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## Pictorial—Justice on Trial: Courtroom Sketches from the Federal Rodney King Trial

Mary Chaney

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**JUSTICE ON TRIAL:  
COURTROOM SKETCHES FROM THE  
FEDERAL RODNEY KING TRIAL<sup>1</sup>**

*Mary Chaney<sup>2</sup>*

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1. This work was originally produced for the following television newscasts: KTTV Channel 11 (David Bryan, reporter; Jose Rios, news director) and KVEA Channel 52 (Manuel Urquiaga, reporter; Fernando Lopez, news director).

2. Mary Chaney works as a courtroom artist, documenting major trials in Los Angeles for television news. She has produced work for KTTV, KVEA, and NBC, as well as "A Current Affair" and "Inside Edition." Recent shows include: "The Badge and the Brush," with the Los Angeles Sheriff's Department; "Where Angels Tread," street scenes of Los Angeles; and "A Tender Dignity," sketches from Tent City. Mary Chaney studied at Chouinard Art Institute, Otis Art Institute, and Loyola University. Ms. Chaney holds copyright to all the sketches contained herein.

*These sketches have been selected to tell the story of a trial, to approximate the drama we witnessed during the federal Rodney King beating trial. As in all courtroom dramas, the last act is not written until the jury surrenders its verdicts. As we hear the verdicts, we make rapid marks on paper, some in ink, some in color; enough, we hope, for a cogent image. Then we surrender the picture to the camera for brief moments on your television screen. These sketches are what remain, traces of a courtroom trial.*

—Mary Chaney

CURATOR'S NOTES<sup>3</sup>

On February 16, 1993, the federal trial of four white Los Angeles Police Department (LAPD) officers accused of violating the civil rights of African-American motorist Rodney King began in the United States District Court in Los Angeles. The defendants had been acquitted the year before in a state criminal trial.

Assistant U.S. Attorney Steven Clymer led the federal prosecution team. He was joined by Department of Justice Attorneys Barry Kowalski and Alan Tieger, and Assistant U.S. Attorney Lawrence Middleton.

On February 25, 1993, Clymer opened the government's case before a packed courtroom. The defendants were present with their counsel: Laurence Powell with his lawyer, Michael Stone, Esq.; Stacey Koon with Ira Salzman, Esq.; Timothy Wind with Paul DePasquale, Esq.; and Ted Briseno with Harland Braun, Esq. Even though the jurors could be seen in open court, courtroom artists were not allowed to detail the jurors' features in their sketches so as to protect their anonymity.

Early in the case, the federal prosecutors called use-of-force expert Sergeant Mark Conta, who testified that the officers used excessive force during the last fifty seconds of the beating. Conta testified regarding proper LAPD procedures, including proper use of the PR-24 police baton. Defendants attributed their actions to faulty LAPD training and policies.

The federal prosecutors also called civilian witnesses to testify regarding their impressions of the altercation between King and the police. Dorothy Gibson and the other civilian witnesses testified that King was not acting in an aggressive or combative manner during the portion of the beating they had observed.

Having been previously described in almost mythical proportions as a "drug-crazed PCP monster," Rodney King defused the defense argument when he took the stand. King's testimony, although not substantively crucial, was an important emotional moment during the trial. No longer could the jury view the videotaped beating without thinking of the human being they had seen and heard on the witness stand.

King presented himself as a sympathetic figure while testifying. During eight hours of cross-examination, he never became agitated or

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3. This summary of events was edited from the curator's notes, written by Professor Laurie L. Levenson, that accompanied these sketches while on display at the Loyola of Los Angeles Law School. These 13 sketches were part of a larger exhibition of Ms. Chaney's work from this trial shown from August through December 1993. The Editors of the *Loyola of Los Angeles Law Review* wish to express their gratitude to Ms. Chaney for graciously granting us permission to reproduce this sampling for our readers.

aggressive. At times, he even appeared vulnerable. For example, when questioned about some of his prior statements, King had to ask the attorney to read the testimony to him, either because he had lost his ability to read (due to his injuries) or because he never had the ability (King never completed high school).

Defendants claimed that they were unable to subdue King because the Los Angeles Police Commission had prohibited the use of the chokehold. In a dramatic courtroom presentation, witness Sergeant Duke nearly rendered defense lawyer Salzman unconscious with a demonstration of the chokehold as a restraint tool.

Perhaps the strongest witness for the defense was defendant Koon, the only defendant who testified. Koon stated that he was the supervising sergeant who controlled the other officers' actions that evening. According to Koon, the officers were justified in beating King because he posed a continuous threat to their safety.

