as the paradigm for the investigation of other societies as well. Furthermore, the relationship between knowledge and the normative order which is seen as the ruling consciousness as well as the metaphysical theory in liberalism can be applied to other societies as well. Liberalism is simply one manifestation of the attempt of human consciousness to understand itself. It is specific to a certain area of the world during a certain time period. It was preceded by a variety of expressions of human consciousness, and is being succeeded by a new mode of consciousness which Unger calls the "corporate-welfare state."

Yet even this new state is not the only mode of consciousness representing modernism--just as liberalism was not the only expression of reflective experience in the preceding era.

An example of a view of a normative order utterly foreign to liberal thought would be that of ancient Confucianism which, according to Unger, vied for dominance with Legalism as a mode of thought during the period of great cultural transformation in ancient China (from approximately the mid-sixth century B.C.E. to 221 B.C.E.).

With respect to the view of human nature, Confucianism emphasized the existence of a natural economy of sentiments. It held that the moral sense exists in man either as a general disposition toward humanity (jen) and righteousness (i), from which standards might be drawn, or as a tacit code of conduct. Under the proper conditions of upbringing and of government, this moral sense could develop so as to ensure harmony in the individual, in society, and, according to the later writings of the Neo-Confucianists, in the cosmos itself. The aim was to elicit latent, pre-existing notions of propriety (Unger, 1976:107).

At the same time, adherents of this expression of the normative order were also aware of the split between the actual and the ideal. Confucianism, in its commitment to harmony through its religious component, had to appeal from its "present historical situation to a mythical golden age in the past . . ." (Unger, 1976:99)

Another non-liberal expression of normative order is part of the western heritage--a heritage beginning with ancient Greece and being enriched during medieval times in Europe.

Many, though not all, of the metaphysical systems of ancient and medieval Europe accepted the view of knowledge whose keynote is the idea that all things in nature have intelligible essences. Hence, they taught that mind can understand what the world is really like. Now this doctrine is truly a master principle, for its friends have drawn from its conclusions about language, morals, and politics. They have

reasoned that because everything has an essence, everything can be classified under the word which names its category. And the supporters of the doctrine of intelligible essences have gone on to hold that the standards of right and wrong must also have essences which thought can comprehend (Unger, 1975:31-32).

This normative dimension includes a natural law conception. Unger shows how this basic metaphysical doctrine with its natural law conception is displayed by a particular society--ancient Greece. (His discussion is in the context of why this particular society did not develop a legal order consistent with that of modern liberalism.)

Both political thought and religious speculation contributed to a theory of universal natural law. But by the time this natural law had been shaped, the triumph of the absolutist imperial states and the rigidification of hierarchy had already destroyed the social bases of legality. Moreover, because of its origins, the . . . natural law tradition lacked the support of a powerful independent priesthood (Unger, 1976:124).

Yet this natural law tradition must be linked to the metaphysical doctrine of intelligible essences. This was done as a result of Greek encounters with other civilizations which simply could not be dismissed as barbaric. Thus they "were forced to confront the issue of the conventionality of their practices and they were encouraged to search for overarching principles with which to evaluate divergent standards of conduct" (Unger, 1976:124). The metaphysical basis of intelligible essences provided the basis for these principles as well as the trend of Hellenic religion to move

. . . to a unification and a personification of deity. The poets and philosophers groped toward an idea of the oneness of God. And . . . the gods were seen more and more as superior to the constraints of nature. The natural order itself could be viewed as a divine creation (Unger, 1976: 124-125).

Unger's methodology has now been developed. Examples have been given not only of its structure, but also of its application. His critical theory as well as his constructive theory can now be delineated. Chapters II and III will focus on his critical theory. Chapter IV will delineate his constructive theory. The main point is not: is he consistent in the application of his typological method? It is whether or not the use of such a method leads to truly constructive critical thought.

CHAPTER II

LIBERAL PSYCHOLOGY: UNGER'S CRITIQUE WITH A DISCUSSION OF LIBERAL DEONTOLOGICAL ETHICS

This chapter has two main tasks. First of all, Unger's delineation of liberal psychology must be elucidated. Then his use of the typological method will be examined in terms of an example of a liberal deontological theory of ethics. The method used here will be, first of all, to set out Unger's criticisms of liberal ethical theories, including, as an example, John Rawls' deontological theory. Discussion of Unger's critical remarks about deontological theories will be set against Rawls rather than Kant (whom Unger discusses) since Rawls' theory attempts to account for some of the problems inherent in Kant's theory. Finally, methodological issues will be raised in light of this discussion.

A. Liberal Psychology

Unger's most extensive treatment of the relationship between knowledge and the normative order is his delineation of liberal thought. The metaphysical basis for knowledge in liberal thought is, according to Unger, the antinomy of theory and fact. This is the conflict between two ideas: "the mediation of all facts through theory and the possibility of an independent comparison of theory with fact" (Unger, 1975:33). These ideas are, according to Unger, contradictory and incoherent.

The true source of the antinomy of theory and fact is the radical separation of form and substance, of the universal and the particular, for that separation is the basis of the difference between general ideas or theories, which are formal and universal, and the understanding or intuition of individual events, which is substantive and particular. . . .

Our ideas about science and nature seem to imply we believe both that our classifications can be true or false and that the question of their truth or falsehood is unanswerable or illusory (Unger, 1975:35-36).

Reason and Desire

What then, is the relation of this metaphysical foundation of liberal thought to normative order? Unger states that in liberal psychology

. . . the self consists of understanding and desire. .
 . . Reason or understanding is the faculty by which the self determines what the world is like. The terms understanding and knowledge also describe the pictures of things in the world produced by the use of reason (Unger, 1975:39).

Desire, on the other hand, is the motivating factor. It is the "faculty by which the self determines the objects of its appetites and aversions" (Unger, 1975:39)--i.e., will. Because of the antinomy of theory and fact, there is a distinction between description and evaluation in liberal thought.

Arbitrary Desire

This distinction is further elaborated by the principle of arbitrary desire. Simply put, this postulate of liberal thought means that reason is unable to justify the content of choice. Desires, while capable of being objects of the understanding, have a double aspect-- a causal aspect as a result of being a psychic event as well as a contingent aspect which is the basis of free will and leads to the problem

of criticizing and justifying human desires. Thus desires can be either facts or ends, facts because of the need to explain the world, ends because of the need to justify and criticize conduct (Unger, 1975: 42). Because reason is unable to justify the content of choice, and because it is subsidiary to desire, the instrumental use of knowledge results. Now both the principle of reason and desire and the principle of arbitrary desire indicate elements of the individual personality in liberal psychology. Thus the relation between the two principles is complicated.

If reason is the universal and desire the particular element in man, both the exaltation of the former and the denial of the latter will undermine individuality. The ideal of a single-minded service to reason will lead to a recognition of the illusory character of individuality and the undivided oneness of the world (Spinoza). When philosophy points the way to the extinction of all desire as the path of wisdom that alone can free us from illusion and suffering, it also takes away the basis of individual identity (Schopenhauer). From the standpoint of liberal psychology, rationalism and mysticism are the twin enemies of the separateness of persons (Unger, 1975:44).

Thus in liberal psychology, Unger maintains that reason must play a supportive role to desire to maintain the idea of individuality.

Analysis

The principle of analysis--the third and last principle of liberal psychology--is particularly related to our apprehension of knowledge. Yet because it is consistent with the antinomy of fact and value, the underlying assumption rests on the concept that the whole is nothing more than the sum of its parts.

The spirit that unifies the liberal theory of knowledge is confidence in the primacy of the simple. The world is made of simple things. Our ability to understand it depends on our success in going from the simple to the more complex and then returning again from the latter to the former. . . . Hence, simplicity is associated with naturalness and concreteness; complexity with abstraction and artificiality. . . . Its fundamental weakness is its dependence on the doctrine of intelligible essences. . . . To accept the doctrine of intelligible essences would be to abandon the modern view of science and to open the gates to theories of objective value or natural law (Unger, 1975:47).

Social implications can certainly be derived out of this principle. Unger claims that it is conservative in that it forces one to be a specialist--to examine the particulars since "it is in these particulars rather than in the system which pretends to describe them that reality lies" (Unger, 1975:48). Furthermore it resists the study of the social order as a whole, since the whole is only the sum of its parts--not something more which merits study in itself. Thus, as an integral component of liberal thought, the principle of analysis resists more than partial criticism of the fundamental and the interdependent assumptions of liberalism (Unger, 1975:49).

B. Morality in Liberal Psychology

These three interdependent assumptions of liberal thought "form the basis of much of our thinking about morals and human nature" (Unger, 1975:49). Actually, Unger claims that the principle of reason and desire and the principle of arbitrary desire form the foundation of liberal morality. Just as the principle of analysis is most consistent with the antinomy of theory and fact, the moral theories which arise out

of liberalism are consistent with the antinomy of reason and desire (Unger, 1975:49).

Because liberal psychology singles out two ultimate elements of the self, it has two main kinds of answers to the moral question: the morality of desire and the morality of reason. . . . The relation of the ethical speculations of the great philosophers to these elementary types of moral thought is like that of the style of the greatest writers to ordinary language, a language kept alive and perfected in the prose of the artist (Unger, 1975:49).

To move out of Unger's phraseology, the morality of desire is consistent with teleological theories of ethics--especially, in the context of liberalism, those theories which are called Utilitarian theories. Deontological theories, on the other hand, are consistent with the morality of reason.

The antinomy of reason and desire simply means that two contradictory moral theories can be derived from the postulates of liberal psychology. Given the conflicting natures of deontological and utilitarian theories, this claim seems plausible (see Appendix A, #2). Unger claims that these two theories "differ in their conceptions of the role of moral theory, as well as in the way they solve the moral problem" (Unger, 1975:51). Moralities of desire are goal oriented--desires must be satisfied. Furthermore,

. . . the contingent desires individuals have are the only material out of which moral standards can be made and therefore all moral thinking must begin with an understanding of the passions to which men are subject as desiring animals (Unger, 1975:51).

Unger has a number of objections to this morality. One criticism is consistent with the now classical objection, i.e., the naturalistic fallacy.

A first objection to the morality of desire is that it is incapable of passing from the description to the evaluation of conduct and, therefore, of laying down any standards of justification. Desires, it has been assumed, are random with respect to any given understanding of the world. We are not entitled to assume that there exists an order among our choices and inclinations, an order reason might discover or impose on the will. . . .

. . . (I)t recognizes the moral impotence of reason in liberal psychology and draws from it the conclusion of absolute moral skepticism. . . .

. . . Its main flaw as a basis for the description of how choices are made is its failure to account for how in fact we praise and blame and for how our practices of moral judgment are connected with the development of our appetites and aversions (Unger, 1975:51-52).

These objections to the morality of desire point to the "moral importance of the principle of analysis" (Unger, 1975:53) as well.

If it is impossible in the acquisition of knowledge to see a whole as different from the sum of its parts, it will also be impossible for the self to understand its own moral vocation as distinct from the sum of its particular desires. Left without a basis upon which to exclude new desires, it is condemned to dissatisfaction and discontentment (Unger, 1975:53).

The other kind of theory which is derived from the tenets of liberal thought is deontological theory--what Unger calls the morality of reason. Rather than follow Unger's delineation of this normative theory, I shall use Rawls' basic theory as promulgated in A Theory of Justice (1971). This theory is particularly appropriate to use as an example for the morality of reason since it is a deontological theory (Rawls, 1971:30)--one of the few deontological theories of the twentieth century. Furthermore, it presents a normative order in a social context which is obviously relevant to the politics of liberalism. Finally, if Unger is correct in his criticism of Rawls, this theory presents a normative order which is as consistent with the classical liberal tradition

as modern theory can be. For these reasons, a brief sketch of Rawls' theory will be presented, then used as an analytic device to reflect Unger's criticism of the morality of reason.

In A Theory of Justice (1971), John Rawls sets out to derive "a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of social contract as found, say in Locke, Rousseau, and Kant" (Rawls, 1971:11). Rawls wants to set up a concept of an ideal, well-ordered society. It is hypothetical, and it forms the basis for his distinction of strict compliance versus partial compliance (Rawls, 1971:8; see Appendix A, #3). In terms of the original contract, the

. . . guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established. This way of regarding the principles of justice I shall call justice as fairness (Rawls, 1971:11).

The original agreement as delineated by Rawls is one in which the persons entering into the contract are stripped of all facets of their individuality. The veil of ignorance allows only very general knowledge in terms of social, economic and political theory as well as

. . . the basis of social organization and the laws of human psychology. Indeed, the parties are presumed to know whatever general facts affect the choice of the principles of justice (Rawls, 1971:137).

What is excluded is all particular knowledge, which leads Rawls to make the following claim:

To begin with, it is clear that since the differences among the parties are unknown to them, and everyone is equally rational and similarly situated, each is convinced by the same arguments. Therefore, we can view the choice in the original position from the standpoint of one person selected at random. If anyone after due reflection prefers a conception of justice to another, then they all do, and a unanimous agreement can be reached (Rawls, 1971:139).

On the other hand, desires are accounted for in Rawls' theory by reference to the social primary goods, which

. . . are things which it is supposed a rational man wants whatever else he wants. Regardless of what an individual's rational plans are in detail, it is assumed that there are various things which he would prefer more of rather than less (Rawls, 1971:92).

The obvious point here is that these are not merely particular desires, they are desires common to all human beings--fundamental desires. They do, however, play a major role in Rawls' Kantian interpretation.

In this respect, Rawls is consistent with Kant's ethical system--in particular, with Kant's categorical imperative.

For by a categorical imperative Kant understands a principle of conduct that applies to a person in virtue of his nature as a free and equal rational being. The validity of the principle does not presuppose that one has a particular desire or aim. . . . The argument for the two principles of justice does not assume that the parties have particular ends, but only that they desire certain primary goods. These are things that it is rational to want whatever else one wants. Thus given human nature, wanting them is part of being rational; and while each is presumed to have some conception of the good, nothing is known about his final ends.

. . . To act from the principles of justice is to act from categorical imperatives in the sense that they apply to us whatever in particular our aims are. This simply reflects the fact that no such contingencies appear as premises in their derivation (Rawls, 1971:253).

Yet the social primary goods in Rawls' theory perform an added function that goes beyond Kant and attempts to account for criticisms of Kant's

theory. They give a dimension within the context of the original position that allows the justification of being a free and rational being who is also moral. Kant's noumenal self cannot guarantee that one is not evil. Yet Rawls' strictures on the original position, plus the social primary goods as a rational basis of choice, allow for the adoption of moral principles--the principles of justice.

The parties qua noumenal selves have complete freedom to choose whatever principles they wish; but they also have a desire to express their nature as rational and equal members of the intelligible realm with precisely this liberty to choose. . . . They must decide, then, which principles most fully reveal their independence from natural contingencies and social accident. . . . (O)ur nature as such beings is displayed when we act from the principles we would choose when this nature is reflected in the conditions determining the choice (Rawls, 1971: 255-256).

The most fundamental of these conditions, of course, are the social primary goods. As desires of all humans, they give flesh to the noumenal self. They acknowledge the role of will in humanity.

Rawls also holds that his theory is consistent with Kant's ethical system in terms of the autonomy of individuals--"a person is acting autonomously when the principles of his action are chosen by him as the most adequate possible expression of his nature as a free and equal rational being" (Rawls, 1971:252). Finally Rawls accepts and finds his theory consistent with the Kantian notion of an ethic of "mutual respect and self esteem" (Rawls, 1971:256). This does not lead, however, to a notion of intrinsic worth of human beings. In this respect, Rawls is not a Kantian. Quite the contrary, Rawls' theory leads to an ethical system based upon reciprocity. Rawls states this on two occasions:

We have only to keep in mind the various priority rules, and the meaning of the difference principle as rendered by its Kantian interpretation (persons are not to be treated as means at all) and its relation to the idea of fraternity (§§ 29.17). The effect of these aspects of justice as fairness is to heighten the operation of the reciprocity principle (Rawls, 1971:499).

(S)implicity of the contract view of the basis of equality is worth emphasizing. The minimum capacity for the sense of justice insures that everyone has equal rights. The claims of all are to be adjudicated by the principles of justice. Equality is supported by the general facts of nature and not merely by a procedural rule without substantive force. Nor does equality presuppose an assessment of the intrinsic worth of persons, or a comparative evaluation of their conceptions of the good. Those who can give justice are owed justice (Rawls, 1971: 510).

Thus Rawls' system is partially consistent with Kant's, but goes beyond it. The noumenal self is fleshed out, providing a basis for morality. Furthermore, Rawls combines the contract system of social theory with the ethical system. In fact, the ethical system becomes an integral part of the social system.

In terms of the normative order for a society--ideal, but a society none the less--Rawls presents a four-stage sequence of deliberations and events in which the original position reasoning deriving the principles of justice is the first stage. These principles are:

First Principle

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Second Principle

Social and economic inequalities are to be arranged so that they are both:

- (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
- (b) attached to offices and positions open to all under conditions of fair equality of opportunity (Rawls, 1971:302).

These principles are followed by two priority rules as well as the general conception of justice (of which the two principles and their priority rules are a special case). The second, third and fourth stages are respectively: the constitutional stage, the legislative stage, and the judicial administrative stage. Two points are significant here. First of all, the veil of ignorance is progressively lifted at each stage of deliberation. Thus knowledge of particulars is finally relevant to Rawls' theory. Secondly, the two principles are arranged in lexical ordering (by the first priority rule), and most important, these principles form constraints on all further deliberations. They are the "rules" under which all decisions about the well-ordered society must be subsidiary (Rawls, 1971:195-201).

This sketch of Rawls' theory is sufficient at this point to use it as the basis of understanding for Unger's delineation and criticism of the morality of reason. Then, in the last section of this chapter, I will go back to some of Unger's points about this sort of morality and attempt to critically analyze their cogency in terms of methodological concerns. Unger may have some good points about deontological theories, but Rawls' particular delineation of this theory may in fact go beyond some of Unger's points.

The first component of the morality of reason in Unger's view is that it "must bind men independently of their individual capricious ends" (Unger, 1975:50). In Rawls' original position, the veil of ignorance prevents knowledge of those basic individual ends.

Unger claims, further, that a morality of reason consists of universal rules--"it is not really pretending to be a legislator of the

good: it is only telling us what principles we would have to accept in order to engage in moral criticism" (Unger, 1975:50). Rawls' principles of justice, since they are formed in that position of initial equality, and since they are part of a hypothetical ideal society, perform such a function. They give us universal standards of morality by which we can judge the justice of existing societies and institutions.

Unger further refers directly to the Kantian categorical imperative. He states (in criticizing Kant's theory as the ideal type of deontological theory):

Kant's ethical theory is the purest example of the morality of reason. Its categorical imperative, "act according to a maxim you might will to be a universal law," illustrates in the most general form what a rule in such a morality would be like, or rather the constitutional standard to which all its propositions would have to conform. So also Kant's conception of will (Wille) is that of a desire that has submitted completely to the formal prescriptions of universal reason (Unger, 1975:51).

