



---

1-1-1994

## Copping an Attitude: Rule of Law Lessons from the Rodney King Incident

Thomas M. Riordan

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

---

### Recommended Citation

Thomas M. Riordan, *Copping an Attitude: Rule of Law Lessons from the Rodney King Incident*, 27 Loy. L.A. L. Rev. 675 (1994).

Available at: <https://digitalcommons.lmu.edu/llr/vol27/iss2/7>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# 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-

---

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

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

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-

---

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

---

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-

---

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.

tial, and in this sense fair, administration of the law.”<sup>74</sup> This notion is part of a more comprehensive conception of political justice Rawls refers to as “justice as fairness.”<sup>75</sup> The rule of law exists when a legal system has incorporated the fundamental precept of fairness, which Rawls identifies as “formal justice.”<sup>76</sup> There are four general precepts of formal justice—normally associated with the “principle of legality”—that will be present in “any system of rules which perfectly embodie[s] the idea of a legal system.”<sup>77</sup> In brief, these are: (1) “ought implies can”; (2) “similar cases [must] be treated similarly”; (3) there is no offense without a law; and (4) natural justice values should be used to preserve the integrity of the judicial process.<sup>78</sup>

A legal system<sup>79</sup> is necessary to the function of a well-ordered society’s formal system of equal liberty.<sup>80</sup> The parameters of liberty are established by equal individuals<sup>81</sup> negotiating a social contract from the “original position.”<sup>82</sup> These negotiations result, in part, in the develop-

74. *Id.* at 235.

75. See RAWLS, *supra* note 11, at 11; RAWLS, *supra* note 10, at 12. “The aim of justice as fairness, then, is practical: it presents itself as a conception of justice that may be shared by citizens as a basis of reasoned, informed and willing political agreement.” RAWLS, *supra* note 11, at 9.

Thus, justice as fairness starts from within a certain political tradition and takes as its fundamental idea that of society as a fair system of cooperation over time, from one generation to the next. This central organizing idea is developed together with two companion fundamental ideas: one is the idea of citizens (those engaged in cooperation) as free and equal persons; the other is the idea of a well-ordered society as a society effectively regulated by a political conception of justice.

*Id.* at 14 (internal references omitted).

This, however, does not mean that justice and fairness are the same. It means only that the principles of justice a social group adopts “are agreed to in an initial situation that is fair.” RAWLS, *supra* note 10, at 12.

76. *Id.* at 235.

77. *Id.* at 236.

78. *Id.* at 236-39. These values mirror those identified by Walker. See *infra* note 107.

79. Rawls defines a legal system as “a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation.” RAWLS, *supra* note 10, at 235.

80. See RAWLS, *supra* note 11, at 35. “When [a legal system’s] rules are just they establish the basis for legitimate expectations. . . . If the [rules] are unsure, so are the boundaries of men’s liberties.” RAWLS, *supra* note 10, at 235.

81. RAWLS, *supra* note 10, at 14. Equality, in this context, means the equal distribution of basic rights and duties. *Id.* This fundamental principle is one of two Rawls identifies in his theory and is significant to the rule of law discussion. The second fundamental principle holds that unequal distribution of wealth or power among members of a society can be justified only if those inequalities benefit the least advantaged members of the society. *Id.* at 14-15.

82. The original position is one in which individuals operate behind a “veil of ignorance”—that is, they have no perception of their unique individuality. *Id.* Because these individuals are ignorant of their social status, talents, intelligence, wealth, strength, and the like, these characteristics do not color their negotiations. *Id.* As such, the veil of ignorance is the

ment of a formal system of equal, shared liberty.<sup>83</sup> Liberty is defined generally as freedom, or lack thereof, from constraints to do or not do a thing.<sup>84</sup> A "formal system"<sup>85</sup> is comprised of constitutional and legal constraints that are binding upon all citizens equally, thereby forming the boundaries of individual liberty.<sup>86</sup> In any given society, the formal system of equal liberty is represented by "a certain structure of institutions, a certain system of public rules defining rights and duties."<sup>87</sup>