California Highway Patrol Officer Melanie Singer devastated the defense by describing, through her tears, how the defendants beat King about the head. Singer's testimony, perhaps even more than the testimony of Rodney King himself, communicated to trial observers the pain and suffering caused by defendants' conduct that evening.

Some defense lawyers, such as Harland Braun, took a minimalist approach toward defending the case. The sole evidence offered in defendant Briseno's behalf was the boot he wore that evening. The prosecutors had claimed that Briseno stomped on King, but Braun tried to persuade the jury that Briseno was seeking to hold King down to protect him from further blows. Braun ironically referred to the boot as a "ballet slipper."

Closing arguments began during the seventh week of trial. In a three-hour closing argument, Clymer focused on the last fifty seconds of the videotape, asking, "Who is in control? Who is aggressive and combative?" His answer, of course, was that it was the defendants, not King. Clymer emphasized how the defendants had distorted the events of that evening in their reports to cover up their behavior. He asked the jury to be the living voice of the Constitution and to find that the defendants had acted unreasonably.

Michael Stone, defendant Powell's lawyer, emphasized the difficult job that police have in protecting the public from the criminal element. Stone claimed that Koon was in control and that there was no time for the officers to preplan their actions: "They were facing the bull." Stone argued that the defendants used force that, based upon their experience and perceptions, appeared reasonable and necessary at the time.

Following closing arguments from prosecution and defense, the jurors were given their instructions. One week later, as the verdicts were read, the defendants sat quietly. In a split verdict, defendants Koon and Powell were convicted; Wind and Briseno were acquitted. The citizens of Los Angeles remained calm after the verdicts, ready to begin the healing process. Justice itself had been on trial over those weeks and had emerged victorious.



# COPPING AN ATTITUDE: RULE OF LAW LESSONS FROM THE RODNEY KING INCIDENT

## I. INTRODUCTION

*We cannot make events. Our business is wisely to improve them . . . . Mankind are governed more by their feelings than by reason. Events which excite those feelings will produce wonderful effects.*<sup>1</sup>

*We started off trying to set up a small anarchist community, but people wouldn't obey the rules.*<sup>2</sup>

The legal order and system of the United States is founded on the rule of law. Americans absorb this axiom in junior high civics classes and, as adults, store it in that part of the brain reserved for trivial pursuits, along with world geography and metric conversion tables. As viewed in other countries, however, this bedrock of our system of justice is of great importance. Indeed, many nations working to establish "governments of laws, not of men" often look to the United States as a model.<sup>3</sup>

Perhaps the U.S. legal order's greatest strength is its long tradition of respect for and adherence to rule of law values. Recent events have shown, however, that unquestioned adherence to a legal system assumed to be based on these values can become a dangerous weakness. It can lead to complacency toward needed change, or worse, blindness to obvious failures. Relying on a centuries-old presumption of fairness and equality, citizens may be unaware or disbelieving of the express injustice their legal system increasingly produces.

The Rodney King incident is a dramatic and painful example of this problem. On March 3, 1991, the police apprehended Mr. Rodney King after a high-speed chase. When Mr. King exited the car but failed to comply with police commands, the police shot him with a Taser and beat him with batons. Eighty-two seconds of home video captured the en-

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1. THE OXFORD DICTIONARY OF QUOTATIONS (Angela Partington ed., 4th ed. 1992) (attributed to American revolutionary leader Samuel Adams 1722-1803).

2. ALAN BENNETT, GETTING ON act 1 (1972).

3. See Igor Grazin, *The Rule of Law: But of Which Law? Natural and Positive Law in Post-Communist Transformations*, 26 J. MARSHALL L. REV. 719 (1993); Paul B. Stephan III, *Further Thoughts on the Rule of Law and a New World Order*, 26 J. MARSHALL L. REV. 739 (1993); William Webster, *The Rule of Law in an Emerging World Order*, 26 J. MARSHALL L. REV. 715 (1993).

counter between Mr. King and the police; it was subsequently broadcast worldwide. Thus began months of social discord for Los Angeles and the nation—months filled with tension, fear, outrage, and at times violence. By now most of the specific criminal justice issues arising from the incident have been resolved to some degree; however, the larger issues of systemic injustice remain unanswered.