Here, Rawls' adherence to the categorical imperative places him in the position of being a deontological moralist. However, it remains to be seen in a later section whether his refinements of Kant's categorical imperative lie open to the above criticism of Unger's. Yet it is plain that, in one sense at least, Rawls is consistent--thus possibly open to Unger's criticism. Rawls' principles of justice do form the constitutional standard to which all further deliberations must conform. In the deliberations in the four-stage sequence, Rawls affirms the priority of the principles of justice over all later stages of deliberations.

Furthermore, Unger claims that the "morality of reason is as untenable as its rival" (Unger, 1975:53) (the morality of desire).

Again, my first objection is directed at the capacity of the morality of reason to serve as the foundation for moral judgments of any kind, and my second argument is concerned with the inadequacy of the way the moralist of reason conceives the moral life (Unger, 1975:53).

According to Unger, the postulate of arbitrary desire which is a necessary component of liberal thought makes deontological theories incoherent.

Given the postulate of arbitrary desire, there is no basis on which to prefer some ends to others. But as long as this formal neutrality is strictly maintained, the standards it produces will be, like the golden rule itself, empty shells. Until the shells are filled up by more concrete precepts, they are capable of accomodating almost any pattern of conduct and incapable of determining precisely what is commanded or prohibited in particular situations of choice. . . .

As soon as we try to make the rules more concrete, however, we run into trouble. The decision about what kinds of benefits to seek from the others, or which commands and prohibitions to cast in the form of universal laws, forces us to descend to the level of conflicting individual goals whose relative worth reason lacks authority to judge (Unger, 1975:53-54).

The main point of this criticism may be relevant to Rawls' theory. The question that must eventually be faced is whether Rawls subordinates the role of desire--thereby denying an intrinsic part of liberal psychology (Unger's principle of arbitrary desire, i.e., "the striving and individual part of the self" (Unger, 1975:54)). Also, if the original position reasoning can be construed as being done solely from the standpoint of an equal, rational person, i.e., one stripped of all individuality, then Unger's claim that "the morality of reason deals with men in a domain in which they are identical to one another" (Unger, 1975:54), has a cogency which cannot be lightly denied. Rawls' attempt to avoid this in terms of the deliberations of the original position as part of his move beyond the Kantian categorical imperative will have to be

carefully analyzed. Also his four-stage sequence and the distinction of the thin and full theory of the good will have to be analyzed to see if they fall back into the trap of the dilemma of the morality of desire. Rawls' theory, as a representative of the morality of reason emphasizes the abstraction of humanity in that no matter what this individual has as goals, in a well-ordered, ideal society the principles of right have an insistent priority over that person's aims, desires and goals. In this sense, it may in fact deny the concreteness of humanity even though the full theory of the good allows for those individual aims, desires and goals--Rawls' rational plan of life. As Unger states this:

The implications of the morality of reason for the idea of personality are exactly symmetrical to those of the morality of desire. The latter denies the continuity and the humanity of the self; the former negates its capacity for moral innovation and its individual identity.

The defining characteristic of principles of rational morality is to bind us regardless of our desires at a given time. They are principles that apply to us simply because we are rational and striving beings, not because our striving is directed to one objective rather than to another. As formal, indeterminate laws, the principles of reason disregard our changing desires. As concrete commands, they suppress them (Unger, 1975:51).

It is also important to note that my early sketch of Rawls' theory was coherent (in terms of its being formal) without the need to flesh it in with the content of the two principles of justice. Furthermore, even with that addition of content, the theory is still formal enough so as to be representative of republican democracies as well as socialist societies--at least according to Rawls (Rawls, 1971:200-201). There is, therefore, also the question of whether Rawls' theory can move beyond the question of content, i.e., being formalistic, that Unger postulates. Finally, the jump from ideal theory to existing societies, from strict

compliance to partial compliance, may exemplify what Unger calls the "rift between understanding and evaluation" (Unger, 1975:55) inherent in liberal thought. It is only by setting up a morality of reason in an ideal, hypothetical society by Rawls in The Theory of Justice (1971) that one can evaluate the real world of existing societies in terms of the principles of justice. This point as well must be evaluated in terms of Unger's criticism of liberal thought.

C. The Typological Method as a Critical Device

In terms of his criticism of liberal thought, Unger's typological method may, in fact, have a number of problems. In the context of the discussion of Weber's theory, Parsons notes that

. . . the basic dichotomy of Weber's analysis is that of the rational and the irrational, and since the latter elements are treated as elements of deviation, the tendency is to create a false, theoretically unwarranted antithesis. Elements which may well in some empirical cases be integrated with the rational elements in a system, are pushed into conflict with it. Thus ultimate values tend to be treated as an absolutely 'irrational force' (Parsons, 1947:16).

This seems to be the case, especially in Knowledge and Politics (1975), in Unger's use of the typological method. I shall focus here on his antinomy of reason and desire in the context of Rawls' theory.

I have used as an example of the morality of reason (as Unger calls it) John Rawls' deontological theory of justice. As I noted, Unger focused upon Kant's categorical imperative as the prime example of will being completely in submission to reason and its formal prescriptions. Reason, according to Unger, is incapable of being the foundation of a morality according to the principle of arbitrary desire. Now if the

principles and antinomies of liberalism are types--and they certainly fit within that parameter--Unger has in fact fallen into the dichotomy into which Parsons states that Weber has fallen. In the case of a deontological theory like that of Rawls, an attempt has been made to integrate desire and reason. The social primary goods fulfill this role as I have stated earlier. They

. . . are things which it is supposed a rational man wants whatever else he wants. Regardless of what an individual's rational plans are in detail, it is assumed that there are various things which he would prefer more of rather than less (Rawls, 1971:92).

The role in which they give flesh to the noumenal self and provide the basis of the answer of the question: "Why should I be moral rather than universalize evil or amoral principles?" is thus Rawls' answer to the Kantian problem. Thus reason does not, in Rawls' scheme, put will entirely into submission. Unger cannot just state that the morality of reason is untenable because the postulate of arbitrary desire gives no basis for preferring one desire over another. He must show why social primary goods cannot be common to all of humanity. His own thesis of a human nature certainly denies this antinomy of reason and desire--at least in the post-liberal society. (See Chapter IV for a full delineation of Unger's constructive theory.) Unger also cannot just claim that there are other primary goods which Rawls, as a liberal, ignores. He must show why, in the context of Rawls' methodology, these goods cannot be included.

Unger also makes the claim that there is no individuality in the morality of reason. Rawls' theory may or may not be susceptible to this claim. In original position reasoning, this is certainly true.

Yet this is a simplifying device for Rawls. If he were to stop at the four-stage sequence, Unger would have a right to such a claim. Yet Rawls does not stop there. His principles of morality are absolutist, universal, but his theory of the good--especially the full theory of the good--is relative. In this sense, Rawls allows for and, in fact, affirms individuality. Desires then play a dual role in Rawls' theory. The thin theory, the social primary goods, allow for a notion of commonality of desires, desires that one has by being human. The full theory, however, allows for desires and plans of life that are extremely varied. The only constraint is the principles of justice and of duty that are chosen in the original position.

Much more attention could be given to Unger's objections to the morality of reason. The purpose here, however, is not to refute Unger's analysis of the moralities of reason and desire; it is to point to the methodological problem inherent in types. Rawls' theory is a liberal theory; in a situation of close analysis it may not hold up under post-liberal scrutiny. However, this brief discussion has led to one possibility--that theories of ethics other than the one Unger poses in his constructive theory may in fact be compatible with post-liberal societies. In terms of method, however, Unger does in fact have in his criticism of liberal thought a tendency to create false antinomies. Unger, by using Kant's deontological theory as his "ideal type" for the morality of reason, creates a false dichotomy. Many of the problems which may be true of Kant's theory have been given attention by contemporary moralists like Rawls. Unger must, if his critical work is to be given any cogency, address these contemporary theories. Only then can it be seen whether

the typological method is, in fact, a useful and usable tool for criticism of liberal social thought.

CHAPTER III

LIBERAL POLITICS WITH EXAMPLES FROM CONTEMPORARY THEORIES OF JURISPRUDENCE

Unger claims that the dichotomies of the normative in liberal psychology correspond to the dichotomies of thought in the sciences. He states:

All our fundamental ways of thinking distinguish between a universal, formal, or rational and a particular, substantive, or appetitive aspect of their subject matters. . . .

There is a remarkable parallel between this recurring contrast of an abstract and a concrete humanity and the view of science outlined at the beginning of the chapter. . . . The counterpoint of abstract humanity, which the moralities of reason and desire enshrine, is a special case of the more general distinction between form and substance in thought, between the universal and the particular (Unger, 1975:58-59).

He claims that this parallel shows that the antinomies of liberal psychology form a united correlate in this contrast between the universal and particular. Not only are the postulates of liberal psychology interdependent, but they form an interdependent whole, a unity. However, there are also correlates of political thought in this liberal unity. These, too, must be given attention. Since these postulates are parallel with those of liberal psychology, attention need not be so detailed. The premises can be delineated and investigated briefly in terms of their consistency, and the correlative relationship to liberal psychology can be shown. Only at this point can a truly coherent discussion of the normative order of liberalism be developed through the legal theories representative of modern liberalism, e.g., Hart and Dworkin.

A. Liberal Politics and Its Relation to the Unity of Liberalism

Rules and Values

The correlate to the principle of reason and desire in Unger's delineation of liberal political thought is the principle of rules and values. "It articulates the conception, embraced by the unreflective view of society, that the eternal hostility of men to one another requires that order and freedom be maintained by government under law" (Unger, 1975:67). The correlate to desire is value-- it "is the social face of desire. It refers to an end of action or to a want when the emphasis is on relations among persons" (Unger, 1975:67). Consistent with the principle of desire, the notion of value is incomplete since, according to the conception of human nature inherent in liberal political thought, human beings have conflicting desires and conflicting values. "Self-interest, the generalized search for comfort and glory, and any sharing of common values will all be insufficient to keep the peace" (Unger, 1975:68).

The insufficiency of self-interest is obvious in a non-religious context. One must imagine all people acting in their own self-interest-- it is rather chaotic. With limited resources, a generalized search for comfort and glory is also an untenable notion for keeping the peace.

Finally, every other sharing of values is bound to be both precarious and morally indifferent. It is precarious because the individual will is the true and only seat of value, forever changing direction. . . . The sharing of values is also without ethical significance. We are not entitled to pass from the fact that we happen to agree upon our ends to the claim that someone else ought to agree to them or at least should do nothing to stop us from attaining them (Unger, 1975: 68).

To show the correlation of value with desire in this context, note that Unger's criticism is again consistent with the naturalistic fallacy criticism he makes against the morality of desire. Again, another component is needed--rules. As we have seen, rules are the political correlate of the morality of reason.

However, Unger makes a distinction between three types of rules--"constitutive, technical or instrumental, and prescriptive" (Unger, 1975:68).

Constitutive rules define a form of conduct in such a way that the distinction between the rule and the ruled activity disappears. It has been said that the rules of the games and the rules of logic are of this sort. . . .

Technical or instrumental rules are guides for the choice of the most effective means to an end. They take the form, do x if you want y. . . . In any given situation, one may find a more efficient means than the one indicated by the rule.

Prescriptive rules are imperatives that state what some category of persons may do, ought to do, or ought not to do. . . . Prescriptive rules differ from constitutive rules because they are clearly distinguishable from the conduct they govern and from instrumental rules because they are not hypothetical (Unger, 1975:68-69).

Unger claims that prescriptive rules are called laws, and that the fundamental nature of all laws is prescriptive. Laws, however, must have certain characteristics. "For liberal political thought, the laws must be general, uniform, public, and capable of coercive enforcement" (Unger, 1975:73).

In psychology, the sanction is described as discontentment; in political thought, as the loss of comfort and glory. If, however, the laws, by virtue of their very impersonality, fail to live up completely to the interests of any person, obedience to the public rules cannot be spontaneously protected by self-interest. A sufficiently stiff punishment, however, will make it in the interest of all to obey them by outweighing the advantages that might be gained from disobedience (Unger, 1975:73).

Unger also ties these characteristics to their assumptions. Generality

. . . is associated with the political ideal of formal equality and with the moral ideal of reason. . . . The public character of law has its immediate ground in the distinction between state and society and in the more inclusive dichotomy of public and private life. . . . The assumption of the belief that the laws must be capable of coercive enforcement is the artificial view of society (Unger, 1975:74-75).

Although these laws are fundamentally prescriptive in their basic characteristics and underlying assumptions, this may only be a component of a law or of the legal order. Unger admits that laws can be seen as either constitutive or instrumental; and, in fact, the whole legal order may be viewed in terms of either of these conceptions of rules (Unger, 1975:69). Rules, of course, correspond to reason in that they place artificial limits on value. Their nature, generality for example, corresponds to the universal abstract notion of reason.

Subjective Value

The principle of subjective value is the political correlate of the principle of arbitrary desire. Two basic claims are ascribed by Unger to liberal thought--that values are all individual and that they are subjective. By individual, Unger means that ends or values are "always the objectives of particular individuals" (Unger, 1975:76). In saying that they are subjective, Unger means that they are determined by an exercise of will, particularly arbitrary desire--choice. This principle is especially important because it is the basis of the rejection of the doctrine of intelligible essences in political thought. If desires are subjective rather than objective, they can have no intelligible essences.

The fundamental point remains; precisely because ends are denied an objective existence, they must be conceived as psychic events going on in the heads of particular men. If events in general had intelligible essences, so would these psychic events (Unger, 1975:79).

This is based upon the liberal assumption that facts have no intrinsic identity, but this has important implications for political thought. If there are no essences, the concept of meaning in language will be of utmost importance.

The conventions of naming rather than any perceived quality of 'tableness' will determine whether an object is to count as a table. In the same way, convention rather than nature will dictate whether a particular bargain is to be treated as a contract (Unger, 1975:80).

Thus a legal order will consist of rules, but these rules will be delineated in categories of names.

To mark off is to name. To apply the rules in particular cases is to subsume individual persons and acts under the general names of which the rules consist. Hence, the theory of law is a special branch of the general theory of meaning (Unger, 1975:80).

According to Unger, this leads to the political problem which haunts liberal thought. This problem is correlated with the problems of the moralities of reason and desire. Both rules and values are incomplete without the other. Yet neither category lends itself readily to the aid of the other. The rejection of intelligible essences allows for no criteria

. . . for defining general categories of acts and persons when we make the rules. . . . Nor are there clear standards by which to classify the particular instances under rules when we come to the stage of applying the rules we have made (Unger, 1975:80).

Individualism

The final postulate of liberal political thought is the principle of individualism. Here the problem is centered on the relationship of individuals to groups. Consistent with the previous two postulates of liberal political thought--the principles of rules and values and of subjective value--this principle states that a group is no more than the number of individuals comprising it. "(I)n other words, the attributes of a group are the sum of the attributes of its individual members" (Unger, 1975:81). Obviously, this principle is a correlate of the principle of analysis. Indeed Unger connects these principles by the characteristic of their similarity--the principle of aggregation (Unger, 1975:138).

This principle of individualism has a number of important characteristics, hence implications for liberal thought. The first point raised by Unger is that the acceptance of this principle leads to an artificial view of groups and/or society in the sense that

. . . groups are products of the will and interests of individuals. For the individual, the group is characteristically a means to the satisfaction of ends he could not achieve except through membership. Because the interests of their members are unstable, groups themselves are precarious associations, constantly destroyed and reborn in different forms (Unger, 1975:81).

This principle also has important methodological and moral implications for Unger. The methodological implication is based upon the primary assumption of this principle--that the group is no more than the individuals which comprise it. The result is that group behavior can be studied and analyzed in terms of individual behavior after the component of the added characteristics relative to joining and participation in a

group is figured into the individual's psychological make-up. As a result, the moral component gives no weight to the group. Sharing of values may exist, but since it is transitory by the very transitory nature of the group, it is contingent and subjective (Unger, 1975:82). Morality can only focus on individual values.

The relationship of this principle of liberal political thought to the other two principles is again one of interdependence. The principle of subjective value leads to the view that groups have no autonomous existence of their own. Values are only individual and subjective, never collective. The principle of rules and values leads to the conclusion that

Because community is always precarious and depends on the convergence of private interests, fixed rules are needed as the guarantees of peaceful and free association (Unger, 1975:83).

This principle leads to the antinomy of liberal political thought--the antinomy of rules and values--i.e., the problem of adjudication (or how can one justify the application of rules when all values are subjective?).

Freedom requires general, impersonal, or neutral laws. . . . If the law applier cannot justify his decisions, because they appear to rest on his own individual and subjective values, liberty will suffer. Those to whom the law is applied will have surrendered their freedom to the judge, the person authorized to apply the rules (Unger, 1975:88-89).

Unger claims that neither formal nor substantive justice is complete (formal justice being an example of a legal order of rules, substantive justice being an example of a legal order based upon values). Neither can solve the problem of freedom. This issue as well as others

concerning this antinomy and others of liberal thought will be more fully developed in the context of the theories of jurisprudence of Hart and Dworkin.

Aggregation

Up to this point, it has been shown that the liberal political theory is the social correlate of liberal psychology. Unger ties these two theories together by the principle of aggregation, which, through the ideas of universals and particulars, or wholes and parts that underly the antinomies of liberal thought, claims that

As a universal, the whole becomes more abstract and formal the greater the number or range of parts or particulars it subsumes. If the whole is complex knowledge, this means that the theory progresses by flattening out the substance or concreteness of particular facts. If the whole is a social group, it means that group unity is preserved and understood only insofar as variations among members are disregarded (Unger, 1975:135-136).

This principle is the key, then, to the relationship of the normative order to knowledge. It reflects the antinomy of reason and desire--reason being the universal element, desire the particular element. It also reflects the antinomy of theory and fact--again theory being the universal element, fact the particular element of this antinomy. Finally, it reflects the antinomy of rules and values which is the social correlate to the antinomy of reason and desire. These antinomies express the radical separation in liberal thought between the universal and the particular, the ideal and the real.

In all of these antinomies, this split affects our treatment of both universals and particulars. Unger implies that there are two processes at work: a process of the evisceration of particulars and a process of

the reification of universals. By this he simply means that liberals tend to give more and more abstractness to particulars in order to speak of them with any intelligibility, while lending the quality of concreteness to universals. "The abstract qualities take on a life of their own because they are the sole possible objects of thought and language" (Unger, 1975:136). This has important consequences for thought and for conduct according to Unger. In legal theory, one examines the legal personality, not people in a given society; when one is engaged in the activities of science, etc., one examines the class of events, not a particular event.

The principle of aggregation points out the antinomies: the processes of the evisceration of particulars and the reification of universals lead to the implication that universals and particulars are incomplete without each other. This leads Unger to the conclusion regarding liberal thought that reconciliation is necessary but impossible.

The universal as form and the particular as substance must be separate from one another if we are to make sense of our scientific, moral, and political ideas. But in each instance their separation seems impossible to uphold. Whenever we begin by thinking of them as independent from one another, we end by recognizing their interdependence. Whenever we start by conceiving of them as interdependent, we are forced to the conclusion that they must be independent (Unger, 1975:136).

Thus, according to Unger, liberal thought is incoherent. As such, there are no qualities inherent in it to rectify the situation.