Rawls contends that rational citizens will want to maintain the rule of law because it is the best way to protect their equally shared liberty: "To be confident in the possession [sic] and exercise of these freedoms, the citizens of a well-ordered society will normally want the rule of law maintained."<sup>88</sup> Additionally, the rule of law provides a process for organizing cooperative enterprises.<sup>89</sup> Furthermore, the rule of law ideal can be an instrument for measuring the justness of a society's legal order.<sup>90</sup> Rawls states, however, that the rule of law can only go so far to determine the *existence of justice* in a particular social order.<sup>91</sup> Unlike adherents of the "rights approach," Rawls contends that the rule of law can only guarantee the "impartial and regular administration of rules," and is a weak constraint to substantive injustice in the rules themselves.<sup>92</sup>

Despite their differences, all these legal conceptions of the rule of law theory couple juridical principles with constitutional principles such as those discussed in the previous section.<sup>93</sup> The addition of juridical principles makes the rule of law a tool for describing and guiding the way people order their everyday lives, even in a mature constitutional democ-

---

absence of special interests. The only thing we assume about these individuals is that they are rational and mutually disinterested—that is, they do not take an interest in one another's interests. *Id.* at 13. Thus, the agreements reached ensure that "no one is advantaged or disadvantaged in the choice of principles . . . . Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain." *Id.* at 12.

83. *See id.* at 11-12, 203.

84. *Id.* at 202.

85. Rawls notes that there are informal systems that affect liberty, such as public opinion and social pressure. *See id.* However, for rule of law purposes, it is only the formal system of liberty that is of importance.

86. *See id.*

87. *Id.*

88. *Id.* at 240.

89. *See id.* at 236.

90. *See id.*

91. *See id.*

92. *Id.* The rule of law being used to justify National Socialist Germany's implementation of the Holocaust is a striking and horrific example of this proposition. *See supra* note 47 and accompanying text.

93. *See supra* part II.B.

racy such as the United States. Therefore, in order to be relevant to a modern democratic society, a comprehensive definition of the rule of law should encompass both constitutional and juridical principles. However, it should provide only minimum content to the substantive law by adhering to basic, broadly conceived principles that can be achieved by implementing procedure within public institutions. This would prevent resistance to the rule of law from citizens faced with "the fact of reasonable pluralism,"<sup>94</sup> as in the United States. Furthermore, the definition should contain specific detail so that it can be used to measure, in a practical and concrete manner, whether a particular system is protecting the equal liberty promised to all members of a society.

#### D. *A Comprehensive Definition of the Rule of Law*

Geoffrey de Q. Walker's book, *The Rule of Law*,<sup>95</sup> develops a comprehensive twelve-point definition of the rule of law that embodies both juridical and constitutional ideals and recognizes that a rule of law system must contain both substantive and procedural elements. Thus, Walker's theory adopts an institutions-principles-procedure approach. Hence, like Rawls's conception of the theory, it strikes a reasonable and cautious balance between the positivist rule-book approach and the social, political, and moral consciousness of the rights approach. However, unlike Rawls's approach, it attempts to identify with greater precision the specific substantive values and procedural components that should be present, at least to some degree, in all rule of law systems. Additionally, Walker offers an interesting explanation as to how these elements interact.

Walker envisions the rule of law as "a principle of the legal organization of human affairs."<sup>96</sup> He states that

[i]t is more a statement of constitutional and juridical principle, a juristic reserve, an idea of profound legality superior, and possibly anterior, to positive law. . . . [I]t manifests itself more as an *absence* than a presence, rather like those other great negatives, peace and freedom. It imports an attitude of restraint, an absence of arbitrary coercion by governments or other individ-

---

94. For Rawls, the "fact of reasonable pluralism" is a fact of life in modern democratic societies. See RAWLS, *supra* note 11, at xvi. He defines the fact of reasonable pluralism as "a plurality of reasonable yet incompatible comprehensive [philosophical, religious, or moral] doctrines." *Id.* This clash of values "is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime." *Id.*

95. WALKER, *supra* note 9.

96. *Id.* at 23.



uals or groups. . . . [It is a] philosophy of legal restraint and fairness . . . that may be hard to encapsulate in statutory language, but it is equally hard to stamp out by overt action.<sup>97</sup>

Walker builds his definition upon two normative foundations: (1) Both people and governments should be ruled by the law and obliged to obey the law; and (2) the law should be such that people are willing and able to be guided by it.<sup>98</sup> He then constructs a twelve-point definition of the rule of law:

1. Substantive laws exist that prohibit private coercion;<sup>99</sup>
2. The government is subject to the substantive laws;<sup>100</sup>
3. The substantive law should possess characteristics of certainty, generality, and equality;<sup>101</sup>
4. Mechanisms are in place that ensure that the content of the laws remains reasonably consistent with social values;<sup>102</sup>
5. Laws against private coercion are enforced;<sup>103</sup>
6. Government action in accordance with the law is subject to oversight and enforcement;<sup>104</sup>

97. *Id.* at 3.