This Comment suggests that events comprising the Rodney King incident—the beating, the trials, the civil unrest—send the message that despite apparent adherence to rule of law values, the current system has serious flaws that, if left unaddressed, may lead to a breakdown of the legal order. Consequently, lawmakers, law enforcement personnel, and citizens should immediately revisit the rule of law roots of our jurisprudence so that they have a basis from which to design and implement necessary changes. To facilitate the process, this Comment first explores the rule of law ideal—its purpose, function, and the specific values it embodies<sup>4</sup>—placing special emphasis on a rule of law value called the attitude of legality.<sup>5</sup> Then it applies a comprehensive rule of law model to several key events of the Rodney King incident, noting where the ideal succeeded and where it failed.<sup>6</sup> In conclusion, this Comment suggests alternatives to some of the current practices used within the legal system that no longer adhere to the rule of law ideal.<sup>7</sup>

## II. RULE OF LAW THEORY

*For justice exists only between men whose mutual relations are governed by law; and law exists for men between whom there is injustice . . . This is why we do not allow a man to rule, but rational principle, because a man behaves thus in his own interests and becomes a tyrant.*<sup>8</sup>

### A. Rule of Law: Its Purpose and Function

Several different conceptions of the rule of law ideal have developed throughout the history of Western societies.<sup>9</sup> Despite differences among

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4. See *infra* part II.

5. See *infra* part II.E.

6. See *infra* part III.

7. See *infra* part IV.

8. ARISTOTLE, *Nicomachean Ethics*, in 9 GREAT BOOKS OF THE WESTERN WORLD 339, 382 (Robert M. Hutchins et al. eds. & W.D. Ross trans., 1952).

9. See GEOFFREY DE Q. WALKER, THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY 1 (1988); Lawrence B. Solum, *Equity and the Rule of Law*, in 36 NOMOS: THE RULE OF LAW 120 (Ian Shapiro ed., forthcoming 1993) (page proofs on file with *Loyola of Los Angeles Law Review*).

these conceptions, the fundamental purpose of the rule of law has remained constant: to justify the legal order and legitimize the legal system of a given society.<sup>10</sup> The rule of law ideal achieves its purpose in several ways.

First, the rule of law serves as a theoretical blueprint for designing an ideal legal system. It represents a synthesis of normative values and processes that is grounded in precepts of natural justice, that promotes and legitimizes the mechanisms of formal justice, and that is perceived by those subject to its restraints as producing actual justice.<sup>11</sup> Therefore, perhaps it is better to conceive of the rule of law as a dynamic network of interrelated, interdependent elements,<sup>12</sup> rather than as a monolith. As one commentator has suggested, the "rule of law may not be a single concept at all; rather, it may be . . . a set of ideals connected more by family resemblance than a unifying conceptual structure."<sup>13</sup>

Second, the rule of law serves to protect the shared liberty interests of all members of a society.<sup>14</sup> It does this by establishing a dynamic equilibrium between power and law.<sup>15</sup> Pure power is arbitrary might; law is a system by which institutions channel power so that it "conform[s] with a people's values and established patterns of expectation."<sup>16</sup> Neither

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10. See WALKER, *supra* note 9, at 41-42. The legal order is a composite of specific rights and duties subject to the coercive force of the sovereign or state. See JOHN RAWLS, *A THEORY OF JUSTICE* 240 (1971). "It is reasonable to assume that even in a well-ordered society the coercive powers of government are to some degree necessary for the stability of social cooperation." *Id.* This order is implemented by a complex of positive laws, agency regulations and orders, enforcement mechanisms, and administrative procedures that constitute the legal system. See *id.* "The role of an authorized public interpretation of rules supported by collective sanctions is precisely to overcome [the] instability [inherent in voluntary agreements]." *Id.*

11. See WALKER, *supra* note 9, at 1, 3. This sentence refers to three "types" of justice. "Natural" justice is a moral concept of universal equality and fairness that exists independent of particular human social ordering. See ARISTOTLE, *supra* note 8, at 382-83. "Formal" justice is justice achieved by adherence to the principle of equality or by obedience to a particular system. RAWLS, *supra* note 10, at 58. As such, it is a political conception of justice. See JOHN RAWLS, *POLITICAL LIBERALISM* 11 (1993). A formal justice system that is based on the rule of law can incorporate notions of natural justice as fundamental precepts. See RAWLS, *supra* note 10, at 238-39; see also ARISTOTLE, *supra* note 8, at 382 ("Of political justice part is natural, part legal—natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent . . ."). The third type of justice, "actual" justice, is defined by this Author as the sum of results produced by a given legal system as perceived by the citizens subject to that legal system's coercive power.

12. WALKER, *supra* note 9, at 46-48 (describing rule of law as "dynamic equilibrium"); see *infra* notes 126-31 and accompanying text.