Unger's criticism of liberal thought is quite abstract as presented. The manner in which the antinomies of liberalism function in a society may give flesh to these points made by Unger. It is thus important to present an example of the social order to grasp the implications of his

claims. To do this effectively, one must move from Knowledge and Politics (1975) to Law in Modern Society (1976) where Unger's analysis of liberal society achieves this substantive example.

B. Liberal Society: Unger with Examples from Hart and Dworkin

The Liberal Social Order

In Law in Modern Society (1976) (the book in which Unger applies and refines his methodology), Unger addresses the complex nature of a social order through his comparative analyses of different societies. He focuses on the liberal society as one component of the greater class of modern societies. Since he treats the social order as a whole, all of the antinomies of liberal thought play a significant part. However, since the antinomy of rules and values addresses explicitly the social nature of humanity, its special role in this interplay will be obvious.

Universalism, interest association, and the estrangement of ideals from actuality have two major effects on consensus. They endanger the possibility of extensive, coherent, concrete, and intense agreement about the rightness or goodness of social arrangements. More importantly, they undermine the willingness to accept the fact of agreement as a sign that one has discovered the good or the right (Unger, 1976:167).

Yet this does not mean that consensus is nonexistent--it primarily means that any attempt at justification will be haunted by the antinomies of liberalism. These antinomies can be detected in the social order itself which relates the problems of consensus to the problems of unjustified hierarchies. Liberal societies are hierarchical societies. Although these hierarchies are not closed--i.e., position and rank is not stable and set by birth, etc.--egalitarian concerns force one to

question and justify the very existence of these hierarchies. The force of Christianity as a class of transcendent, monotheistic religions played an important role in this development of egalitarianism. If all are equal before God, then hierarchy becomes inconsistent with that inherent egalitarianism. According to Unger, the secularization of this transcendence (through social and political philosophy and through the pluralistic nature of the social order) only intensifies the questioning of hierarchy. The problems of both consensus and hierarchy are all based upon the defining characteristics of liberalism as a social order.

The first element is the multiplication of significant groups with the diminishment of the area of individual life dominated by each group. Roles are specialized, but every person occupies a variety of them. The second basic feature of liberal society is the disappearance of a sharp distinction between strangers and insiders. The social order becomes an association of interests that plays on men's need for each other's approval. Third, ideals are opposed to actuality. .

. . . (T)he last defining attribute of liberal society . . .
(is) its tendency to destroy the foundations of the idea that what ought to be somehow inheres in what is. The loosening of the ties of community fosters a particular mode of consciousness and is fostered by it (Unger, 1976: 167, 169).

As a result of the interplay of these characteristics, the antinomies of liberalism come sharply into focus. The antinomy of rules and values reduces the support for communal values. Laws need justification but neither the theories based upon rules nor those based upon subjective value are able to stand alone. (This will become even more apparent later in this discussion.) The antinomies of theory and fact and of reason and desire also become apparent. They are displayed in the following manner according to Unger.

To the extent that moral, religious, or aesthetic ideals lose the support of communal authority, they have to be re-defined as private concerns and preferences for choice among which there are not public criteria. The consequence of this privatization of ideals is that whatever consensus does persist in liberal society seems groundless. Unmasked as products of circumstances and tradition, conventional morality and taste have lost the appearance of inevitability; they must be measured against some independent standard. Yet no standards with which to evaluate agreed upon conventions remain; even religious revelation is now regarded as an experience of the individual conscience, over which government has no say and from which it can infer nothing. At last there comes the despair of the worth of everyday tasks, a despair that may start off as an experience of the intelligentsia, but which reaches little by little into every sector of the population (Unger, 1976:169-170).

This background of the social order of liberalism serves two purposes.

First of all, it fleshes out Unger's theory of liberalism and points to the antinomies of liberal thought which are reflected by consciousness into the social order. More importantly, it helps us see what Unger believes are the problems inherent in liberal theories of jurisprudence. With this background completed, one can now turn to the antinomy of rules and values as reflected in the theories of jurisprudence of Hart and Dworkin.

Unger distinguishes between two major forms of legal reasoning and conceptions of justice. Formalistic reasoning is consistent with rules--"when the mere invocation of rules and the deduction of conclusions from them is believed sufficient for every authoritative legal choice" (Unger, 1976:194). The other form of legal reasoning is purposive--purposive as meant in terms of goals.

The difference between these two types of legal reasoning is one between the criteria thought appropriate to the overt justification or criticism of official decisions; it does not pretend to describe the actual causes and motives of decisions (Unger, 1976:194).

The conceptions of justice which are typical of liberal societies are reflected by the types of legal reasoning. The formalistic approach to jurisprudence exemplifies a formal idea of justice "when it makes the uniform application of general rules the keystone of justice or when it establishes principles whose validity is supposedly independent of choices among conflicting values" (Unger, 1976:194). Purposive legal reasoning leads to two forms or conceptions of justice--procedural and substantive. Procedural justice is distributive justice: "it imposes conditions on the legitimacy of the processes by which social advantages are exchanged or distributed" (Unger, 1976:194). John Rawls' theory of justice is a model example of this form of justice (see Appendix A, #4). An adherent of substantive justice, on the other hand, would want to go further than procedural justice in achieving her/his aims because a substantive conception of justice attempts to govern "the actual outcome of distributive decisions or of bargains" (Unger, 1976:194). Of the three conceptions of justice outlined by these preliminary remarks, only two will be approached in any depth--the formal view of justice will be represented by the theory advanced by H. L. A. Hart in The Concept of Law (1961); and the substantive notion of justice by Ronald Dworkin's theory as presented in Taking Rights Seriously (1977). Neither theory of jurisprudence is a "pure" representative of the particular forms of legal reasoning, but both are lucid and sophisticated examples of those forms.

Formal Justice: H. L. A. Hart

Unger states that formal conceptions of justice must, to be coherent, have faith in the possibility of formalistic reasoning. But what does such a theory look like? According to Unger, such a theory would exemplify the marks of a legal system.

Formality views the core of law as a system of general, autonomous, public and positive rules that limit, even if they do not fully determine, what one may do as an official or as a private person. Standards are seen as dangerous tumors on the body of formality; principles as rules with a higher degree of generality than other rules, a more indeterminate range of application, and a variable degree of force within that range (Unger, 1976:204).

Compare this statement with Hart's conception of a legal system. The union of primary rules of obligation with the secondary rules of recognition, change and adjudication form the heart of a legal system for Hart. Primary rules of obligation have a prescriptive force in that they make a normative claim on a person's actions as well as in terms of duties and obligations. This concept also has an internal component which focuses on the acceptance of these rules as delineated by their use in terms of justification for conduct or of the fulfillment of duties and obligations. The sanction--or authoritative ability to punish--comes into play as an external component of these primary rules.

'Sanctions' are therefore required not as the normal motive for obedience, but as a guarantee that those who could voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall. Given this standing danger, what reason demands is voluntary co-operation in a coercive system (Hart, 1961:193).

Primary rules of obligation, in terms of their normative content, are thus related to Hart's minimum content of natural law. Briefly,

these human qualities which are included in the "content" of natural law include the following social conditions. The basis for rules which restrict persons from inflicting harm on one another is human vulnerability. Mutual respect and forbearance which limit power come about as a result of the quality of approximate equality. Now humans also possess the quality of limited altruism. This leads to the possibility that a legal system can exist--that mutual respect and forbearance are possible norms of action. Furthermore, human beings have natural limitations forced upon them from the world. Limited resources is a condition which all must be aware of, thus competition is going to be a factor in human existence. Finally, human beings are not gods, they have limited understanding and strength of will--i.e., they will make mistakes and some will need sanctions to prevent them from overstepping the proper bounds of social behavior (Hart, 1961:190-193). These reflections on the dichotomies of human existence indicate Hart's acceptance of the fundamental tenets of liberal political thought. Unger presents these in similar form in his introduction to the basic posulates of liberal political theory in Knowledge and Politics (Unger, 1975:64-67).

The secondary rules in Hart's formulation of a legal system are rules about the primary rules of obligation. "They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined (Hart, 1961:92). Although Hart admits that the rule of recognition becomes very complex in a complex society, its basic function is that it is a "rule for conclusive identification of the primary rules of obligation" (Hart, 1961:92). Furthermore, this rule is ultimate in that

it determines the validity of other rules. One of the best examples which comes to mind here is the constitution in constitutional societies. Rules of change are legislative rules. Rules of adjudication govern the judicial order. These rules also determine the powers and the limits of those powers and sources of authority within the context of the legal system.

However, Hart's conception of justice is not a component of the primary and secondary rules. Furthermore, the normative context of the primary rules of obligation is not necessarily the moral context. In fact, Hart distinguishes between the conceptions of a legal system and the conceptions of morality (Hart, 1961:168-171). Justice is a moral concept for Hart, although it has intimate connections with a legal system. His notion of justice is complex and at times leads to a purposive rather than a formal conception of legal reasoning. However, it is important to note that he emphasizes the formal aspects of the ideal of justice.

We may say that it consists of two parts: a uniform or constant feature, summarized in the precept 'Treat like cases alike' and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different. . . . This is pre-eminently the case when we are concerned not with the justice or injustice of the law but of its application in particular cases (Hart, 1961:156).

Application is relevant in terms of impartiality. It is also relevant in its relationship to the notion of proceeding by rule.

It might be said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule, without prejudice, interest, or caprice (Hart, 1961: 156-157).

Yet justice is not only a legal concept, it is a moral concept as well. As such it functions as an independent criterion for the assessment of the morality of laws. This is, simply put, our ability to judge laws as just or unjust. If this were not the case, according to Hart, the law would be unable to determine "what resemblances and differences among individuals the law must recognize if its rules are to treat like cases alike and so be just" (Hart, 1961:157). Thus, for Hart, the constant feature of justice can only be fleshed out by appealing to moral considerations. Only then can human beings have any guides for conduct in the social context.

This basic exposition of Hart's theory of a legal system can now be compared with Unger's analysis of formalism in legal theory. According to Unger, the formalist maintains an uneasy relationship with the problem of equity--"the intuitive sense of justice in the particular case" (Unger, 1976:205). Equity is the polar opposite of formalism. Its cognate, the ideal of solidarity, presents the means of delineating this opposition. Solidarity means more than a formal system of rules based upon a concern of equal respect or justice in Hart's terms--i.e., justice as fairness.

The kernel of solidarity is our feeling of responsibility for those whose lives touch in some way upon our own and our greater or lesser willingness to share their fate. Solidarity is the social face of love; it is concern with another as a person rather than just respect for him as a bearer of formally equal rights and duties or admiration for his gifts and achievements.

. . . Solidarity does not differ in kind from love; it is merely love struggling to move beyond the circle of intimacy. When we fail to achieve the fuller communion and knowledge required by love, we may nevertheless be able to acknowledge another's unique value as a person to the extent of sharing in some predicament he faces (Unger, 1976:206-207).

Now Unger claims that this ideal is inconsistent with a formalist theory. Formalists also talk in terms of obligations (Hart's primary rules of obligation). Yet the ideal of solidarity goes beyond the claims of entitlement and obligation.

A powerholder who acts out of a sense of solidarity will always have to ask himself whether the exercise of his power in a particular situation would be consistent with the aim of sharing the burden of the people with whom he is dealing. To this question, there can never be a general answer, laid down in advance. Everything will depend on issues like the degree to which the other person has acted wrongly in the particular relationship and his ability to bear the loss that would result from the exercise of the power. These are not factors that can be made the basis of rules; instead, they are elements of decision that bear on how one uses the rights allocated by existing rules (Hart, 1961:207-208).

This type of decision making is inconsistent with formalistic reasoning. Rules laid down in advance limit the legal system. Moral concerns may be consistent with the rules, but are not intrinsic to those rules. It is at this point that formalists like Hart must separate morality from legality. Equity (here in Hart's sense, not Unger's) is blind--treat like cases alike. It cannot appeal to the particularities of a case and delineate the special concerns demanded by solidarity--especially when equity is the separate moral counterpart of a formalist system regulated by pre-existing rules. Solidarity (here in Unger's usage), which represents an effort to temper this tension between legality and morality, leads into purposive legal reasoning.

Substantive Justice: Ronald Dworkin

Ronald Dworking presents the best example of purposive legal reasoning. He represents the substantive conception of justice rather than

a procedural one. For example, in his chapter, "Justice and Rights," in Taking Rights Seriously (1977), he reconstrues Rawls' theme of equal concern and respect into a notion of intrinsic worth. Rawls' position is based upon reciprocity which allows for fraternity. Fraternity, for Rawls, corresponds to the difference principle. He uses the natural meaning of fraternity--"namely, . . . the idea of not wanting to have greater advantages unless this is to the benefit of others who are less well off" (Rawls, 1971:105). The difference between Rawls' notion of fraternity and Unger's "solidarity" is that Rawls' "fraternity" is grounded in the difference principle and is thus based upon a conception of equal concern and respect. Unger, on the other hand, rejects respect as the foundation for solidarity since "it sets aside each other's individuality" (Unger, 1976:207). He also denies that solidarity has any foundation or basis in rules. Solidarity, for Unger, is grounded in the belief of the intrinsic worth of each person. Unger calls solidarity "the social face of love" (Unger, 1976:206), and as such it functions like love, but in a broader social context. Since solidarity is like love it

. . . differs from respect because it prizes the loved one's humanity in the unique form of his individual personality. It differs from admiration because it addresses the total personality rather than some facet of it and because it surpasses the limits of praise and blame. Love is neither an act nor an emotion, but a gift of self. . . .

. . . Solidarity does not differ in kind from love; it is merely love struggling to move beyond the circle of intimacy.

. . . When we fail to achieve the fuller communion required by love, we may nevertheless be able to acknowledge another's unique value as a person to the extent of sharing in some predicament he faces (Unger, 1976:207).

Obviously there are elements of reciprocity in Unger's conception of solidarity, but they are grounded in his conception of the intrinsic worth of the individual.

The same assumption--the grounding of reciprocity in a fundamental background belief of intrinsic worth--holds true for Dworkin. He begins to draw this distinction when he states:

We may therefore say that justice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice (emphasis added) (Dworkin, 1977:182).

Rawls focuses on a Kantian conception of autonomy and reciprocity.

Dworkin, on the other hand, focuses on the Kantian concept of dignity as fundamental. His use of the term implies a notion of intrinsic worth.

This idea, associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust (Dworkin, 1977: 198).

He also accedes to the necessity of political equality as part of his conception of a right, but his language is more consistent with the notion of solidarity as delineated by Unger than with fraternity as used by Rawls. This can be shown by his delineation of the reasoning and the justification of that reasoning followed by judges deciding the "hard" cases which must be confronted in a modern society. The "rights thesis" provides the foundation for Dworkin's substantive notion of justice.

This thesis holds that judicial decisions are based upon principles, not policies.

An argument of principle can supply a justification for a particular decision, under the doctrine of responsibility, only if the principle cited can be shown to be consistent with earlier decisions not recanted, and with decisions that the institution is prepared to make in the hypothetical circumstances. . . .

Consistency here, of course, means consistency in the application of the principle relied upon, not merely in the application of the particular rule announced in the name of that principle (Dworkin, 1977:88).

This thesis attempts to respond to three problems:

(1) When politicians appeal to individual rights, they have in mind grand propositions about very abstract and fundamental interests, like the right to freedom or equality of respect. These grand rights do not seem apposite to the decision of hard cases at law, except perhaps, constitutional law; and even when they are apposite they seem too abstract to have much argumentative power. . . .

(2) . . . No one thinks that the law as it stands is perfectly just. Suppose that some line of precedents is in fact unjust, because it refuses to enforce, as a legal right, some political right of the citizens. Even though a judge deciding some hard case disapproves of these precedents for that reason, the doctrine of articulate consistency nevertheless requires that he allow his argument to be affected by them. . . . It is necessary . . . to consider the special qualities of institutional rights in general . . . and the particular qualities of legal rights as a species of institutional rights. . . .

(3) . . . It might be said that the thesis is indefensible because it cheats the majority of its rights to decide questions of political morality for itself (The numbers are added for clarity.) (Dworkin, 1977:89-90).

The first problem is solved by distinguishing between abstract and concrete rights. Abstract rights are those which do not in themselves supply any criteria for decision making. They do not deal with particularities of real cases. They are the "grand rights" that are used in political debate and rhetoric, somehow considered to be absolute. Yet in specific cases, concrete rights play the dominant role. Generally,

speaking, abstract rights provide the justification and arguments for concrete rights. Concrete rights differ from abstract rights in that they present guidelines for the determination of particular cases. Concrete rights can be weighed in cases of conflict; the relevant weight of a particular right is determined by the argument(s) from abstract rights.

The rights thesis provides that judges decide hard cases by confirming or denying concrete rights. But the concrete rights upon which judges rely must have two other characteristics. They must be institutional rather than background rights, and they must be legal rather than some other form of institutional rights (Dworkin, 1977:101).

Background rights are more consistent with abstract rights. They provide "a justification for political decisions by society in the abstract. . . ." (Dworkin- 1977:93). Institutional rights, on the other hand, provide "a justification by some particular and specified political institution" (Dworkin, 1977:93). Yet Dworkin does not provide for the full autonomy of the political institutions. He claims that full autonomy consists of a closed system of constitutive and regulative rules--with no appeal for a particular institutional right through a direct appeal to the general or political morality. The political institutions have limited autonomy in that citizens "are expected to repair to general considerations of political morality when they argue for" (Dworkin, 1977:101) new or particular rights against the institutions which serve them. Thus the rights acknowledged by a particular institution may diverge from the background rights accepted by the citizenry.

Legal rights play an integral role in the autonomy of the political institutions. They are constituted not only in the purposive nature of the statutes, but are also embedded in the fundamental principles underlying the rules of law. Their role in legal justification for the determination of those contested "hard" cases is fundamental. Thus legal rights have a special function in a legal system--a specialized function of political rights in general.

If a judge accepts the settled practices of his legal system--if he accepts, that is, the autonomy provided by its distinct constitutive and regulative rules--then he must, according to the doctrine of political responsibility, accept some general political theory that justifies these practices (Dworkin, 1977:109).

Political institutions have both a horizontal and vertical ordering, according to Dworkin. Vertical ordering provides for the delineation of constitutional theory through political and moral reasoning under which a judge must operate. The horizontal ordering provides for the consistency of application of the principles at a particular level of that institution.

This form of legal reasoning has a number of consequences. First of all, traditional forces in legal reasoning are not denied. The roles of precedent, history and of institutional structure are affirmed, yet are recognized as fallible. The reasoning process, which includes moral as well as political theory, provides a mechanism of normative control and a justification process for those hard cases. This, of course, is also the mechanism for substantive legal reasoning. Once the normative aspect is included in--rather than separated from--the legal reasoning process, moral values must become a component of the judge's

decisions. On a theoretical basis, Dworkin fundamentally accepts this implication. He calls this the gravitational forces. This basis also provides for the resolution of the third problem faced by the rights thesis--that the majority is cheated out of the right to determine the issues of political morality.