13. Solum, *supra* note 9, at 121.

14. See RAWLS, *supra* note 10, at 239-40.

15. See WALKER, *supra* note 9, at 1, 47; *infra* notes 126-31 and accompanying text.

16. WALKER, *supra* note 9, at 1.

power nor law alone will lead to a stable society.<sup>17</sup> As ends in themselves, power is coercive and unpredictable, and law can become inflexible and hence potentially oppressive.<sup>18</sup> Without rule of law values to regulate the tension between these antagonistic forces, the dominance of one over the other would likely lead to serious infringement or curtailment of individual liberty.<sup>19</sup>

Finally, the rule of law is a part of and offers support for the larger network of systems that comprise the social order.<sup>20</sup> Social order is a complex of interrelated normative and descriptive systems that reflects—through social custom and politically determined rules—shared notions of justice, governance, politics, economics, and group and interpersonal relationships.<sup>21</sup> The primary function of social order is to accommodate the tension, inherent in all human activity, between the common good and the individual good, between obedience to the general will and pursuit of free will.<sup>22</sup> A legal system based on rule of law values will encourage maximization of common good by promoting certainty, fairness, and equality in social arrangements. At the same time, it will protect

17. *Id.*

18. *Id.*

19. *See id.*

20. "The rule of law is not a complete formula for the good society, but there can be no good society without it." *Id.* at 42.

21. *See* RAWLS, *supra* note 11, at 11. Rawls uses the term "basic structure" to refer to the less precise "social order." *See id.* "By the basic structure I mean a society's main political, social, and economic institutions, and how they fit together into one unified system of social cooperation from one generation to the next." *Id.*

22. Rousseau was one of many to ponder this tension. His conclusion was that the two were irreconcilable. JULES STEINBERG, *LOCKE, ROUSSEAU, AND THE IDEA OF CONSENT* 84 (1978). Thus, Rousseau set out to describe a form of government in which the individual, when obeying the law, was in essence following his or her own free will. *Id.* His thesis on the social contract was an attempt to lay the foundations for this type of self-governance by consent. *See* JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (1762), *reprinted in* 38 *GREAT BOOKS OF THE WESTERN WORLD* 387 (Robert M. Hutchins et al. eds. & G.D.H. Cole trans., 1952).

*"The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before."* This is the fundamental problem of which the *Social Contract* provides the solution. . . .

. . . .  
 . . . [E]ach man, in giving himself to all, gives himself to nobody; and as there is no associate over whom he does not acquire the same right as he yields others over himself, he gains an equivalent for everything he loses, and an increase of force for the preservation of what he has.

*Id.* at 391.

individual autonomy by deterring behavior that impinges on a person's liberty interests.<sup>23</sup>

In light of the rule of law's overarching purpose and function, the network-of-ideals approach provides the best normative and descriptive explanation of how the theory shapes a legal system, and how it fits the legal order within the larger social order. Thus, a comprehensive rule of law theory will combine the ideals of natural justice and the mechanisms of positive justice with notions of interrelation, fluidity, and balance. Because many conceptions of rule of law theory fail to account for this mix of values, rules, and flexibility, they have limited practical usefulness. A brief overview of several different conceptions of rule of law theory will illustrate this fact and help underscore the value of the network-of-ideals approach.

*B. The Constitutional Principle: Popular American Variant of the Rule of Law*

The idea of the rule of law is bred in the bone for most U.S. citizens. Its origins date back to the foundations of democratic political thought.<sup>24</sup> The common shorthand for this conception of rule of law theory is that a free people are those governed by "the rule of law, not of men."<sup>25</sup> Along these same lines, a "government under law"<sup>26</sup> has been commonly under-

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23. See the discussion of Rawls's rule of law conception *infra* notes 74-92 and accompanying text, and Walker's twelve-point definition *infra* part II.D.

24. See, e.g., ARISTOTLE, *Politics*, in 9 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 8, at 439. See generally WALKER, *supra* note 9, at 93-127 (describing early development of rule of law from Athens to English colonies of North America); Ellis Sandoz, *Fortescue, Coke, and Anglo-American Constitutionalism*, in THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTIONALISM, AND THE ANGLO-AMERICAN TRADITION OF THE RULE OF LAW 1 (Ellis Sandoz ed., 1993) [hereinafter THE ROOTS OF LIBERTY] (tracing roots of liberty, inseparably entwined around concept of rule of law, from medieval Europe to eighteenth-century revolutionary America).

25. See ARISTOTLE, *supra* note 24, at 485.

Now, absolute monarchy, or the arbitrary rule of a sovereign over . . . a city which consists of equals, is . . . contrary to nature . . . . And the rule of law, it is argued, is preferable to that of any individual. . . . Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast . . . .

*Id.*

26. This phrase is attributed to John Adams. JOHN BARTLETT, FAMILIAR QUOTATIONS 381 (15th ed. 1980) (noting that phrase latter incorporated in Massachusetts Constitution, first appeared in tract printed under Adams's pseudonym in *Boston Gazette* in 1774).

stood as synonymous with "rule of law."<sup>27</sup> Thus, the rule of law has developed into an essential principle of constitutional democracy.<sup>28</sup>

This iteration of the rule of law ideal provided the basis upon which the founders of the United States chose to reject a monarchy and to create a revolutionary system of self-government among equals operating under a written constitution.<sup>29</sup> As a political tool, it has been used grandly to justify the separation of powers<sup>30</sup> and intimately to offer an equitable remedy for an injured plaintiff.<sup>31</sup> Additionally, it has lent support for the proposition that government not only must operate through the positive law, but also must be subject to its power.

This popular American variant of the rule of law reduces it to a constitutional truism that is far too limiting.<sup>32</sup> First, it only focuses on part of the rule of law ideal: rule of law as a tool of popular sovereignty.<sup>33</sup> Although the rule of law is an integral part of constitutional democracy, it has value to citizens on a more intimate level. It has a

27. See WALKER, *supra* note 9, at 2-3. Other common catch phrases that define the rule of law as a political theory are: "free government, . . . liberty under law, Constitutional and representative government, [and] republicanism." Sandoz, *supra* note 24, at 4.

28. See THE ROOTS OF LIBERTY, *supra* note 24, *passim*; WALKER, *supra* note 9, at 1-2.

29. Webster, *supra* note 3, at 715. For example, in *Common Sense* Thomas Paine proclaimed, "let a day be solemnly set apart . . . that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other." THOMAS PAINE, *COMMON SENSE* (1776), reprinted in *THE ESSENTIAL THOMAS PAINE* 23, 49 (1969). Both the Declaration of Independence and the Constitution begin with reference to the foundational self-governing importance of the rule of law. See U.S. CONST. pmb. ("WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice . . ."). The Declaration of Independence states:

That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; . . . it is the right of the people . . . to institute a new government, laying its foundations on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

30. For a state example, see MASS. CONST. art. XXX.

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers of either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

*Id.* On the federal level, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 49 (1803).

31. *Marbury*, 5 U.S. (1 Cranch) 49. In order to reach his more momentous holding later in the opinion, Chief Justice John Marshall first had to justify the Court's power to furnish the disappointed *Marbury* some sort of remedy, and hence its jurisdiction to even consider the case. He relied on the rule of law. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.* at 59.

32. See WALKER, *supra* note 9, at 2.

33. See *id.* at 2-3.

juridical component that can guide the development of rules and procedures by which specific conflicts are resolved in a way that is generally perceived as just. Second, this conception is a chauvinistic perspective that history refutes. Other nondemocratic forms of government, such as theocracies, monarchies, and communist systems, can also operate in accord with the rule of law ideal.<sup>34</sup> Finally, if the rule of law is viewed solely as a concept of constitutionalism, it will rarely contribute much to contemporary legal discourse in a mature constitutional government. Thus, there must be more to the rule of law if it is to be significant and relevant to the way modern Americans order their lives.

### C. *The Juridical Principle: Legal Conceptions of the Rule of Law*

A number of legal philosophers consider the rule of law solely as a component of positivist legal theory. This is largely due to the immense influence of the work of A.V. Dicey, a legal positivist greatly influenced by the Austinian<sup>35</sup> school of classical positivism.<sup>36</sup> Dicey's tripartite approach—a homage to sparse Austinian methodology<sup>37</sup>—has dominated discourse on the subject.<sup>38</sup> He posited his conception of the rule of law as follows:

“That ‘rule of law,’ then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view.

It means, in the first place, the absolute supremacy or pre-dominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part

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34. *Id.* at 1, 12-13; *cf.* Grazin, *supra* note 3 (discussing species of rule of law, albeit flawed, that existed in Soviet Union); *infra* note 47 (debating whether rule of law existed in Nazi Germany).

35. “Austinian” positivism is the brand of positivism made famous by the Englishman John Austin (1790-1859), founder of English analytical jurisprudence. *See* RICHARD A. COSGROVE, *THE RULE OF LAW: ALBERT VENN DICEY, VICTORIAN JURIST* 23 (1980). He is remembered for his seminal work regarding the command-of-the-sovereign doctrine as well as the separation theory of law and morality. The command-of-the-sovereign doctrine holds that law is that which is publicly articulated by a sovereign and habitually obeyed by those persons subject to the coercive power of that sovereign. *Id.* at 24. Austin's separation theory holds that what the law *is* and what the law *ought* to be are two separate and distinct inquiries. *Id.* at 23. This was a direct response to natural law theory, which he believed led to the unnecessary confusion of legal and moral questions. *Id.* at 24.