If a judge's decision is unpopular, the justification for that decision may show that the majority itself is inconsistent in its affirmation of certain institutional rights. Institutional, constitutional morality, when it affirms fundamental principles is prior to popular morality. A judge's theory is not a personal theory. Referring to his mythical super-judge, Hercules, Dworkin states:

Hercules' theory of adjudication at no point provides for choice between his own political convictions and those he takes to be the political convictions of the community at large. On the contrary, his theory identifies a particular conception of community morality as decisive of legal issues; that conception holds that community morality is the political morality presupposed by the laws and institutions of the community.

We may summarize these important points this way: the community's morality . . . is not some sum or combination or function of the competing claims of its members: it is rather what each of the competing claims claims to be (Dworkin, 1977: 126, 128-129).

These competing claims are based upon principles, and the judge must decide, on the basis of concrete rights which are consistent with those fundamental abstract rights, in a manner consistent with the principles of justice. When a judge makes a mistake, it becomes a matter of injustice in terms of Dworkin's theory. Thus he states:

We must commend techniques of adjudication that might be expected to reduce the number of mistakes overall based on some judgment of the relative capacities of men and women who might occupy different roles (Dworkin, 1977:130).

Yet the implications of Dworkin's theory of adjudication go beyond a procedural notion of justice. Dworkin's discussions of hard cases in civil law and of reverse discrimination exemplify Unger's notion of substantive justice.

In private law, substantive justice will be preoccupied with the elaboration of criteria for determining the equivalence of performance exchanged through contract and for allocating the losses arising from private disputes on the basis of both comparative fault and relative need. In public law, substantive justice may work through theories of substantive equal protection that define the kinds of differences of treatment that are morally justified or required (Unger, 1976:212).

Furthermore, Unger notes that such theories are consistent with the ideal of solidarity as well as attacking the problems of domination. Accordingly, they "refuse to acquiesce in the inevitability of subjective value and they insist on judging the moral quality of social relations and of the powers men exercise over each other" (Unger, 1976:213). This final point has already been indicated through Dworkin's concern for the three problems facing any theory of adjudication. A judge's power to adjudicate is constrained by constitutional and moral principles and theories. Furthermore, Dworkin takes great pains to justify (in a moral sense) the judge's power to make decisions which affect the community. He is acutely aware of the problem of unjustified power in this sense.

In the realm of civil law, Dworkin's view are also consistent with the notion of substantive justice. His adherence to the rights thesis leads him to affirm a principle oriented rather than a policy oriented theory of adjudication. Although he provides for the consistency of the judgments rendered through the adherence to constitutional theory and the role of precedent, he is aware of the problem of judicial

mistakes--whether through argument by policy or through unjust decisions. Yet the adherence to horizontal as well as vertical ordering of political theory determines the weight and gravitational force of these precedents in common law. Thus in the determination of those cases which are to be treated alike and those which are relevantly different, Dworkin presents two maxims that move his theory into the realm of substantive justice.

If he can show, by arguments of history and by appeal to some sense of the legal community, that a particular principle, though it once had sufficient appeal to persuade a legislature or court to a legal decision, has now so little force that it is unlikely to generate any further such decisions, then the argument from fairness that supports that principle is undercut. If he can show by arguments of political morality that such a principle, apart from its popularity, is unjust, then the argument from fairness that supports that principle is overridden (Dworkin, 1977:122-123).

This presentation of Dworkin's rights thesis which is embodied in his treatment of hard cases leads back, then, to his theory's consistency with a notion of substantive justice. Perhaps the full substantive conception of his fundamental principle of equal concern and respect can now be developed. This principle is the basis of his rejection of utilitarian conceptions of justice which can either manipulate the formalistic system or embody a radical individualistic idea of justice.

Dworkin rejects these conceptions of justice in that they lend weight to external personal preferences. This is anti-egalitarian in a fundamental way. "It will not respect the right of everyone to be treated with equal concern and respect " (Dworkin, 1977:278). External preferences may include racial intolerance or intolerance based upon moral grounds--such as aversion to pornography, homosexuality, abortion, or issues of political persuasion.

They prefer not only that they themselves do not indulge in these activities, but that no one else does so either, and they believe that a community that permits rather than prohibits these acts is inherently a worse community. These are external preferences, but, once again, they are no less genuine, nor less a source of pleasure when satisfied and displeasure when ignored, than purely personal preferences (Dworkin, 1977:276).

Now Dworkin's right to equal concern and respect is not a formal or empty right. It embodies the ideal of solidarity which is the fundamental assumption underlying the principle. Dworkin claims that

Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived.

I propose that the right to treatment as an equal must be taken to be fundamental under the liberal conception of equality, and that the more restrictive right to equal treatments holds only in those special circumstances in which, for some special reason, it follows from the more fundamental right. . . . I also propose that individual rights to distinct liberties must be recognized only when the fundamental right to treatment as an equal can be shown to require these rights (Dworkin, 1977:273-274).

This embodiment of the ideal of solidarity into the fundamental principle of equality leads Dworkin to substantive legal reasoning. His affirmation of affirmative action provides an example of such reasoning. He argues against the use of utilitarian arguments in the determination of such cases. The obvious objection to utilitarian arguments is that racial prejudice held by a majority of the people would still provide for a situation of injustice toward blacks. Ideal utilitarian arguments may not be vulnerable to this objection--if they are based on a principle that an equal society is preferable despite the wishes of citizens that prefer inequality. Yet the argument based upon the principle of equal concern and respect--fundamentally, the right to

treatment as an equal--justifies the resolution of these issues independently of utilitarian concerns.

Racial criteria are not necessarily the right standards for deciding which applicants should be accepted by law schools. But neither are intellectual criteria, nor indeed, any other set of criteria. The fairness--and constitutionality--of any admissions program must be tested in the same way. It is justified if it serves a proper policy that respects the right of all members of the community to be treated as equals, but not otherwise. . . .

We are all rightly suspicious of racial classifications. They have been used to deny, rather than to respect, the right of equality, and we are all conscious of the consequent injustice. But if we misunderstand the nature of that injustice because we do not make the simple distinctions that are necessary to understand it, then we are in danger of more injustice still. It may be that preferential admissions programs will not, in fact make a more equal society, because they may not have the effects their advocates believe they will. . . . But we must not corrupt the debate by supposing that these programs are unfair even if they do work. We must take care not to use the Equal Protection Clause to cheat our selves of equality (Dworkin: 1977:239; see Appendix A, #5).

Thus in the case of affirmative action, Dworkin opts for preferential treatment for blacks in admission to programs which would further equality. Dworkin treats the Equal Protection Clause (in terms of the right to treatment as an equal) in a substantive manner. He claims that this Clause is intended to attack slavery and racial prejudice "but it is unlikely that (it was) intended to outlaw all racial classifications, or that (it was) "expected" that such a prohibition . . . be the result of what" was written (Dworkin, 1977:226). The lack of equal treatment in the DeFunis case did not violate DeFunis' right to treatment as an equal, according to Dworkin. "An individual's right to be treated as an equal means that his potential loss must be treated as a matter of concern, but that loss may nevertheless be outweighed by the gain to the

community as a whole" (Dworkin, 1977:227). Dworkin goes on to claim that racial preferences in favor of blacks and other minorities do serve the cause of justice, in that the disparities between the races of wealth and power may be overcome. In the special circumstances of this decade, one in which the majority has reaped success at the expense of minorities, affirmative action programs are justifiable.

Dworkin thus provides a model for substantive legal reasoning. However both Dworkin and Unger are acutely aware that programs instituted under this form of legal reasoning may not prevail. Not only may the goals not be achieved as hoped--wealth and power may continue to be unequally distributed--but the very controversies surrounding the aims of these theories may tend to thwart their very effectiveness in bringing about change.

Apart from the questionable effectiveness of such a form of legal reasoning, Unger claims (although Dworkin would probably not agree) that utilization of substantive justice has consequences for the fundamental nature of modern law. It eats away at law's distinctive character--its qualities of generality and autonomy, as well as its public and positive character. These four marks of a legal order are consistent with the liberal social order. Generality is corrupted by substantive legal reasoning because of the expansion of "impermissible inequalities among social situations" (Unger, 1976:198), with the growth of the need for individualized treatment. Unger mentions as an example the move to reverse preferences--which Dworkin also treats as a serious need in his affirmative action arguments. Autonomy is reduced,

according to Unger, by the very move to a political and normative reasoning process as used by Dworkin.

The decline in the distinctiveness of legal reasoning is connected with the need administrators and judges have of reaching out to the substantive ideals of different groups, of drawing upon a conventional morality or a dominant tradition. These changes in the substance and method of law also help undercut the identity of legal institutions and of the legal profession. Courts begin to resemble openly first administrative, then other political institutions. Thus, the difference between lawyers and other bureaucrats or technicians starts to disappear (Unger, 1976:200).

Finally, the public and positive character of the legal order is severely mitigated by the inclusion of concepts of moral obligation into the legal system.

The greater the commitment to equity and solidarity as sources and ideals of law, the less it is possible to distinguish state law from ideas of moral obligation or propriety that are entertained in the different social settings within which disputes may arise. And the less importance do positive rules have in the law (Unger, 1976:214).

These points of Unger's regarding the main characteristics of a legal order are relevant to Dworkin's theory. His dependence on political and constitutional theory as well as public morality in developing his theory of jurisprudence chip away at autonomy and generality. His manner of purposive legal reasoning through his emphasis on moral principles of justice (which are based upon the ideals of equity and solidarity) do, in fact, blur the distinction between legality and morality. Although Unger affirms these ideals of solidarity and equity, he is acutely aware of the dangers and problems to which this type of theory may succumb. He presents the reader with a number of these dangers; he then proceeds to flesh out his list with the example of the disintegration of the legal order in the Weimar republic as a result of a turn to

substantive legal reasoning. For the purposes of this paper, however, the list of dangers will be sufficient.

First of all, Unger claims that with the disintegration of positive law, there is the

. . . risk that the search for a nonpositive law will lose its dynamism and result in the sanctification of the practices of certain dominant groups, with the repression of other communities or of dissident members of the dominant groups themselves (Unger, 1976:214).

The second risk is what Unger calls "historical entropy"--the loss of the ability of human beings to discern the gap between what is and what ought to be. If the quest of substantive justice is to pursue the goals of equity and solidarity on a social level, the power of the State then forces its citizens to act within the context of these ideals. This may lead, according to Unger, to hypocrisy.

The realities of the heart would forever continue to mock the pretenses of our public selves, and the public realm would at every moment be on the verge of falling victim to the demonic impulses it had tried to submerge (Unger, 1976:215).

This leads to a stifling of the normative order in a society. What is needed is not a tension between the public and individual realms, but a tension within the public realm itself in terms of what is and what ought to be. If this can be maintained, then Unger believes that moral growth within the community can be maintained.

Within the contexts of the social order and the legal systems themselves, Unger leans more sympathetically to the notion of substantive legal reasoning. However, even the Western societies which produced the liberal legal system are moving beyond the form of social order which is typical of a liberal society, according to Unger. He

claims that the antinomies of liberal thought which produce a liberal society force the society and its law to develop different norms, thus creating the need for a theory of social order and of law that goes beyond the parameters of the liberal state and the liberal conception of the law.

Against this background of discussion of the liberal legal system as portrayed by Unger, Dworkin's theory still retains the assumptions of liberal political theory (as obviously does Hart's). Unger's conception of the antinomy of rules and values is apparent in both systems. In Knowledge and Politics (1975), Unger claims that the substantive conception of justice is the liberal political affirmation of value--the counterpart of the morality of desire. The morality of reason has as its political counterpart the rule-oriented formalistic system which is typified by H. L. A. Hart's theory of law. Neither system can overcome the antinomy of rules and values by itself.

Legal justice and substantive justice, judgment according to rules and according to values, the universal and the particular in politics, both must be and cannot be separated (Unger, 1975:135).

Thus although Dworkin's theory of adjudication is consistent with the ideals of solidarity and equity which Unger affirms, Unger must claim that it is only a partial attempt to escape from the antinomies of liberalism, and thus is incomplete. Unger would object, furthermore, that even though Dworkin's theory has tied into those ideals, Dworkin's theory of principles with the concept of abstract rights shows a strong dependence on the morality of reason, the universal correlate to judgment according to rules in liberal politics. As the above quotation

shows, Unger would state that this is a further example of the antinomy of rules and values. What Unger claims is needed, on the other hand, is the development of a new form of legal order, one consistent with what he sees as the evolution of the social order which is taking place.

C. Some Methodological Considerations

Unger's use of his version of the typological method leads into two problems in this chapter. The first problem is his use of terminology when he is developing the types of justice discussed in this chapter. The second problem is familiar. Again, it seems that Unger's use of the typological method creates false dichotomies. Both problems bear some discussion.

Unger's use of terminology in his development of types of liberal expressions of justice leads into a number of problems which are based in his conception of common meaning.

The method of common meaning redefines the terms of the debate by viewing the smallest unit of social study as a certain correspondence between belief and conduct rather than each one alone. This correspondence is called meaning (Unger, 1976:246).

Sometimes Unger's redefinition is not limited to the "terms of the debate by viewing the smallest unit . . ."; sometimes he redefines the terms as well. There is, for example, a chasm of difference between the meaning of the concept "equity" as Unger uses it and as Hart uses it. Thus, earlier in the chapter, I had to specify that I was using Hart's conception of this term, for Hart means by "equity" treat like cases like and different cases differently. Unger, on the other hand, considers equity the cognate of solidarity; it is "the intuitive sense

of justice in the particular case" (Unger, 1976:205). Now I am not claiming that Hart adheres only to "treat like cases like" for Hart states of the idea of justice in which the concept of equity is embedded:

We may say that it consists of two parts: a universal or constant feature, summarized in the precept 'Treat like cases alike' and a shifting or varying criterion used in determining when for any given purpose, cases are alike or different. . . .

In certain cases, indeed, the resemblances and differences between human beings which are relevant for the criticism of legal arrangements as just or unjust are quite obvious. This is preeminently the case when we are concerned not with the justice or injustice of the law but of its application in particular cases. For here the relevant resemblances and differences between individuals, to which the person who administers the law must attend, are determined by the law itself (Hart, 1961:156).

It is obvious that Hart does not separate out the rule for treating like cases alike and different cases differently. Unger, in redefining the debate, does make the distinction. There is also a shift in meaning and usage of terms in Unger's own works. Thus one must be extremely careful in moving back and forth between Knowledge and Politics (1975) and Law in Modern Society (1976). This is particularly relevant for this chapter on liberal politics, for Law in Modern Society (1976) places these issues squarely in legal theory, while the earlier Knowledge and Politics (1975) deals with these issues in the context of the postulates of liberal thought. As a result, using existing liberal theories as a basis for discussion and comparison of Unger's critique is exceedingly difficult.

Once all of this groundwork on terminology is completed, however, the second problem emerges. It has been claimed earlier in this essay that the use of the typological method leads to false dichotomies and

antinomies. This seems to be the case with regard to the issues raised in this chapter as well. In closing the last section of this chapter, I stated that Unger would have to claim that Dworkin's theory, as a theory which accepts (at least some) of the postulates of liberalism, must fall into the dichotomies of liberalism. First of all, as a substantive theory of justice, Unger would want to claim that this is a theory which affirms the liberal conception of value (a counterpart to the morality of desire). But Dworkin's substantive theory is, in fact, grounded in principles. It is the adherence to those particular principles which leads one to take on that particular conception of justice. Principles are not empty of content. They lead one toward a particular moral posture toward the world. This can be seen by Dworkin's rejection of utilitarian reasoning. His is fundamentally a deontological theory. Now seen from Unger's point of view, Dworkin's theory is all mixed up. If it is substantive justice, it must be based upon considerations of value, thus it must be consistent with the morality of desire. But Unger's theory has no room for principles; it only has room for rules and values. At the most, he can claim that principles are an unhappy compromise to avoid the liberal antinomies. But this must be argued. He cannot just assert that such theories are incoherent. Nor can he assert that Dworkin's type of reasoning is dangerous in that it might lead to the kind of legal system that fell apart in the Weimar Republic. Unger must show how a theory like Dworkin's which is grounded in principles can lead to such chaos. His use of typological method which leads to the claim that substantive theories of justice (which are

grounded in value, the counterpart of the morality of desire) lead into disasters like the Weimar Republic has not accounted for Dworkin's theory.

There are other examples, to be sure, which substantiate the claim that the typological method as used by Unger is inadequate as a method for total criticism. Indeed, Hart's theory is not so purely formalistic as it looks at first glance. Furthermore, the issue of the antinomy of rules and values could be investigated to see if it, too, creates a false antithesis. I believe that it does. The same arguments against this antinomy could be raised here as were raised in Chapter II with regard to the antinomy of reason and desire. It would be redundant to do so.

If Unger's methodology is to be a useful tool in the criticism of liberal thought, it must be restructured to avoid false dichotomies and antitheses. As it presently is used, there are enough problems in Unger's criticism of liberal thought to lead one to question his complete critical approach. If there is a further task here, it is to examine other aspects of his theory to see if they are fraught with the same problems. Those who are sympathetic to Unger's task, on the other hand, would have the task of restructuring Unger's methodology so that it no longer leads one into false or unwarranted dichotomies. It is, however, useful to examine Unger's constructive theory by applying it to some concrete ethical issues. That is the task for the next two chapters.

CHAPTER IV

UNGER'S CONSTRUCTIVE THEORY

This chapter will be primarily expository. There is really no need in this chapter to "test" Unger's constructive theory for methodological consistency. There is a methodological link between Knowledge and Politics (1975) and Law in Modern Society (1976), a link based upon Unger's conception of human nature and its relationship to the doctrine of universals and particulars. These issues were considered in Chapter I in the section on the typological structure (see pages 6 - 11). Here the task is to describe that relationship as Unger uses it in his constructive theory. Unger has two applications of theory of human nature: the theory of the self; and the social or political counterpart to the theory of the self. Both applications will be delineated.

A. Human Nature: The Theory of the Self

Unger's constructive theory starts out with his conception of human nature as part of his doctrine of universals and particulars. The methodological focus is, of course, to avoid the dangers of rationalism and historicism.

The device with which to accomplish this is the doctrine of universals and particulars suggested by the criticism of liberal thought. If one takes human nature as the universal and its manifestations in forms of social life and individual personalities as particulars, one may say that human nature is neither an ideal entity that subsists in its own right nor a mere collection of persons and cultures. Instead it is a universal that exists through its particular embodiments, always moves beyond any one of them, and changes through their sequence. Each form of social life

represents a novel interpretation of humanity, and each new interpretation transforms what humanity is (Unger, 1975:196).

Unger, of course, states that the consequence of this view of human nature is that it affirms the notion of a unitary human nature without incorporating the notion of essences. Furthermore, it changes within the context of the forms of social life. Unger delineates his conception of this human nature in terms of the puzzles and problems faced by human beings "in their relations to nature, to others, and to themselves. It is the universality of a predicament rather than that of a substance" (Unger, 1975:196). Underlying this is the theory of the self.

Unger states that "the doctrine of the self answers two questions, one historical, the other metaphysical" (Unger, 1975:197). Each has a corresponding justification.

. . . (0)ne criterion of the choice of a theory of the self is historical: Does the theory allow us to clarify the sense of the antagonistic trends

The second standard of preference for a theory of the self is a metaphysical and moral one. It is an appeal to our everyday judgments, tacit and explicit, about what men are and what they ought to be (Unger, 1975:197).

His basis for proof is the move from one level of experience to a more basic one. He states:

This appeal is the provisional solution to the dilemma of proof. We call judgments basic the more their abandonment would have consequences we would recognize as absurd, and the less they could be suppressed by hostile doctrines and modes of consciousness (Unger, 1975:198).

He claims to avoid the circularity problem for the theory of the self that he proposes ("the moral interest that helps justify the doctrine must in the end be justified by the doctrine itself" (Unger, 1975:198)) by the request for acceptance of the "notion that the theory of human

nature must build on a moral vision that partly precedes it but that is constantly refined, transformed, and vindicated through the development of the theory" (Unger, 1975:198).

Self and Nature in Unger's Theory

In discussing human nature as part of the theory of the self, Unger postulates four attributes of the self--(a) indeterminacy, (b) consciousness, (c) practicality, and (d) objectivity--which are interconnected into a relationship which Unger calls natural harmony. Indeterminacy is "the limited hold the instincts have over human activity" (Unger, 1975:199) with instinct meaning the genetic uniformity or orientation of a species. Since features of conduct are not genetically transmitted, Unger states that human relationship with the world is not preordained. Thus causal implications about human conduct are limited. Consciousness, on the other hand, is the "ability to reflect on existence" (Unger, 1975:200). Unger also calls consciousness the "sign of the self's distance from the world" (Unger, 1975:201). He bases the strength of the social bond on humanity's desire to close the gap of separation from the world.

Indeterminate because it is conscious and conscious because it is indeterminate, the self is separated from the world and, above all, from the natural world around it. The moral sign of this separation is disconcertment in the face of everything in nature that is alien to human concerns and immeasurable by human proportions. The cognitive sign of the separation is the necessary and radical incompleteness of our knowledge of nature (Unger, 1975:202).

This leads to the twofold active aspect of this problem of human nature. Human beings desire to be part of the world, to participate in nature.

Practicality and objectivity seek to bridge the gap of the barrier of the self to the world.

When the attempt to reconcile self and nature is viewed subjectively, from the standpoint of the acting self, it takes the form of the tendency of all conduct to change the world in conformity with human ends. This tendency may be called the practical character of the self. When the same reconciliation with nature is viewed objectively, from the perspective of its effects on the world, it appears as the tendency of work to create objects that survive the worker and become part of the world. This is the objective quality of the self. Practicality and objectivity, like consciousness and indeterminacy, are the reverse sides of each other (Unger, 1975:203; my emphasis).

These four qualities of the self, according to Unger, form not only the reality of the problem of self and nature, but also the ideal, "for it constitutes a perennial as well as a proper aim of human striving" (Unger, 1975:204-205). The problem of self and nature leads to two demands, one of separation (independence) and the other of being one with the world.

The situation in which man is at one with nature though separate from it, in which he has overcome his moral and cognitive estrangement without losing his independence, is natural harmony (Unger, 1975:205).

Unger examines the ideal of natural harmony through focusing on reconciliation to the nonhuman world through the moral, artistic, and religious aspects of culture. He then examines the achievement of natural harmony in day-to-day existence through work. Finally he examines this ideal through the context of knowledge.

There is only one category of things that allies the features of natural and geometrical objects, and this is the category of work. Because the work occupies a place in the external world, it always appears as an individual entity, distinct from all other entities of similar kind. Each act committed, or object made, or relation established is unique (Unger, 1975:208).

Intention of the worker is the first determinant of meaning. The next is the use or observation of others of the object of work. Here,

. . . the practical and objective knowledge of the work is possible only if they are somehow able to put themselves in the place of the worker and to grasp the relationship between his conscious reflection and the product of his labor (Unger, 1975:209).

Unger sees obstacles to the notion of natural harmony--through the forms of social consciousness and of organization, which are contingent, and other obstacles which he states are universal and insuperable. Where the contingent impediments are removed there still remains as universal and insuperable the brute facticity of nature and an element of narcissism in the worker (Unger, 1975:212). Thus there is never a full solution to the problem of humanity and its relationship to nature. Unger postulates an ideal of community, an ideal consistent with his doctrine of universals and particulars.

Self and Others

Under this heading, Unger examines the relations of the individual to others. He delineates the bases of individuality: the need for limits, the body as a limit, and the indeterminate nature of humanity which affects the relationships of human beings with one another. Thus he states:

Every person is a unique, particular expression of the universal that is the species, a universal that cannot exist except in one of these particulars but that none of them completely describes. Individuality is an implication of the way universal and particular are linked in the constitution of humanity (Unger, 1975:214).

There is a link, according to Unger, that connects the social aspect of humanity to the individual aspect. This link has its cognitive and moral dimensions.

Consciousness implies autonomous identity, the experience of division from other objects and from other selves. But the medium through which consciousness expresses itself is made up of the symbols of culture, and these, according to the principle of totality, are irreducibly social. . . . That is the cognitive aspect of sociability (Unger, 1975: 215).

Unger claims that there is a paradox within this cognitive aspect of sociability. The more estranged and tenuous the cultural symbols are in a society, the less meaning and security one has in one's individuality. On the other hand, the more extensive sharing of such symbols in a culture blurs the distinction of self from others. Thus, "(i)n the measure of its conscious distance from others, the self both needs and fears assent" (Unger, 1975:216).

The moral aspect of sociability is especially important to this essay for it contains the foundations of Unger's normative position. Thus it will be developed carefully and in somewhat more detail than the cognitive aspect of the social nature of the self. The fundamental basis for the moral aspect of the sociability of the self is the requirement "that one be recognized by others as a person" (Unger, 1975:216). Unger delineates this need from three different standpoints: "the weakness of self-reflection, the relational character of identity, and the place of the individual in the species" (Unger, 1975:216). Self-reflection is weak, according to Unger, because one can never see one's self as a whole. We develop our self-image through the reflections of others. Unger further claims that "we are our relations; the way in which others conceive of those relations is one of their determinants, and therefore one of the determinants of our own selfhood" (Unger, 1975:

216). The third standpoint is based upon the finite nature of the individual in terms of the species.

Because each individual can develop only a minute fraction of the talents of mankind, the way in which he belongs to the species is never obvious. The universal quality of humanity is hidden as well as revealed in its particular manifestations. To find that universal quality . . . a man must live in a community of persons who acknowledge one another's humanity by regarding each other's talents as complementary powers of the species (Unger, 1975:216).

According to Unger, the need for recognition has its own dilemma, one that corresponds to the cognitive dilemma. This dilemma is posed in the context of the problem of conformity and its loss of individuality--and, of course, the need for recognition, vying for dominance with it. The lack of resolution of this dilemma in liberal society results in the antinomy of rules and values in Unger's point of view. To transcend this antinomy, Unger states that one would have to view the relationship between the self and others in a different manner.

The person would have to find a way in which union with the others would foster rather than diminish the sense of his own individual being. This union could be described as a circumstance in which others are complementary rather than opposing wills in the sense that to join with them in a community of understandings and purposes increases rather than diminishes one's own individuality. An alternative statement would be that the union consists in the reciprocal acknowledgement of the universal attribute of humanity possessed by each in the particular mode of his being (Unger, 1975:217).

Now Unger claims that this condition which he asks the reader to imagine can be realized through the ideal of sympathy, which also exemplifies to the greatest extent the notion of sociability. He states also that this ideal is "to the relation between self and others what the ideal of natural harmony is to the relation between self and nature" (Unger, 1975:

217). Unger claims that the preceeding is his argument for the ideal of sympathy, but that he wants to make the concept more precise. Thus he distinguishes love from sympathy.

In the context of religious doctrine, Unger first postulates what he calls the universal brotherhood of man which stems from the fatherhood of God in transcendent near-Eastern religions. From this comes the precept that human beings should love one another. He then analyzes personal love--not only its complementary aspects, but also its limitations which plunge it into the paradox of sociability, perverse and romantic love. Furthermore, love, because of its intensity, limits itself to a few. Thus Unger feels that love, although admirable in its positive aspects, cannot form the basis of sympathy. He then turns to the political analogue to personal love, the notion of community. In this context, he distinguishes love from sympathy.

The sentiment of sympathy differs from love in its conditions as well as in its context. Love is so strong that it may allow the lover to acknowledge the concrete individuality of the loved one and to perceive him as a complementary will despite an opposition of values between the lover and the loved. Sympathy is weaker. As the association becomes less intimate and total, it depends increasingly on shared ends to achieve the recognition of concrete individuality and the complementarity of wills (Unger, 1975:220).

For Unger, community is consistent with the ideal of sympathy since it enhances the notion of shared ends. If these shared ends express human nature rather than mere preferences, the acceptance of them affirms human nature and one's own nature as well. In this manner, the paradox of sociability is eased. The complementary nature of other wills would be expressed rather than the notion of opposed wills. By

the sharing of ends, "furtherance of their ends would mean the advancement of one's own" (Unger, 1975:220). Through the notion of community, then, Unger postulates that the need for recognition of one's humanity by others is satisfied.

Moreover, in this community, individuals would have to live together in a situation sufficiently varied, intimate, and stable to allow them to know and treat each other as concrete persons rather than as role occupants. To the extent that a community acquired these features, it would become a political realization of the ideal of sympathy (Unger, 1975:221).

Unger admits that this view of community is dependent upon certain crucial assumptions--a unitary human nature; that human nature does in fact constitute the basis for moral judgment; and that even this notion or ideal is capable of being transcended. He also admits to the same kind of limitation to this ideal as apply to the ideal of natural harmony. In the context of community, there is the tension of the limitations of the size of the group. This limitation is faced, on the other side, by the need to become a universal association. "Until it has been universalized there will always be some other persons in relation to whom the members of the community have not yet solved the problem of self and others (Unger, 1975:221). Unger also notes the need for universalization of community in that "the moral authority of the shared values of a communal group depends on the degree of their faithfulness to human nature" (Unger, 1975:221), a necessary, but not sufficient condition. Thus there is still conflict, even in Unger's point of view. The limits necessarily preserve the notion of being a person.

This very crucial aspect of Unger's theory--his normative ideal--shall be investigated in detail in the chapter which pertains to medical ethics. Now, however, we must complete Unger's constructive theory.

The Abstract and Concrete Self

Unger calls the relationship between the abstract and concrete self the psychological counterpart to the relationship between self and others. In this sense, it relates to the antinomy of reason and desire. This is the issue of the connection of the psychological aspects of the self, the elements of personality. The abstract part of the self is that part that participates in the nature of the species, a many-sided nature, according to Unger. The concrete self is defined by the determinate finite nature of human life.

Unger states that there are two "false" ways of trying to deal with the problem of personality. One exemplifies the morality of desire, the other the morality of reason. The morality of desire lends itself to acquiescence to the partiality of the self

. . . and the abandonment of the universal part of the self as a hopeless dream. . . . The use of the principle of role and of the division of labor as a foundation for the unity of the person constitutes such a response (Unger, 1975:223-224).

The other "false" way of dealing with this is what Unger calls the "vain attempt to approach in individual life the many-sidedness of the species" (Unger, 1975:224).

Those who adopt this view, which one might call abstract universality, imagine themselves as occupants of the greatest possible variety of life situations and practice the cult of the fullness of 'experience.' The tragic character of abstract universality lies in its inability to escape from the realm of dreams into the world of social relations (Unger, 1975:224).

In contrast to this, Unger postulates what he calls concrete universality. He claims that this notion represents the connection of personality as embodied in its species nature and the individual through the doctrine of universals and particulars. This connection, Unger claims, must be found within the individual. The ideal of concrete universality, of course, corresponds to the ideals of natural harmony and sympathy. Again, he postulates an illustration of an ideal which goes beyond the parameters of his notion. This time it is what he calls the love of the ideal--inspiration--which "has something of the character of personal love" (Unger, 1975:225). This, too, has limitations; thus Unger postulates a new conception of the division of labor, one which is not burdened by the social consciousness of liberalism nor its pattern of domination by class or role.

Suppose, however, the existence of communities of shared purpose. Imagine further that these common ends increasingly express the species nature of man because they develop in conditions of diminishing domination and are ever more widely held. The more the community approaches this scheme, the stronger the chance that its evolving common ends may represent the ideals service to which satisfies the need for universality. At the same time, the particular way one's work furthers those values accommodates the element of partiality of the self. Thus concrete universality is actualized through the division of labor within the group (Unger, 1975:225-226).

Again, there are assumptions--the prime one being the reduction of dominance. Another assumption is that specialization cannot be rigid or extreme so that it would stultify the individual's capacity to view the self apart from that person's social place. There are also limitations. Again, this cannot ever be fully realized. One cannot fully express the

many-sidedness of humanity in one's lifetime at a direct level. The gap cannot be totally bridged.

What is offered instead is the possibility of advancing the species nature or of being guided by it. Thus there is the danger that one will come to treat one's own life as a mere means to an end that lies beyond it (Unger, 1975:226).

From this level, Unger goes to the higher level of abstraction--his conception of the self and the world.

Unger's view of the self and the world has two modes of expression. Consistent with his treatment of the self and nature, the self and others, and the abstract and concrete self, one mode is of separation, the other is of union.

Each mode of being achieves its better form when it is joined together with the other mode, and falls into its worse one when it is separated from the other. Natural harmony, sympathy, and concrete universality describe the hypothetical ideal circumstance that combines the two ways of being and thereby perfects both. This circumstance is the ideal of the self, and its achievement is the good (Unger, 1975:228).

This ends Unger's delineation of the ideal of the self. He goes on to note its importance in the following respects.

First of all, the modes of expression of the self and the world are good explanatory devices. Unger uses them to delineate his criticisms of the liberal society as well as the welfare-corporate state. Furthermore, according to Unger, this ideal of the self offers an alternative to liberalism for it shows what the resolution of the antinomies of liberalism would need to move beyond that form of social consciousness and order. It also leads to a "critical understanding of modern society" (Unger, 1975:229). Indeed, it provides the methodology for Unger's

treatment of modernity in Law in Modern Society (1976) as well as of the different modes of social order. Finally, it provides the levels of generality of the ideal type as Unger uses it.

Unger states that his theory is teleological

. . . insofar as it recognizes that history is made by men who have purposes and above all the purpose of affirming their humanity. . . . The sense in which my account is not teleological should now be clear. It does not attribute designs to history itself, nor does it view as foreordained the actualization of the ideal or any of the past stages toward its possible accomplishment (Unger, 1975:230-231).

Humanity may fail.

Unger does, however, go beyond this theory of self in Knowledge and Politics (1975). In his last chapter, he starts with a statement of the good, then advances a theory of an ideal of community, one which transcends modern states. A brief look at this expansion will complete this exposition of Unger's constructive theory.

The Good and the Ideal of Community

Unger attempts to devise a doctrine of the good which avoids the antinomies of liberalism. His doctrine of the good has two basic elements:

The first element is the concern of the theory of the self: it is the notion that the good consists in the development of the species nature in the lives of particular persons. The second element is the thesis . . . that both human nature and our understanding of it can progress through a spiral of increasing community and diminishing domination (Unger, 1975:239).

The first of these elements, consistent with the development of the theory of the self, consists of both a universal and a particular conception of the good. This is in terms of conduct. Thus the universal

good is the "perfection" of species nature: the particular good is the development of talents and capacities "through which the species nature of mankind takes a concrete form in him" (Unger, 1975:239). There is no claim of an essence of humanity in this concept of the good.

Furthermore, the particular good is not a mirror image of the universal good. The connection of the two notions of the good, according to Unger, can only be interpreted in the context of the relationship of universals to particulars.

The species nature advances through the development of the capacities of individuals. But no definable set of realized individual talents exhausts human nature, which is continuously changing in history. The universal good exists solely in particular goods, yet it is always capable of transcending them. The two aspects of the good are inseparable (Unger, 1975:240).

Unger does not determine what is the good by making lists, nor does he catalog preferences in the context of present society. He asks a different kind of question: "(W)e should ask first under what conditions their choices might inform us more fully about what is distinctive to each of them and to mankind as a whole" (Unger, 1975:242). In the context of this question is the second aspect of Unger's doctrine of the good, the notion of domination and community. It "elucidates the relationship between moral agreement and human nature" (Unger, 1975:243). Domination, according to Unger, has a corrupting influence on shared values.

Yet domination and autonomy have no self-evident meaning. To be dominated by another is to be subject to his unjustified power. Thus, to define domination one must be able to distinguish the justified and the unjustified forms of power, and to trace the true limits of autonomy. This

requires judgments that have to rely to a greater or lesser extent on our established moral intuitions and practices (Unger, 1975:243).

Obviously, this problem can lead into a vicious circle, but Unger claims that this can be turned into a spiral of less domination and more community through politics. Two criteria are needed to achieve this:

(a) success in separating morality from power inequalities, and (b) continuity of moral views. The guide for this is, according to Unger, prudential reasoning. Unger justifies this on the basis of his belief that human nature is a manifestation of the good with "moral agreement as an indication of what human nature is and demands" (Unger, 1975:245). If there were no such relationship between human nature, the good and moral agreement, subjective value is the alternative; and he also notes the religious view that the "realm of values is somehow grounded in the reality of things; that truth and goodness are partners" (Unger, 1975:248).

One important point remains to be noted about Unger's doctrine of the good: his notion of evil. For Unger, evil is not what he calls a positive force in the world.

The mark of evil is the acceptance of a certain form of personal existence as complete in itself or of a particular kind of social life as the ultimate achievement of the race. It is the sacrifice of universality to particularity and the reduction of man to the animal state (Unger, 1975:246-247).

This is certainly a strange concept of evil; but it is consistent as the opposite of his theory of the good.

B. Human Nature: The Political Counterpart to the Theory of the Self

Unger goes on to form his political counterpart to the ideal of self, his ideal of community--the organic group. It is meant to be a regulative ideal since the spiral of domination and autonomy can never attain this in history. It will, as the political counterpart to the ideal of self, pose the political counterparts of the ideals of natural harmony, sympathy and concrete universality: the institutional principles of the community of life, the democracy of ends, and the division of labor.

The Occupational Group

The community of life has two defining elements: the breadth of group life and the intimacy of association. Individuality and universality pose the limits. Unger tentatively postulates the model of the family as a way of realizing this in terms of institutional structure, but sees that the correspondence of love and family make this untenable. Instead he looks for a correlate of sympathy. He finds this in the occupational group as part of the bureaucratic institution. However the issues of decentralization and the multipurpose group mitigate the unhappy implications.

On the one hand, the increase of 'leisure time' contributes to the possible diversity of community life even when specialization among groups increases. On the other hand, the effort to foster productivity may tend to bring the members of the occupational group more closely together by offering them joint facilities for housing, health care, education, or recreation (Unger, 1975:265).