36. *Id.* For a summary of Austin's influence on Dicey, see *id.* at 23-28.

37. Dicey was most influenced by Austinian methodology. *Id.* at 24. This methodology is characterized by reducing a subject to a few principles of undoubted validity, and building a comprehensive body of knowledge through the analysis of pertinent cases. *See id.* at 24-25.

38. *See* WALKER, *supra* note 9, at 128.

of the government. . . . [A] man may with us be punished for a breach of law, but he can be punished for nothing else.

It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts . . . [and] excludes the idea of any exemption of officials or others from the duty of obedience to the law . . . or the jurisdiction of the ordinary tribunals . . . .

. . . [L]astly, [it] may be used as a formula for expressing . . . that with us the law of the constitution . . . are [sic] not the source but the consequence of the rights of individuals, as defined and enforced by the courts . . . thus the constitution is the result of the ordinary law of the land."<sup>39</sup>

Since the turn of the century, Dicey's theory and the rule of law generally have been attacked and discredited on a number of grounds.<sup>40</sup> One critic has labeled positivist formulations of the doctrine—with their emphasis on the positive law and its pedigree<sup>41</sup>—the "rule-book" conception.<sup>42</sup> An oft-noted criticism of this conception of the rule of law is that it strictly bifurcates the legal system into the procedural and substantive—never the twain shall meet.<sup>43</sup> This separation allows a legal system with immoral substantive laws to justify them by instituting processes that apparently operate in accord with rule of law procedural values.<sup>44</sup>

39. *Id.* at 129 (quoting ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202-03 (10th ed. 1960)).

40. For a discussion of the "century of criticism" inspired by Dicey's theory, see *id.* at 128-39.

41. "Pedigree" is shorthand for the more complex notion H.L.A. Hart calls the rule of recognition. H.L.A. HART, THE CONCEPT OF LAW 89-96 (1961). This rule embodies the fundamental principles accepted by government officials and citizens as the necessary criteria of validity by which a rule becomes law in a given legal system. *Id.*

42. Ronald Dworkin, *Political Judges and the Rule of Law*, in 64 PROCEEDINGS OF THE BRITISH ACADEMY 259, 261 (1978).

[The rule-book approach] insists that, so far as is possible, the power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all. The government as well as ordinary citizens must play by these public rules until they are changed, in accordance with further rules about how they are to be changed, which are also set out in the rule book.

*Id.* at 261-62.

43. *Id.* at 262.

[T]hose who have this conception of the rule of law do care about the content of the rules in the rule book, but they say that this is a matter of substantive justice, and that substantive justice is an independent ideal, in no sense part of the ideal of the rule of law.

*Id.*

44. This criticism is part of the general attack leveled against the separation theory, which is at the core of positivist thought. See *supra* note 35.

As examples, consider the "law-state" of Nazi Germany<sup>45</sup> or the wholesale importation of German racial law, despite a constitutional prohibition to the contrary, into Vichy France.<sup>46</sup> These legal systems produced laws that were certain, general, and public, and had been validated by appropriate government participation—legislatures enacted the laws and independent courts and lawyers interpreted and applied them.<sup>47</sup> Yet the content of these laws was substantively corrupt because it sanctioned racial and ethnic discrimination. South African apartheid—legitimized by positive and common law<sup>48</sup>—is a recent example of this kind of corruption of the rule of law<sup>49</sup> that is only now being remedied.<sup>50</sup>

Since Dicey, some have narrowed the positivist approach to formalist extremes by equating the rule of law to a law of rules.<sup>51</sup> Indeed, this cramped approach has led some jurists to believe the rule of law is noth-

45. See WALKER, *supra* note 9, at 5.

46. See, e.g., Richard H. Weisberg, *Three Lessons from Law and Literature*, 27 LOY. L.A. L. REV. 285, 292-300 (1993).

47. Whether National Socialist Germany actually operated a rule of law legal system has been the subject of debate. Compare H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 617 (1958) (arguing that as reprehensible as content of Nazi law was, it was still law, duly enacted and enforced) with Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 650-51 (1958) (arguing that many Nazi laws were "secret" and many judges and lawyers were under duress "from above" to interpret laws favorably for government so that system did not produce law). Pursuant to Walker's comprehensive twelve-point definition of the rule of law, see *infra* part II.D., these types of laws would violate rule of law values of certainty, generality, and equality. See WALKER, *supra* note 9, at 25. Perhaps the example of Vichy France offers a clearer illustration of rule of law values being used to legitimize an immoral legal system. See the discussion of enactment and legal interpretation of racial laws even stricter than those of Nazi Germany in Richard H. Weisberg, *Legal Rhetoric Under Stress: The Example of Vichy*, 12 CARDOZO L. REV. 1371 (1991); Weisberg, *supra* note 46, at 292-300.

48. JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 53-106 (1978).

49. See DAVID DYZENHANS, *HARD CASES IN A WICKED LEGAL SYSTEM* vii-ix, 49 (1991).

50. MARINA OTTAWAY, *SOUTH AFRICA: THE STRUGGLE FOR A NEW ORDER* (1993).

51. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); see also *Morrison v. Olson*, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting) ("A government of laws means a government of rules. Today's decision . . . is ungoverned by rule, and hence ungoverned by law."). The focus of Justice Scalia's article concerns judicial discretion and "the dichotomy between general rules and personal discretion within the narrow context of law that is made by the courts." Scalia, *supra*, at 1176. His thesis is that judges, when deciding particular cases, should strive to develop general rules so that judge-made law can take on the rule of law values of legislatively enacted laws: equality, publicity, and predictability. See *id.* at 1178-80. So highly does he regard the empowering constraints of the rule (book) of law ideal that he states "[t]here are times when even a bad rule is better than no rule at all." *Id.* at 1179. Unfortunately, he fails to give us any rule as to when that time would be.

ing more than "law and order."<sup>52</sup> In the popular media, the rule of law is often employed in this way to denounce criminal behavior or social upheaval.<sup>53</sup> This simplistic view, however, has been widely repudiated.<sup>54</sup>

Another school of thought inculcates its conception of the rule of law with social, political, and moral principles that place requirements on the substantive content of the law. This approach to the doctrine has been called the "rights" conception.<sup>55</sup> The Declaration of Delhi<sup>56</sup> is an example of this approach. It reads in part: "[T]he Rule of Law is a dynamic concept . . . not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish

52. DUGARD, *supra* note 48, at 43; *see, e.g.*, ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 58-59 (1968).

This may seem harsh [to be sent to prison for defying laws that mandate racial discrimination]. It may seem especially harsh if we assume that I profoundly believe that the law I am violating is immoral and unconstitutional . . . . *But this is what we mean by the rule of law . . . .*

. . . The state, the courts, and the individual citizen are bound by a set of laws which have been adopted in a prescribed manner, and the state and the individual must accept the courts' determinations of what those rules are and mean in specific instances. *This is the rule of law*, even if the ultimate judicial decision is by the narrow margin of five to four!

*Id.*

53. *E.g.*, Carol Morello, *Rule of Law Returns to War-Torn Streets*, PHILA. INQUIRER, Dec. 13, 1992, at C3 (reporting that rule of law has returned to Beirut because former militiamen now spend their time issuing traffic tickets); Seth Mydans, *Los Angeles Force Contains Disorder*, N.Y. TIMES, Dec. 16, 1992, at A20 (quoting report issued by special commission headed by William Webster: "[T]he first priority for law enforcement must be to re-establish an understanding that the rule of law still governs society."); Karen Tumulty, *U.S. Crime Rate Dips but Violent Offenses Climb*, L.A. TIMES, Oct. 3, 1993, at A1 (quoting FBI Director Louis J. Freeh: "[C]rime is shockingly high in a country where the rule of law should prevail. ").

54. *See, e.g.*, HOWARD ZINN, DISOBEDIENCE AND DEMOCRACY 8-27 (1968).

[S]ome mystical value has been attached to "the rule of law", beyond those human rights which law, way back in our democratic tradition, was set up to support. . . . Until American citizens can overcome this idolization of law, until they begin to see that law is, like other institutions and actions, to be measured against moral principles, against human needs, we will remain a static society in a world of change, a society deaf to the rising cries for justice—and therefore, a society in serious trouble.

*Id.* at 23.

55. Dworkin, *supra* note 42, at 262.

[The rights conception] insists that these moral and political rights be recognized in positive law, so that they may be enforced *upon the demand of individual citizens* through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law . . . is the ideal rule by an accurate public conception of individual rights.