There may be problems. Production may suffer, but this may be dealt with by compromise. Each group in itself may be more specialized, but the concept of efficiency may have to be undermined. However, another problem deals with the autonomy of the local group as opposed to the rest of society. Unjustified dominance by the central government may lead to a rigid hierarchy. Finally, there is the problem of the individual as opposed to the social aspect of personality. The notion of community may oppress individuality by its imposition of consensus.

A politics that responds to this threat must be one that emphasizes the transitory and limited character of all forms of group life as manifestations of human nature. Such a politics will be committed to the plurality and diversity of groups, and it will prize the conflictual process through which community is created and made universal above the preservations of any one collectivity (Unger, 1975:267).

The democracy of ends is the next category for the ideal of community. This principle establishes the

. . . replacement of meritocratic by democratic power in the ordinary institutions of society and, above all, in its occupational group. (It thus) provides the organic group with a method to formulate shared values and to ensure their pre-eminence over the life of the community . . . (Unger, 1975: 269).

while assuming deference to the individual. This notion depends, however, on the notion of community with its conception of shared values. There is, as well, the tension of the need for a small democratic group and the need for universality.

Distributive Justice

One of the standards of choice is the conception of justice. Unger opts for a distributive criterion of need which overrides the meritocratic tendency of society. It must thus respond to Unger's ideal of

sympathy. Accordingly, Unger states that the criterion of distribution by need must enhance the treatment of a person as "a being who has needs that reveal both his concrete individuality and his common humanity" (Unger, 1975:291). This is obviously an ideal since there is no self-evident content here and the ideal of sympathy must be incorporated as a sentiment if there are not to be disastrous economic consequences. Thus Unger notes that this should be a process by which merit and need are combined until other factors justify the move to the distribution of need only.

The foundation of power must be the democratic principle, according to Unger; but this, he claims, must be tempered by prudential judgment. However, efficiency must be eliminated as one of the bases of this type of judgment. There is also the problem of the relationship of the institution and society in terms of the democratic principle. Democracy must reach beyond the particular institution--groups must interact with other groups on the basis of the democratic principle. Finally there is the problem of privacy. There must be a balance between the public arena and the private one or autonomy will be destroyed. It is again the problem of the universal and particular and the relationship between the two that must be worked out.

The Division of Labor

The division of labor is the third principle embodied in the ideal of community, the organic group. This principle deals with the individual's particular good--the perfection of talents through which one affirms one's selfhood. The principle of the division of labor is the

political counterpart to the ideal of concrete individuality. It must, however, be radically changed from its traditional ties with domination. Two conditions are necessary: (a) Unger's other institutional principles must be followed; and (b) "the division of labor should be arranged so as to allow the individual to understand and to experience the connection between his particular work and the more universal ends that give it meaning"(Unger, 1975:274). To implement these conditions, Unger proposes what he calls criteria of ranking which are practical objectives.

Individuals who exercise power in one respect should be subject to power in another. The rotation of tasks can be used as a moderating device. Lastly, there may be jobs in the group whose performance is indispensable, but are generally abhorred, have little value for the development of talents, or stand at too great a distance from the ideals they serve or satisfy the aspirations of the abstract self. The group must assume these tasks as a common burden until technical progress makes them unnecessary (Unger, 1975:275).

This principle is a tempering device on specialization, according to Unger. It moves to mitigate the antagonism between differentiation and community, and, in fact, strengthens "the texture of community (into) a series of bonds of friendship" (Unger, 1975:276). There is, of course, the tension of the universal and particular in this principle as well--the tension of the abstract and concrete self.

Thus Unger's institutional principles are interrelated in the same manner as the ideals of the self. They suffer from the same tensions as well--the conflict between the universal and particular aspects of each. Finally, Unger states that they all

. . . call for a communitarian politics whose distinguishing features are the critique of efficiency, the alliance between politics in the institution and politics in the society at large, and the acknowledgment of the limits to politics itself (Unger, 1975:277).

In light of these principles, Unger's view of a society is somewhat predictable. Freedom is redefined to reflect these principles. It entails the freedom of joining and leaving groups, and the freedom to express ideas, and the freedom to work (Unger, 1975:279, 280, 281). Unger calls these liberties "a sort of constitutional charter of freedom . . . based on the very structure of the organic group and on the generic conception of liberty as the individual's power to achieve the good" (Unger, 1975:281). In this context, the state has a number of aims, which include peace and individual freedom. Unger conceives of the state as a hierarchy of associations that must develop the institutional principles which reflect the organic community. There will be, of course, some problems that must be attended to in this conception of a state--a state which must reflect a world community.

Some Dilemmas

Unger cautions against two misconceptions: (a) that this can be realized in history; and (b) that the choices faced "are really the same as those of the society it seeks to replace" (Unger, 1975:284). But these are not the dilemmas of such an ideal conception of society. The first dilemma deals with the integration of the groups. There are dangers in the conceptions of horizontal and vertical integration. The danger of vertical integration is the threat to individual autonomy:

. . . it seems that a system of vertically integrated communities could work only if there were significant restrictions on the freedom to join and leave them, (and it) keeps us from resolving the problem of self and others in our relationships to all but the persons who belong to the same group as we do (Unger, 1975:285).

Horizontal integration poses the problem of division of labor on a group level--the group is in danger of becoming too specialized which leads to the group having a role.

Another dilemma is the constitutional structure of the state. It may be too weakened at the top to be functional in nature. It may be unable to fulfill its aim of peace, thus stopping the spiral that Unger sees as a positive possibility. On the other hand, with too much authority, the state may weaken the autonomy of the groups which it includes. It would demand time and involvement of its members. It may even be an incomprehensible notion, for the concept of a group implies that it be small or it would lose the association of the bonds of friendship.

The emergence of new communities and the competition with older communities may also disrupt the notion of an organic group. The spiral that Unger perceives includes the notion of experimentation, which includes a notion of new communities but there is that danger of either disruption or stagnation.

The fourth tension is one of cohesion. Transcendence of the present is necessary, but this comes into conflict with the notion of shared values. Education may harm the cohesion, since it opens one up to new ideas, and higher conceptions of the good.

Unger states that a balance must be struck within the context of these dilemmas.

Theory can define the tensions and suggest the factors that should be taken into account in dealing with them. But only prudence can teach us what to do about them at each moment. And only practice can yield the insights needed to correct the decisions we make (Unger, 1975:288).

The dilemmas of the organic state reflect the tension between the universal and particular which is apparent in all of the tensions that Unger notes in his theory.

The community needs to remain a particular group, yet it must also become a universal one. Thus we rediscover on the larger screen of politics the same predicament of a universality at once desired and forbidden so characteristic of human love, the same irreconcilability of the universal and the particular that holds all human thought and life in its grip. It is this disharmony, diminished but never undone, that makes politics incapable of ever fully redressing the imperfections of existence and of reaching the ideal in history (Unger, 1975:289).

This imperfection is intrinsic to the character of the world and the place of humanity within it, according to Unger (Unger, 1975:291). It cannot be reconciled. Thus Unger postulates an ideal, one which can never be realized but can always be strived for, an ideal which includes a conception of the self and of the community in which the self must take part.

This ends the chapter on Unger's positive, constructive theory. The implications for medical ethics will be examined the next chapter. Unger's methodology is clear in his constructive theory. The next question is whether or not it provides a useful tool for the discipline of medical ethics.

CHAPTER V

IMPLICATIONS FOR THE USE OF UNGER'S THEORY FOR MEDICAL ETHICS

Unger's normative theory presents a bare-bones sketch of both an interpersonal ethical system and social ethic. As such, it may be a tool for the resolution of some of the issues that arise in medical ethics. While this is a possibility, it must be noted that Unger's theory is also difficult in that fine distinctions will be nearly impossible to make without developing it further. As a consequence, there is no guarantee that the speculations that will be made are actually the way he himself would choose to flesh out his normative system. Because of the complexity of the task in this chapter, the general questions under which the issues of medical ethics will be taken up will be those "tests" of an ethical theory outlined in Principles of Biomedical Ethics, by Tom. L. Beauchamp and James F. Childress: a theory to be adequate must be consistent and coherent, simple, comprehensive and reflect our moral judgments (Beauchamp and Childress, 1979:13-14). Beauchamp and Childress acknowledge that theories do not generally score highly on all of the particular aspects of this series of tests, but "we do and should appeal to them in trying to determine which elements in a theory are acceptable" (Beauchamp and Childress, 1979:13). These questions are "safe" to ask in examining Unger's normative theory since they reflect no particular "liberal" bias. They reflect the kind of questions that could be asked of any philosophical system, whether classical, modern, or "post-modern."

This chapter on medical ethics will be broken up into three parts. The first section will be an attempt to further develop Unger's ethic of sympathy so that it can be intelligibly used as a tool for medical ethics. The second section will deal with Unger's ethic of sympathy as a norm for the health-care professional/patient relationship. The issues appropriate to this relationship will be discussed in terms of the theory's ability to pass the tests of an ethical system. The final part of the chapter will follow the same format, but will be discussed in terms of Unger's theory of social ethics, focusing in on the broader issues involved in health-care delivery system.

A. Toward a Feasible Normative Theory

Unger's delineation of an ideal of sympathy as the basis for his ethical system is not, as it stands, a feasible tool for use in issues in medical ethics. There is no basis for decision making present in it as it was developed in his constructive theory. His methodology may be a key to sorting out the various components of this normative ideal so that it can, in fact, be a usable tool. After a brief review of Unger's delineation of the "virtue" of sympathy, I shall attempt to develop it in a manner which is consistent with the typological method. What then are the components of Unger's ethic of sympathy?

In the last chapter, Unger's argument for the ideal of sympathy was presented. It was noted that the fundamental basis for the moral aspect of sociability was the need for recognition as a person by others. To transcend the antinomy of rules and values, Unger postulates a way of

looking at the problem of conformity versus individuality. Part of the problem is the need for recognition in terms of a union of the universal and particular which "consists in the reciprocal acknowledgment of the universal attribute of humanity possessed by each in the particular mode of his being" (Unger, 1975:217). This notion is based on a conception of shared values rather than opposing wills, which, according to Unger, complements individuality rather than diminishes it. Unger's basis for sympathy is based on a notion of community in which the elements are complementary to the elements of love:

. . . the complementarity of wills and the capacity to give to others and receive from them the acknowledgment of concrete individuality. The sentiment that animates community and pushes beyond the borders of love is called by Aristotle philia or fellow-feeling, by Aquinas charity (though with both a supernatural and a profane meaning), by Hume sympathy, and by Comte and Durkheim altruism. Thus, sympathy names both the ideal and the affect that contributes to its realization (Unger, 1975:220).

There are a number of interwoven strands in Unger's conception of sympathy which can be drawn out. Perhaps they can form the basis for the discussion of issues which arise in the context of the health-care professional/patient relationship.

Reciprocity is a concept which seems to be an integral part of Unger's conception of sympathy. There is the notion of the reciprocal acknowledgment of the universal attribute of humanity possessed by all people. Furthermore, there is the notion of the human capacity of not only giving but also receiving an acknowledgment of the particular element of human nature--Unger's notion of concrete individuality. Reciprocity is not a fundamental principle, however. It obviously must be

understood in the context of the ideal of sympathy. Used in this way, however, reciprocity can be construed, first of all, as a mode of fulfilling the need for recognition which is the basis of sympathy.

In the context of the ideal of sympathy itself, the notion of shared ends becomes important. It is fundamental to the conception of complementarity of wills.

The sharing of values in a group may be measured with respect to the number of persons who subscribe to the same ends or standards (extension); the degree to which the common purposes are concrete enough to guide practical decisions (concreteness); the importance people attach to the shared values (intensity); and the fidelity with which those values are followed or displayed in the behavior of the individuals who acknowledge them (adherence). . . .

. . . Shared values carry weight only in the measure to which they are not simply products of dominance. Yet domination and autonomy have no self-evident meaning. To be dominated by another is to be subject to his unjustified power. Thus, to define domination one must be able to distinguish the justified and the unjustified forms of power, and to trace the true limits of autonomy. This requires judgments that have to rely to a greater or lesser extent on our established moral institutions and practices (Unger, 1975:243).

The conception of complementarity of wills leads into another strand of Unger's conception of sympathy--autonomy. The manifestation of this concept in Unger's theory of sympathy is the individual's need to be separate from others, the person's individuality. In the context of the individual's need for recognition from others as an autonomous being, it is the acknowledgement by others of one's particularity as a mode of the universal human nature.

These three interwoven strands of sympathy--reciprocity, shared values through the complementarity of wills, and autonomy--can form the basis of a way of dealing with the issues related to the health-care

professional/patient relationship. In this context, tests of consistency, coherence, simplicity, comprehensiveness, and continuity of our moral judgments can be used.

B. The Health-Care Professional/Patient Relationship:

Sympathy as the Normative Aspect

The basis for the health-care professional/patient relationship is the restoration or preservation of health. Sometimes, in the context of this, the relationship seeks to save lives of human beings. Broadly speaking, then, there is a shared value in the preservation of life and health which precipitates the health-care professional/patient relationship. Health and survival are goods in this sense. In fact, Unger notes that if one attempts to list universally shared values, the only two that can be consistently enumerated are these two goods (Unger, 1975:241). In the context of Unger's theory of the good, health and survival promote the species nature through the continuation of allowing for the development of the capacities of individuals. The questions which should be asked about these goods, according to Unger, would consist in how these goods are distinctive in the choices made to attain them and which can reflect the universal and particular elements of human nature. Here the basic question is: how can the elements of sympathy--reciprocity, shared values and autonomy of identity--operate in the context of the health-care professional/patient relationship in order to achieve the goods of health and survival? A number of questions follow from this; the answers to these questions may give answers to the tests of an ethical theory.

A basic question is this: are health and survival always concomitant goods? When preservation of health is impossible, as in the case of terminal illness, should survival still be considered a good to be strived for? The answer to this basic question and its correlate should be implicit on the ideal of sympathy. The issues of the health-care professional/patient relationship implied by this question include: informed consent and refusal of treatment. There are other issues involved as well. Some of these will be considered under the guise of these broader issues; others, for the sake of brevity, will not be addressed at all.

Informed Consent

Concerning the question whether health and survival are concomitant goods, the issue of informed consent is fairly simple with regard to shared values. The health-care professional (HCP) and the patient both share the values of the restoration and/or maintenance of health as well as of survival so that the capacities of that patient can continue to be developed (or can be restored so that the capacities of that patient can continue to be developed). This strand of sympathy is not unnecessary, however. At the very least it serves as the source of background assumptions that operate in the HCP/patient relationship. This becomes obvious if the end(s) of the patient and the HCP are, in fact, different. Perhaps the patient's goal is relief from pain when the illness cannot be reversed. If the HCP fears that more pain-killers will cause addiction, and furthermore, wants to take aggressive action to slow the course of the illness, there may be a conflict of values. (This issue,

however, is better avoided until the problem of refusal of treatment is taken up.) As it pertains to informed consent, however, sympathy's strand of shared values can be assumed. It then is reflected as a relevant consideration in decision making in terms of the other two strands of sympathy--autonomy and reciprocity.

Beauchamp and Childress note four necessary components of informed consent: (a) disclosure, (b) comprehension of information, (c) voluntary consent, and (d) competence to consent (Beauchamp and Childress, 1979:67). Competence, they claim, is more of a precondition to consent. They define competence as follows: "a person is competent if and only if that person can make decisions based on rational reasons" (Beauchamp and Childress, 1979:69). For the sake of simplicity in this delineation of the issue of informed consent, I will assume that the patient is competent. Thus I am assuming, along with Beauchamp and Childress, that

. . . this standard entails that a person must be able to understand a therapy or research procedure, must be able to weigh its risks and benefits, and must be able to make a decision in the light of such knowledge and through such abilities, even if the person chooses not to utilize the information (Beauchamp and Childress, 1979:69).

Reciprocity and autonomy are the primary aspects of the other three components of informed consent. In a consideration of disclosure, autonomy places the focus on the patient. It is that person who needs the information so that the decision about the course of health care can be made. Reciprocity is the more general strand of decision making in the medical context. In the standard case of disclosure, the HCP recognizes the patient as a particular mode of universal human nature and affirms that being of the other by sharing the information relevant to a rational decision regarding the manner of health care by the patient.

There may be cases in which the "benevolent" withholding of information may be an application of reciprocity. For example, a very sick person may go to a physician with the suspicion that s/he may have a terminal illness. S/He may then say to the HCP: "Look, I simply do not want to know it if I have cancer and am going to die in the next six months." The HCP should certainly discuss this with the patient but if s/he is convinced that this is truly the wish of the patient, a case might be made for the benevolent withholding of information. This is simply an issue that I do not want to confront. At any rate, the procedure for resolution of this case will be similar to the resolution of the issue of waiver of disclosure. I would maintain that in the standard case, however, reciprocity as an interwoven strand of sympathy generally affirms the autonomy of the patient.

With regard to comprehension of information, the issue of informed consent can become more complex in terms of the elements of reciprocity and autonomy. Indeed, the appeal may have to be led back to the normative ideal of sympathy in all of its complexity. Comprehension is not defined as the ability to comprehend all of the medical information relevant to a decision, according to Beauchamp and Childress. As long as the information is adequate for a decision, it is acceptable.

This position is based on an inadequate view of so-called "full disclosure." So long as one clings to the ideal of complete disclosure of all possibly relevant knowledge, such claims about the limited capacity of subjects will be given credence. But if this ideal standard is replaced by an acceptable reasonable-person standard, there should no longer be any temptation to succumb to (this) form of pessimism. From the fact that we are never fully voluntary, fully informed, or fully autonomous persons, it does not

follow that we are never adequately informed, free, and autonomous (Beauchamp and Childress, 1979:77).

Instead, Beauchamp and Childress pose this issue in terms of the refusal of the patient to receive more or any information, i.e., waiver of disclosure. (Or these people may refuse to use the information given in terms of their decision making.) Here autonomy and reciprocity clash. The issue is complex because if such information is forced on the patient, that person's autonomy has been violated; on the other hand, accepting this waiver of disclosure or of consent may play into the inordinate amount of trust placed on the HCP, "and the general recognition of waivers of consent in research and therapeutic settings could make patients more vulnerable to those who would use far too abbreviated consent procedures merely because they are convenient" (Beauchamp and Childress, 1979:78). This plays into Unger's concern with domination, the use of unjustified power. The question here is: can Unger's notion of sympathy give any answers to this dilemma? Certainly adequacy of information as the standard for comprehension is not problematic. The ideal for that notion is the same as the procedure outlined for disclosure. It is the issue of waiver of consent that must be confronted here.

Perhaps Unger's conception of evil can be considered as a starting point for the solution to this dilemma. Unger's conception of evil is as follows:

It sees evil as the deprivation that consists in a failure to move ahead in the spiral of domination and community. The mark of evil is the acceptance of a certain form of personal existence as complete in itself or of a particular kind of social life as the ultimate achievement of the race (Unger, 1975:246-247).

In terms of this, the patient who waives consent could be considered as a person who has chosen an evil course of action, that is, the patient has given up individuality and placed the burden of decision making on the HCP. By exercising autonomy as separate from the other strands of sympathy, the notion of reciprocity is abrogated. The HCP may refuse this burden, and force autonomy (a contradiction in terms?) back on the patient by refusing to continue the relationship unless the patient participates in their shared pursuit of the end of health/survival by taking part in the decision making. This end may not be jeopardized, but the patient has not lived up to his/her responsibilities in the HCP/patient relationship. This simply will not work. If the relationship is terminated on this basis, the patient moves on to the next HCP and the dilemma is repeated. Eventually the situation will have to be confronted. Furthermore, forced autonomy seems contradictory. One is denying the autonomy of the individual in her/his choice so that one can affirm it in the choice of alternatives in her/his preservation/restoration of health. Such a notion violates not only our considered moral judgments in the use of Unger's theory but also the coherence of the theory--two of the tests of an ethical system.

The other alternative--the HCP taking responsibility for decision making when consent is waived--also is problematic in terms of the notion of evil as delineated by Unger. It has already been noted that this course of action leads to domination. It represents a failure to move along the spiral of domination/community. True, such a course of action enhances the good of health/survival, but it does so at the cost of reciprocity. The patient thus becomes a means to the furtherance of

this good. Since the HCP taking responsibility for decision making has little effect in many elements of health-care decision making, it might be acceptable in many cases. But what about the decisions in which the comprehension of the courses of action is vital to the higher good of restoring or maintaining the patient's ability to develop her/his capacities? For example, what if one treatment, with a low rate of success and the risk of impairment of a capacity vital to one's work, has a better total outlook for full recovery than an alternative treatment with a better rate of success and less risk of impairment of that vital capacity, but has a poor outlook for total recovery? How can such a choice be made without reciprocity? Here total health is risky; limited health, on the other hand, insures the patient of the continued development of her/his capacities--but with constant health problems. The only person who can make that kind of choice is the patient. For the HCP to make that decision without adequate knowledge of the patient is to deny the particularity of the patient. The problem may be mitigated if the HCP and the patient have discussed the patient's goals and values--but if there is no agreement between them, the problem simply arises again. Thus either alternative looked at in terms of Unger's notion of evil is intolerable. Perhaps then, sympathy as the complex norm consisting of the interwoven strands of autonomy, shared values and reciprocity can find a way out of this dilemma.

Sympathy is dependent on the shared ends for the achievement of concrete individuality and the complementarity of wills which consists of the capacity to give and receive from others that needed recognition

as a person. Viewed in this manner, the HCP affirms the personhood of the patient by striving to share the necessary information in order for both of them to come to an adequate understanding of the patient's condition and so that they can mutually take part in the decision-making process. The patient, on the other hand, chooses to waive the process, trusting in the HCP to make the right decision because of their shared end of restoring health or maintaining it. The only way in which this dilemma can be resolved, then, is for the patient to contribute information about her/his capacities which are being developed, and about her/his priorities and attitudes regarding the risk to the functioning of those capacities, percentage of success and outlook for total recovery. This at least allows the HCP to make an adequate decision. There is, however, an additional factor which must be considered. The HCP must never assume that consent is continuously waived in terms of comprehension of information. That would be a violation of the strands of autonomy, and especially of reciprocity. S/He must continually check to see if that condition still prevails. A patient may waive consent in terms of diagnostic procedures but may want to participate in the decisions to be made in light of that diagnosis. Or that patient may waive consent for a (specified or unspecified) range of minor procedures, but want to participate fully in decisions which will have a major impact on her/his life.

This solution to the dilemma fits the criteria of coherence and consistency. It is also relatively simple as well as being somewhat comprehensive. Does it reflect our everyday moral judgments as we perceive them? Generally, yes. But there is, perhaps, a sense of unease in two

respects here. In terms of the problem of domination, a consistent pattern of patients who waive consent on all issues of health care can reinforce the pattern of domination. A change of attitude on the part of people in general is needed in terms of their apprehension of the health-care professional. Somehow our awe of the white coat must be tempered. Health-care professionals must take part in the removal of this unwarranted sense of awe or otherwise reciprocity and autonomy cannot ever be affirmed as positive values. The relative weight of the power balance will be too unequal. The other source of unease is that this solution places too much of a burden on the HCP.

S/He must not only bear the burden of decision making, but must also continually check back to see that the situation remains the same. The only answer that I can give in response to this is as follows: If the patient refuses the responsibility of sharing the burden of making a decision about his/her own health care, that decision must still be made. It is better made in the light of relevant information about the patient from the patient than without it. The burden of checking back to see if the waiver is still in force is a positive way to continue to affirm the autonomy and the reciprocity inherent in the ideal of sympathy in light of the shared end of health.

The final condition of informed consent is voluntariness, which is defined in the context of this issue as "exercising choice about an action free of coercion or undue influence by another person" (Beauchamp and Childress, 1979:81). Two notions are considered here: coercion and undue influence. Beauchamp and Childress make the following distinctions:

Coercion occurs when one person intentionally uses an actual threat of harm or forceful manipulation to influence another. The harm could be physical, psychological, economic, etc. By contrast, undue influence occurs whenever someone uses an excessive reward or irrationally persuasive technique to induce a person to a decision the person might otherwise not reach (Beauchamp and Childress, 1979:81).

They contrast these two concepts with the notion of

. . . mere influence or pressure to make a decision. We almost always make decisions in a context of competing wants, needs, familial interests, legal obligations, persuasive arguments, etc. Many inducements will thus be pressures but not unduly influential ones--though no sharp boundary line can perhaps be drawn in some cases between pressure to decide and undue influence (Beauchamp and Childress, 1979:81).

They note in light of this distinction that consent may be valid under situations of pressure--and that it may be voluntary as well.

There is little problem with Unger's ethic of sympathy and the notion of voluntariness as an aspect of informed consent. One of the major themes of Unger's books is the unjustified use of power, i.e., of domination. Coercion and undue influence both constitute variants of domination. By using Unger's ideal of sympathy (through the use of its three interrelated strands--autonomy, reciprocity and shared values), this can be stated more positively: reciprocity and autonomy interact in the HCP/patient relationship in the context of the shared value of the preservation of the health of the patient. Thus the affirmation of the condition of voluntariness affirms the spiral of domination into community. The elements of sympathy function to reduce dominance when voluntariness is affirmed.

Informed consent is thus intelligible under the delineation of Unger's ideal of sympathy. The most difficult factor up to this point

has been that of comprehension in waiver of consent. The theory is coherent. One can intelligibly discuss and make moves consistent with the theory to resolve some problems. It is relatively simple--but perhaps not as simple as some ethical theories used in medical ethics. Three interwoven strands have been identified in Unger's conception of sympathy. Sympathy's relation to the good is not unduly strange, or complex. The theory also comprehensively deals with the conditions that make up informed consent. And, for the most part, there is no implication inherent in the notion of sympathy that offends our considered moral judgments. However, no hard cases have been presented to test this notion. For simplicity's sake, the notion of competence has been side-stepped. The next issue, however, does deal with some of those hard cases, e.g., the refusal to give informed consent after all other conditions of consent have been met.

Refusal of Consent

Refusal of consent can bring up the issue of the conflict of the values of health and survival. Here the issue of treatment to prolong life when recovery (reattainment) of health is impossible becomes relevant. On the other hand, religious values may prohibit certain treatments. Thus health and survival may both be attained but only at the cost of the abrogation of those religious values. An example here is the relatively common case of a Jehovah's Witness refusing blood transfusions, even as a life-saving technique. Another issue is the treatment of a new life-threatening illness when one already has a terminal illness. An example of this would be a terminally ill cancer patient

who develops pneumonia. Treatment of the second life-threatening disease may be refused on the basis that a relatively quick death by pneumonia would be a merciful end to an otherwise debilitating process of dying. In all of these issues, the sharing of values is a primary problem. Out of this problem, the elements of reciprocity and autonomy may no longer interact harmoniously.

Unger postulates an ideal of the sharing of values which is an important component of his conception of community. These values can be measured through a determination of extension, concreteness, intensity and adherence. The question to be asked is "under what conditions (human beings') choices might inform us more fully about what is distinctive to each of them and to mankind as a whole" (Unger, 1975:242). In assessing the answer to this question, Unger notes two "master criteria."

The first is the measure of success achieved in disentangling our ethical or political views from inequalities of power. The second is the continuity of those views over space and time. The former criterion is empty without the latter. The latter is dangerous without the former, for it threatens to enshrine the interests of the powerful and to deny the chance of moral progress (Unger, 1975:245).

Perhaps these criteria delineated by Unger can help resolve the conflict of values in the issue of refusal of treatment in health care delivery.

A cautionary note is necessary here. One cannot go into Unger's ideal of community to find the answer that, in terms of the HCP/patient relationship, one can assume that both the HCP and the patient are members of the same community, thus their values will converge. If Unger's theory is to have any relevance at all to issues in bio-medical ethics, today's situations must be taken into account. Furthermore, on a

systemic level, a spiral of domination and community as envisioned by Unger can only take place by working through issues like conflict of values in the context of Unger's theory--i.e., by applying his criteria to see if they are manageable and to see what, if any, values are generally shared in present-day society. The issues are complicated in medical ethics because of the technological advances of the bio-medical sciences. Prior to these advances, prolongation of life in the case of a terminal illness was virtually impossible. Blood transfusions were risky before the sophistication of cross-matching made them a relatively safe and useful process; thus, the issue was not one that presented itself to Jehovah's Witnesses very often until recently. As a result, the conflicts of value experienced today are relatively new issues. Prior to the present time we did not have to investigate our conflicts which, because of our lack of technology, were relatively non-existent.

Before investigating some of these value conflicts, another consideration must be taken into account--Unger's theory of the good. Our considerations of these conflicts should result in an affirmation of Unger's theory of the good, rather than conflict with it. Thus if I am consistent in adhering to Unger's criteria in assessing the answer to the question raised for the determination of value, the results of these determinations must reflect Unger's theory of the good. This requirement is imposed by the criterion of consistency.

One of the deepest value conflicts that has arisen in medical ethics is that of the value of survival. Under normal circumstances we take this value for granted. In the conflict situations that I delineated, however, it is obvious that survival is not considered to be a

value which we do accept unreflectively. Indeed, the literature of medical ethics is replete with suggested solutions to this value conflict. Rather than pose this issue in terms of killing/letting die, or in terms of refusal of treatment, etc., I am going to investigate the underlying issue which gives rise to these conflicts--the intrinsic worth of a human being which is inherent in the very notion of one's humanity versus the notion that a human being by her/his very nature is a being capable of free and rational choice, and thus should have the capability to determine whether or not one's life situation can warrant the continuation of that life. This is the old debate between reverence for human life versus quality of life considerations with autonomy mixed into the latter. I have posed the debate in the longer version because each version has the qualities which are relevant to Unger's theory. Indeed, Unger's delineation of human nature contains both facets of this debate. Now this issue should be set up in terms of Unger's question which is: Under what conditions might human beings' choices about the reverence for life as opposed to the quality of life inform us more fully about what is distinctive to each of them and to humankind as a whole? This question must now be investigated using Unger's criteria for assessing value questions. The measurement of these values will be a useful tool in that context.

Little can be said about the number of persons who subscribe to one or the other position in the debate (extension). The Roman Catholic Church, for example, is thought to follow the reverence for life position, but their distinctions in terms of double effect, killing and

letting die, and using ordinary versus extraordinary means to preserve life certainly limit their adherence to such a view (see Appendix A, #6). Physicians and other health-care professionals are just as divided on this issue. Some would "pull the plug"; others would not connect in the first place, but would not pull the plug if it were in fact connected; others would not even consider anything but aggressive treatment (see Appendix A, #7). Philosophers are also divided on this issue. Beauchamp and Childress even go so far as to support autonomous suicide in support of the quality of life side of the issue, although they back away from the handiness of such a phrase used as a slogan (Beauchamp and Childress, 1979:82-95; 105-131). Beauchamp and Childress discuss both sides of this issue. They also provide invaluable discussion of recent literature about this debate. Yet considerations of extension take us no further than the fact that there is definitely a debate going on concerning this issue. The problem is that this approach of measuring the values may clearly point out the sides that people have taken--and the debate may be exacerbated in terms of the other determinants of measurement. Thus another way of discussing this question is needed.

Unger gives a hint to a way of defining the problem of conflict so that there can be some resolution. He states:

The more shared values emerge from a process in which what some men want is predetermined by what others have desired, the less may we rely on the resulting convergence to infer something universal about mankind. Because of the fact of domination, moral agreement is often little more than a testimonial to the allocation of power in the group. For moral union to be representative of the species nature, it must arise from conditions of autonomy (Unger, 1975:243).

Thus the element of autonomy of the ideal of sympathy may be the key to the investigation of the conflict of values.

Autonomy of the patient is the primary factor in the conflict of values. If the autonomy of the HCP were to be considered as primary, the issue of dominance would continue to haunt the discussion. I have already alluded to the "power" inherent in the white coat in discussing informed consent. Unless the power inequality of the HCP/patient relationship were to change radically, to consider primarily the HCP's autonomy would increase the problem of domination incredibly. Despite the HCP's who would argue for the "quality of life" position, too many HCP's take the precept, "Do no harm," to support a "reverence for life" position. When this precept is tied into a belief of the intrinsic worth of a human being in virtue of the very nature of that humanity, the "reverence for life" position can mean saving a person's life regardless of whether that person wants her/his life saved. This is a case of dominance that is unjustified in Unger's system unless the basic position can be justified in the context of Unger's conception of shared values. Furthermore the autonomy of the patient is denied because the values of that person are denied as irrelevant. Finally, if the autonomous values of the patient were in express contradiction with those of the HCP (with the disclosure of such value conflicts at a given time allowing for change), the patient could change to a HCP who shares the same values. "It seems that, short of the spiraling evolution, we can't know which value is consistent with the species nature according to Unger, but one can say that given the situation we are in, the need to avoid dominance is paramount" (see Appendix A, #8). Thus the patient's autonomy

is of first concern. Because of this, in value conflicts between the HCP's and the patients, the autonomy of the patient serves as the basis of determination whether a value is consistent with the species nature of the individual and of humankind as a whole.

This leads to a problem. How is Unger's ethical theory superior to the "liberal" theories that he criticizes as bifurcated and leading into the antinomies of rules and values? We have been led, because we cannot know which value is consistent with our species nature, to choose autonomy as the primary value. Why? Of the interwoven strands of sympathy, the strand of shared values is at the present time only an ideal. The actual situation in our world is one of pluralism--and that includes pluralism of values. Reciprocity cannot be the primary strand either. It has been shown that the problem of dominance in the medical situation limits the weight of this strand. Hence we are left with autonomy--autonomy of the patient--as the primary strand of Unger's conception of sympathy. Yet issues of autonomy are problematic here as well. It will be seen shortly that these issues can only be given a chance for solution if one makes an appeal to Unger's theory of the good. Even then, it will be obvious that the exercise of autonomous choice by the patient may violate the conception of the good. (See the case of the dancer faced with amputation on page 124. In this case, the intuitive solution would be forced amputation--i.e., a violation of that person's autonomy.)

The primary problem is the conflict of values. The solution is to balance the strand of autonomy by reflecting it against Unger's theory of the good. This leads to a methodological dilemma. By doing this, am

I not fragmenting Unger's conception of sympathy by separating the interrelated strands and treating them as liberal "elements"? Yet, there seems to be no other choice if there is to be a solution to the dilemma. It thus seems, that if one of the strands of sympathy is the focal point of an ethical dilemma, the primacy of another strand forces one to go out of the ideal of sympathy to the theory of the good which results in the same fragmentation of this ethic as in liberal ethical systems. We shall see now if the move to the theory of the good does lead to this dilemma.

There are some patients who would choose life at any cost: others would opt for "autonomous suicide" if their life situation reflected a future that was devoid of positive expression of their humanity. Therefore, it is perhaps best to analyze Unger's conception of the good to see which of these determinations or something in between would be consistent with that conception. Concerning this, a number of questions can be asked.

First of all, does the value of survival always reflect not only the species nature of humanity but also the particular good of the human being in question ("the development of the unique set of talents and capacities through which the species nature of mankind takes a concrete form in him" (Unger, 1975:239)). In terms of the universal good, the perfection of the species nature of humanity, survival must be considered as one of the primary values, if not the primary value, for Unger states in terms of this universal species nature:

. . . Instead it starts out from the idea that the distinctive experience of personality is that of confronting a certain set of intelligible, interrelated problems that arise in one's dealings with nature, with others, and with oneself. Insofar as both the problems and the ideal ways of responding to them are continuous in space and time, one may speak of a human nature and of a universal good. But continuity does not mean permanence (Unger, 1975:240).

Offhand, I cannot think of a value which would conflict with the survival of the universal, the species nature of mankind. Furthermore, although the individual must embody the species nature, the focus here is on the particular good. What, then, about the particular good of the particular person? Looked at in terms of a value of survival of the individual, the answer is relatively clear. Survival of the individual can be a primary value only insofar as it affirms the unique set of talents and capacities which are embodied in that particular individual. From this, one could argue that in quality of life situations, the individual (the patient) may express autonomous choice to refuse treatment, to discontinue treatment and even of autonomous suicide if the continuation of her/his life precludes the development or redevelopment of the unique set of talents and capacities which are embodied in her/him as a concrete form of the species nature of humanity.

Now this argument must appeal to the total set of talents and capacities that the individual has. For example, one could be a dancer and lose a limb. Autonomous suicide would not be an acceptable course of action in this case, because other, undeveloped talents and capacities must also be taken into account. Suppose that this dancer has, as one of her/his capacities, the ability to be a choreographer. To choose suicide or to refuse treatment of the limb which must be removed

(in this case, surgery), when one can still develop one's particular talents and capacities, would be to deny one's embodiment as a member of a species that has a universal aspect of human nature as well.

Thus, perhaps there would be many who would state that this is a case of justified dominance by saying that the amputation is the only moral action to take.

The answer given to this question of survival must now be investigated in those situations in which the decision to refuse treatment, to discontinue treatment, or to commit autonomous suicide is allowable or justifiable. Again the argument must consider the set of talents and capacities possessed by the individual. First of all, that individual must be aware of those capacities and talents. S/he must know with some certainty when one's future possibilities do not allow for the development of those talents and capacities. The element of reciprocity must play a role in this, for the individual perceives the self in terms of the need of recognition from others. Thus the individual must be open to the reflections of others with regard to those talents and capacities. In light of this, one may have to accept a form of treatment in order to test out the reflections of others regarding one's talents and capacities. However if this is to be relevant, the wishes expressed in the original assessment by the patient must be affirmed if the treatment goes afoul. Thus it may have to be discontinued if that is the expressed decision of the individual based upon reflection.

In a terminal illness, the decision of the patient to refuse treatment, to discontinue treatment or even to suicide is a viable autonomous choice. It is rather demeaning of that person's concrete

individuality to demand that this person choose otherwise. The individual is a finite being. To deny that is to commit evil in the context of Unger's delineation of evil. These considerations are enough, I believe, to warrant the following conclusion. Quality of life considerations, if made in the context of Unger's notion of the good of the individual, are relevant and override the value of survival in certain situations. Now we must test this conclusion against Unger's criteria of assessment of values.