*Id.*

56. The Declaration of Delhi, along with detailed conclusions and proceedings, was published in a report by the International Commission of Jurists, which met in New Delhi, India in 1959. The Commission, which had 185 members, consisted of judges, practicing lawyers, and law professors from 53 countries. INTERNATIONAL COMM'N OF JURISTS, THE RULE OF LAW IN A FREE SOCIETY 3 (1959).

social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized."<sup>57</sup>

Criticisms of the rights approach focus on describing why rule of law theory is ill-equipped to manage any real control over the substantive content of the laws within a given system.<sup>58</sup> A commonly noted weakness is that the rights approach presupposes that citizens have moral rights prior to the positive enactment of those rights.<sup>59</sup> Many legal philosophers believe that the notion that citizens have rights outside of those bestowed on them by the positive law makes no sense at all.<sup>60</sup> Furthermore, defining the nature and scope of human rights—whether bestowed by law or by a higher source—is a difficult and perilous task.<sup>61</sup> Thus, reaching consensus on what those rights are is extremely difficult, and deciding how to resolve differences of opinion is even more so.<sup>62</sup> Witness the turmoil surrounding the debate over a woman's right to choose abortion in the United States—a country fairly unique in that it expressly recognizes and protects an individual's inalienable rights through a written constitution "with an entrenched Bill of Rights."<sup>63</sup> Thus, one of the jurists in Delhi argued that if fundamental rights were to be part of a universally accepted rule of law system, they should be limited to "negative rights"—freedoms *from* rather than freedoms *to*.<sup>64</sup>

A third juridical conception of the rule of law has been called the "institutions-principles-procedures" approach.<sup>65</sup> This approach begins with the assumption that the rule of law exists to some greater or lesser

57. *Id.*

58. See WALKER, *supra* note 9, at 6.

59. See Dworkin, *supra* note 42, at 263.

60. *Id.*

61. See *id.*

62. See *id.*

63. See WALKER, *supra* note 9, at 10.

64. See INTERNATIONAL COMM'N OF JURISTS, *supra* note 56, at 65. This negative freedoms approach was implicitly sanctioned by the United States Supreme Court in *Harris v. McRae*, 448 U.S. 297 (1980).

Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be because government may not prohibit the use of contraceptives . . . government, therefore has an affirmative constitutional obligation to ensure that all persons have financial resources to obtain contraceptives . . . .

*Id.* at 318; see also Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 797 (1985) ("As it has evolved in the decisions of this Court, the freedom recognized by the Court in *Roe v. Wade* and its progeny is essentially a negative one . . . .") (White, J., dissenting).

65. WALKER, *supra* note 9, at 14.

degree in all common-law jurisdictions, as well as in countries where the individual enjoys rights and remedies similar to those enjoyed by citizens of common-law countries.<sup>66</sup> Thus, by examining the principles underlying the particular legal institutions in a given country, one can determine the extent to which the rule of law ideal is operative.<sup>67</sup> For example, civil-law countries use the "inquisitorial" approach in criminal trials, whereas common-law countries use the "accusatorial" approach.<sup>68</sup> Though they employ different methods of discovering the truth, both approaches share the common goal of providing a fair and open trial to the accused.<sup>69</sup> Therefore, the underlying principle requiring open, impartial tribunals is an integral part of both legal systems, and both can be said to operate pursuant to the rule of law.<sup>70</sup>

In developing this conception of the rule of law, then, the question becomes: What *principles* are of such importance that they must be present to some degree in some kind of institution or procedure? A requirement of minimum substantive content can prevent grotesque parodies of the rule of law, as seen in the examples of Nazi Germany and Vichy France. The difficulty, however, is to limit these principles carefully to avoid the philosophical and political problems inherent in the rights conception.<sup>71</sup> Thus, the foundational normative principles required for the rule of law must be *minimalist*—just those necessary to prevent the legal system from enacting the letter of the rule of law, while trampling its spirit.<sup>72</sup>

What then is the basis for these minimalist normative principles? Professor John Rawls's theory of justice<sup>73</sup> provides some insight. According to Rawls, the minimal substantive content necessary to maintain the rule of law ideal is that required to ensure "[t]he regular and impar-

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66. *Id.* at 10. Walker justifies this "starting point" by saying: (1) the rule of law must be meaningful since it has been the subject of debate in common-law countries for centuries; (2) writers in noncommon-law countries have noted that the rule of law concept is present in common-law countries; and (3) even critics of rule of law theory say that it exists in common-law countries. *Id.*

67. *Id.* at 10-11.

68. *Id.* at 11.

69. *See id.*

70. *See id.* Whether these different approaches are equally effective in furthering the underlying purpose—open, impartial tribunals—is a separate inquiry. *Id.*

71. *See* INTERNATIONAL COMM'N OF JURISTS, *supra* note 56, at 65; WALKER, *supra* note 9, at 5-6.

72. *See* WALKER, *supra* note 9, at 5-6. Professor Walker offers a few, specific minimal "rights" implicit in this approach: the presumption of innocence, the presumption against retroactive legislation, the right to legal representation, and the right to a fair, speedy, and public trial. *Id.* at 5.

73. For a detailed discussion of Rawls's theory of justice, see RAWLS, *supra* note 10.