In terms of the measure of success that can be achieved in delineating the ethical issues in the conflict between the reverence for life and quality of life considerations, the use of Unger's theory has been rather successful. Power considerations were taken into account; in this context, the autonomous choice of the patient was given primacy, since at this time, the power is balanced in favor of the HCP. Furthermore, the conceptions of the good and the use of the element of sympathy--autonomy--were consistent with Unger's delineation of the concepts. A basis for decision was reached by appealing to quality of life considerations. It is limited, but useful.

In terms of the tests for an ethical system, this attempt at deriving a basis for a shared value has had some success. In one sense, it is obviously consistent. Once the basis was derived, the method is relatively simple in the use of the steps which must be taken. However, the question of methodological consistency has arisen. Because of the conflict of values--a problem in the strand of shared values--only one strand can give us the basis for decision making. Sympathy can no longer function as the last resort for ethical solutions. An

appeal must be made to Unger's theory of the good. Now this is acceptable if and only if sympathy as a whole, i.e., composed of all three interwoven strands, can be reflected on the theory of the good to test consistency in moral judgments. Here we have given the strand of autonomy primacy. This could not be avoided because of the conflict in the strand of shared values and the problem of dominance in the strand of reciprocity. As a result, the ideal of sympathy was fragmented. The conclusion, then, seems to be that Unger's own theory cannot always be applied with methodological consistency. It is thus legitimate to ask whether this theory is really superior to the liberal theories of ethics which he criticizes as bifurcated and as leading into unacceptable antinomies. I do not choose to argue for an answer to this question. It is enough for the purposes of this paper to point out that the application of Unger's theory has many of the same problems as those which he criticizes.

Comprehensiveness cannot be tested completely for I have not tested this conception of value in the contexts of incompetence and of immediate life-threatening situations. (For the sake of brevity, these aspects must be part of an unfinished agenda for medical ethics.) Finally, in terms of our considered judgments, this delineation has had limited success. Those who adhere to the principle of reverence for life may come to the same conclusions that I have, but they would not find them acceptable in terms of their own considered judgments. Those who value the quality of life considerations may find these considerations too limited. The result of these tests is, on the whole, positive. Given flesh by using actual issues, the meagerness of Unger's

theory can be enriched. Decisions can be made that are relatively consistent and simple. Comprehensiveness has not been fully tested, but, at least in the clear cases, some decisions have been able to be delineated. The test of considered judgments may be one of the weakest aspects of Unger's theory in this time of cultural and value pluralism.

In terms of Unger's second criterion for assessing value determinations, the continuity of such values over time and space, the result of these deliberations of value is yet to be seen. The issue, as I noted earlier, is a relatively new one. If trends have any relevance at all, the following conclusion can be made. The issue of quality of life considerations became relevant in the context of technological developments in the biomedical sciences. As these have continued to increase, the issue has become an open debate. Concepts like the Living Will have been introduced to give a basis for these considerations. It may be, on this account, that the changing nature of the world we live in has an impact on the values that we hold. A value that was acceptable in a time of little technology may no longer be acceptable. Thus one can tentatively state that this criterion of assessment is satisfied for quality of life considerations.

These conclusions lead me to the end of this section on the implications for medical ethics in Unger's theory, the section dealing with issues that arise in the context of the HCP/patient relationship. What has been accomplished? First of all, in the previous section, Unger's ideal of sympathy was given a content which allows it to confront the tests of an ethical theory so that it may be applied in medical ethics.

There is no claim here that this is the most adequate theory that can be used; there is only the claim that it passes the tests of an ethical theory adequately--at least for the issues which have been considered. Secondly, the methodology has been worked out to delineate the basis for possible shared values. Yet it has also been shown that the application of this methodology leads to fragmentation of the ideal of sympathy when one of its interwoven strands is the focal point of controversy. However, conclusions can be reached within his system, conclusions which affirm his conception of the good. In both cases of medical ethics, it was shown that flesh can be given to Unger's theory without damage to the content, i.e., conclusions can be reached--but only with damage to the methodology. Admittedly, there is still much to be done, but the purpose of seeing whether implications for medical ethics can be drawn out of such a theory has been accomplished. By doing this, I have shown that Unger's theory can be approached by the discipline of medical ethics. It thus implies that other disciplines can develop and test aspects of it with interesting results. Now it is time to move on to the last section of this chapter on the implications for medical ethics: the implications for use of Unger's theory for a social ethic to deal with health-care delivery systems.

C. Health-Care Delivery Systems: A Question of Distributive Justice

I am limiting this part of the section to Unger's conception of distributive justice and its implications for medical ethics. Part of this

is for the sake of brevity, part due to my belief that this may be the most troublesome aspect of Unger's theory in terms of its applicability to problems of health care. The first step in this analysis will be a brief review of Unger's argument for his principle of the democracy of ends. Then a notion of distributive justice will be delineated by using Unger's theory and its relation to his conception of the good. Again, the Beauchamp-Childress tests of an ethical theory will be applied. From this exercise, some conclusions may be reached about the implications for medical ethics for the norms that develop within the context of Unger's theory.

Briefly, the principle of the democracy of ends seeks to attain democratic power in the institutions of society. An inherent part of such a conception is the conception of justice; and Unger favors distributive justice in terms of the criterion of need. Justice, however, must not only conform to the ideal of sympathy, it must also enhance and be consistent with Unger's theory of the good. Thus it entails implications for the individual as well as the organic group. There are, of course, the continual tensions between the universal and particular in the democracy of ends, as in all ideals and principles in Unger's theory. The focus, however, is on the notion of justice that emerges in the context of this principle.

Unger sets the issue of distribution against the issue of equality. His brief examination of the history of this concept notes that there has always been inequality, first the natural inequality of strength, then the social inequality based upon one's origin of birth, finally,

the natural inequality of talents and capacities. Concerning this condition of inequality that has ranged through history, Unger states:

Because of these differences in capacity, our political purposes are constantly in danger of defeat by the caprice of nature, which threatens us with a world of irremediable inequality and unquenchable envy. . . .

As long as men are rewarded according to their productive capacities, the distribution of goods will continue to reflect the same inadequate ideal that underlies meritocratic power and the association of roles. Hence, the main problem of distributive justice for the organic group is the discovery of a standard of distribution that might override the natural inequality of talents just as the democratic principle disregards this inequality in the assignment of fundamental powers of participation (Unger, 1975:271).

Unger then states that rather than productivity, it is the ideal of sympathy with its social implications which leads to the solution of the problem of justice:

. . . (T)he theory of the self teaches us that interdependence is an intrinsic part of individual personality: the form of our individuality is determined by the character of our sociability. A person manifests his own nature by the particular way he needs other human beings. Thus, there must be a universal as well as particular needs in the same sense that there is a universal and a particular human nature. The distribution of benefits could therefore only respond fully to the sympathetic ideal by treating man as a being who has needs that reveal both his concrete individuality and his common humanity (Unger, 1975:271).

Because of the possibility of ruinous economic effects, however, Unger notes that at first the meritocratic criterion may have to be balanced with the criterion of need in an approximation of distributive justice. In affirming the theory of the good, the "democratically chosen ends come closer to showing man's species nature, and individual capacities are realized more completely" (Unger, 1975:272). This enhances the spiral that arises from domination to community.

Now, the basic question regarding available health-care delivery systems and those that should be instituted is related to the concept of need. Since we live in a society in which meritocratic concerns still play a major role in health-care delivery systems, the criterion of need must be approached cautiously. Furthermore, although the predominant health-care delivery system in this country is based on the concept of fee for service, there is generally some form of indigent care available. Is this system of health-care delivery adequate? The answer to this question is based on a prior question, one that must be formulated in the context of Unger's theory of the good and of the criterion of need as an approximation of distributive justice. Unger hints at the formulation of that question. He states (in terms of the juxtaposition of merit and need at first):

. . . And as it defines the basic needs that ought to be satisfied independently of capacity or effort, it should do what it does when it begins to define domination: to look for the most tangible and most widely recognized. Their satisfaction will then be treated as an absolute entitlement (Unger, 1975:272).

With this in mind, the basic question can now be formulated: Under what conditions might a human being's choices about the distributive criterion of need regarding health care and its delivery inform us more fully about what is distinctive to each person and to mankind as a whole? Now, since the question is formulated as a parallel (this is justified by Unger's own parallelism in dealing with these issues) to the earlier question of the determination of shared values, the method of answering this question will also be similar. Also, since distributive justice is based on the ideal of sympathy and on its consistency

with Unger's theory of the good, the same moves can be made as in the earlier effort to determine a possible resolution to conflicting value. Because Unger refers us to the problem of domination in this case as well, and because the ideal of sympathy is, in a sense, prior, the conditions of autonomy are again relevant. Here, however, autonomy must enhance the distributive criterion of need.

Because of this, we must begin by investigating the limitations of autonomy on the individual if basic health care needs are not provided. We cannot investigate how the average person is affected by a health-care delivery system. We must look instead at those who benefit the least from existing systems. This move is justified because the problem of domination points us to those people who receive the least benefits from the health-care delivery system; thus their autonomy is threatened the most. For the sake of brevity, only the peculiar mix of fee for service and indigent health care that exists in our country will be examined. Further, rather than focusing on health care for the indigent (which is minimal to be sure), I will focus on that individual who just makes enough money to be disqualified from receiving health care on the basis of indigency.

Many people fit into this category--the elderly, day laborers and their families, and many others. Now some, if not all, of these people have some supplement to their income for their health-care needs, but enough of their own income must be used so that a hardship is imposed on them. As a result, access to the health-care delivery system is limited. It just costs too much. As a further result, the autonomy of

the individual is impaired. The dominance of the middle class and upper classes is asserted in that they receive needed health care and are thus able to develop their talents and capacities to the fullest extent. People of marginal wealth and power may be forced because of financial concerns to stay away from the health-care delivery system when a genuine need exists. Poor health, as a result of poor and inadequate health care, does not allow development of their talents and capacities to the fullest extent. Unger's theory of the good obviously has implications about this.

Continual unjustifiable domination flattens out the spiral of decreasing domination towards community. The concrete individuality of an individual is not allowed to be expressed. To use Unger's theory of the good one can state that the development of talents and capacities is suppressed in those people who are the victims of unjustified power. The species nature, the universal element in Unger's theory, is also denied. The embodiment of the species nature of humanity in the individual as a universal good is reflected in the spiral of domination toward community. When unjustified domination flattens out that spiral, the species nature of humanity is denied.

From these considerations, two conclusions may be drawn. First, health care is a basic need of human beings: it must be accessible to all. Secondly, accessibility, however, is not enough. The quality of health care must be at a level which allows for the development of the talents and capacities of all individuals. Now the next problem must be faced: how basic is this need? Is it basic enough to overrule the

meritarian concerns which must temper the criterion of need to prevent economic chaos which may result as a consequence of imposing the criterion of need as an absolute? My intuitive answer is yes. This intuition must be shown to be feasible. In order to do this, the societies that have gone from fee for service to a variant of socialized medicine must be examined to see the effect on their societies. How much merit can mitigate the criterion of need is a matter for prudential reasoning. Unger states this best.

The decision about which matters to subordinate directly to democratic choice and which to have decided by individuals selected for their special capacities cannot be settled in a permanent and general way. Like the issues of the size and specialization of the community, it must be resolved by prudential judgment (Unger, 1975:273).

Unger notes that prudence has standards to go by, but one standard is not nor can ever be efficiency for efficiency re-affirms dominance, according to Unger.

These issues, however, may be set aside. The arguments for a health-care delivery system parallel those on health-care issues if Unger's methodology is to be followed with any consistency. Hence, a solution can be derived that displays adequacy when faced with the same dilemma: fragmentation of the ethic of sympathy when constructing the arguments for an adequate health-care delivery system. Thus we continue to be faced with a choice: either a solution to an ethical dilemma--but with fragmentation of the ethic of sympathy--or no way to reach a solution to the ethical dilemma itself.

There is, however, one interesting result that has been achieved from this application of Unger's constructive theory. If we accept the

premise that it is part of our good as human beings to have the opportunity to develop our talents and capacities, then we must realize that access to health care is an important need--a need that, whatever ethical theory we choose as our own, must be accounted for.

In this chapter, I have attempted to consistently apply Unger's methodology in the use of his ethical system for issues in medical ethics. The results of this application have been found to be mixed. In the first section of this chapter, I examined Unger's ethic of sympathy. I did not develop his reference to his ideal as being in the spirit of Aristotle and Hume since neither can be used for a post-liberal society. Aristotle's theory is dependent upon a theory of intelligible essences which Unger rejects. Hume's theory, on the other hand, is embedded in the assumptions of liberalism; thus, it too is unacceptable. Instead, I chose to examine Unger's use of this concept, and found three interwoven strands that played a major role in helping one to apply this ideal.

In the second and third sections of this chapter, I applied Unger's methodology to his ethic of sympathy in the context of issues in medical ethics. The most important result of this application is that it leads into the same fragmentation of an ethic as does the application of the ethical theories of liberalism. It was found, however, that despite this fragmentation, a solution to the problems in medical ethics could be reached. In terms of this, the theory is adequate.

CHAPTER VI

CONCLUSION

Unger has not achieved the goals he set for himself in either Knowledge and Politics (1975) or Law in Modern Society (1976). He did develop a new methodology to examine the issues of social theory, but it has a number of problems. First of all, in his critical aspect of his application of his method, it has been found that there is still the problem that Parsons criticized in Weber's version of the typological method, i.e., there is still a tendency to create false or unwarranted antitheses. In Unger's case, the application of his method seems to create false antinomies. Perhaps work can be done to show that this is not the case. But then it is up to Unger or his supporters to show how certain theories, e.g., Rawls' and Dworkin's, do in fact fall victim to the antinomies as Unger delineates them. Questions have been raised about this. They must be answered if application of Unger's typological method is to be acceptable for use by the various disciplines. Until these answers are given, Unger has not achieved his goal of total criticism of liberal thought.

Furthermore, it has been shown that there are methodological difficulties in applying Unger's constructive theory. When issues in medical ethics were raised that displayed conflict in one of the interwoven strands that make up Unger's ideal of sympathy, the interwoven strands fragmented into liberal elements. In both cases examined in this essay, the strand of autonomy was given primacy when the conflict centered on the strand of shared values. The strand of reciprocity was inadequate

because the issue of dominance effectively blocked it from functioning as it normally would. Admittedly, a solution to the ethical dilemmas was reached in both cases, but that solution was reached at the cost of fragmenting the strands of sympathy. The theory was shown adequate in that a solution could be reached that fulfilled the criteria of adequacy set up by Beachamp and Childress. Thus the most that could be said of Unger's ethical theory was that it is an alternative to liberal theories of ethics. To make it superior, however, the methodology must be strengthened so that fragmentation of the ideal of sympathy does not take place. This, I believe, would be extremely difficult. Thus Unger's goal of constructing a social theory which is a superior alternative to liberalism has also failed. Until the problems which have been pointed out in this essay have been solved, Unger's theory can be no more than another partial criticism of liberalism.

REFERENCES

REFERENCES

- Beauchamp, Tom L. and James F. Childress
1979 Principles of Biomedical Ethics. New York: Oxford University Press.
- Dworkin, Ronald
1977 Taking Rights Seriously. Cambridge: Harvard University Press.
- Gerth, H. H. and C. Wright Mills (eds.)
1958 From Max Weber: Essays in Sociology. New York: Oxford University Press.
- Hart, H. L. A.
1961 The Concept of Law. New York: Oxford University Press.
- Nicholson, Susan T.
1978 Abortion and the Roman Catholic Church. Knoxville, Tennessee: Religious Ethics, Inc.
- Parsons, Talcott (ed.)
1947 Max Weber: The Theory of Social and Economic Organization. New York: The Free Press of Glencoe (Oxford University Press).
- 1968 The Social System. New York: The Free Press.
- Ramsey, Paul.
1970 The Patient as Person. New Haven: Yale University Press.
- 1978 Ethics at the Edges of Life: Medical and Legal Inter-Sections. New Haven: Yale University Press.
- Rawls, John.
1971 A Theory of Justice. Cambridge: The Belknap Press of Harvard University Press.
- Unger, Roberto Mangabeira.
1975 Knowledge and Politics. New York: The Free Press.
- 1976 Law in Modern Society: Toward a Criticism of Social Theory. New York: The Free Press.

APPENDIX

APPENDIX

1. Unger refers directly to Parsons here. See his Note 14 for Chapter 2 of Law in Modern Society, p. 274.
2. One point that must be remembered is that there are many utilitarian theories that are built upon objective standards of value rather than contingent desires. Those that have been pointed out include Moore's and Rashdall's. Ideal utilitarian conceptions also are not built on contingent desires. Unger's points fit best the traditional form of utilitarian theory that is also an important part of the heritage of political liberalism, i.e., the theory of Bentham and Mill.
3. Also see Sections 25 and 39 for hypothetical and strict and partial compliance discussion.
4. See pp. 83-88, 120, 136. Pages 85f is important in that this is where he defines his concept of procedural justice. Pages 120 and 126 relate this notion to the original position in which the two principles of justice are derived.
5. Affirming the University of Wasington in the DeFunis case.
6. For an interesting discussion of these issues, see: Susan T. Nicholson, Abortion and the Roman Catholic Church (Knoxville: Religious Ethics, Inc., 1978), pp. 22-46 and 66-86.
7. See Paul Ramsey, The Patient as Person (New Haven: Yale University Press, 1970), pp. 113-164, and Ethics at the Edges of Life (New Haven: Yale University Press, 1978), Part II, for some interesting discussion from a different view.

8. A comment on Unger in a note by Betsy Postow--a comment that hits the mark completely in my opinion.

VITA

Margaret I. Lovell was born in Fort Bragg, North Carolina on April 5, 1943. She attended elementary schools in Green Bay, Wisconsin and graduated from St. Joseph's Academy in June 1961. She returned to her studies at St. Petersburg Junior College, St. Petersburg, Florida in the fall of 1965 and graduated in December 1968 with an Associate of Arts degree. She then enrolled in the University of Colorado, Boulder, in January 1969 for one semester. Ms. Lovell returned to school at the University of Tennessee, Knoxville, in September 1975, and graduated with high honors with a Bachelor of Arts degree in Liberal Arts, majoring in Philosophy with a minor in Political Science. In June 1976 she began her graduate studies, accepting a graduate assistantship, followed by a teaching assistantship, from the Department of Philosophy at the University of Tennessee, Knoxville. She received her Master of Arts in Philosophy with Concentration in Medical Ethics in June 1980.

Since September 1978 Ms. Lovell has held an assistantship from the Department of Religious Studies as Editorial Assistant to The Journal of Religious Ethics. She also participated in the Pre-Medical Enrichment Program as a teaching assistant during the summer of 1978.

The author has been an active member of the Knoxville Rape Crisis Center (KRCC) since September 1976. She has served in various Board of Directors positions including Volunteers' Coordinator in 1978 and Co-Chairperson in 1980. She also served as an active counselor with KRCC from November 1976 to March 1979.

Ms. Lovell is married to Ralph J. Lovell and has three grown step-children, Linda, John and Ann.