98. *Id.* at 23.

99. *Id.* at 24. The primary purpose of the rule of law is to protect the individual from general lawlessness and anarchy. *Id.*

100. *Id.* "The government must be bound by substantive law, not only by the constitution, but also as far as possible by the same laws as those which bind the individual." *Id.*

101. *Id.* at 25. This requires that the positive laws "should be specific about what they prohibit, [and] they should not particularize the subjects to whom they apply." *Id.* These normative characteristics condemn ambiguous laws that empower judges and law enforcement officials to deal arbitrarily with citizens. *Id.* Professor Solum would add another term to the normative characteristics required of the positive law—publicity. Solum, *supra* note 9, at 122. "The laws should be known and expressly promulgated; no criminal penalties should be imposed for violation of rules that are not announced in advance." *Id.* Although this requirement has a certain appeal, anyone familiar with legal research will wonder whether laws generally receive the publicity required to make them "known" to the ordinary citizen. Perhaps the oft-quoted maxim "ignorance of the law is no excuse," combined with the constitutional and statutory procedural requirements of law and rule promulgation, which can then be reviewed in hindsight by courts, are enough to satisfy Professor Solum's publicity requirement.

102. WALKER, *supra* note 9, at 27. These mechanisms can take a variety of forms depending on the source of law—statutory, common law, or custom. *See id.* In theory, the California ballot initiative system, which can be used to amend even the state constitution, is an example of one of these mechanisms. *See* CAL. CONST. art. II, § 8; CAL. ELEC. CODE §§ 3500, 29710 (West 1989); WALKER, *supra* note 9, at 27.

103. WALKER, *supra* note 9, at 28. This means that the machinery of law enforcement and adjudication should be efficient and timely. *See id.*

104. *Id.* at 29. This requires that there be procedures and institutions that can resolve disputes between the government and its citizens. *Id.* The constitutional power of the federal courts to review legislation and executive action is an example of this rule of law value. *See id.*

7. The judiciary is independent;<sup>105</sup>

8. Members of the legal profession are independent;<sup>106</sup>

---

105. *Id.* Professor Walker states that “[a]n independent judiciary is an indispensable requirement of the rule of law.” *Id.*

“The argument for the independence of the judge is that in performing his function of rule-interpretation he should not be subject to pressure that would cause him to vary the meaning of the rules to suit the views of the persons affected by them, and that in ascertaining ‘facts’ he will not be influenced by considerations of expediency. It is an essential element in the maintenance of that stability and predictability of the rules which is the core of constitutionalism.”

*Id.* at 30 (quoting M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 329 (1967)). In fact, the United States Constitution has explicit guarantees to ensure that the federal judiciary remains independent. *See* U.S. CONST. art. II, § 2 (federal judiciary is appointed, not elected, by President with “advice and consent of the Senate”); *id.* art. III, § 1 (federal judges have lifetime appointment “during good behavior,” and cannot have their compensation reduced).

Probably everyone would agree that the judiciary should be independent; however, in the current political climate of the United States, the debate has recently centered on the issue of how much independence is enough. Thus, the fight is not over *who* but *what political ideology* will wear the robes. *See, e.g.,* ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 267-336 (1990) (describing as “Bloody Crossroads” his nomination, and subsequent defeat by Senate vote for appointment to Supreme Court).

The battle was ultimately about whether intellectual class values, which are far more egalitarian and socially permissive, which is to say left-liberal, than those of the public at large and so cannot carry elections, were to continue to be enacted into law by the Supreme Court. That was why this nomination became the focal point of the war within our culture.

*Id.* at 337.

In California, the tug-of-war of politics and the bench is even more pronounced. Superior court judges are elected and subject to recall. CAL. CONST. art. VI, § 16; CAL. ELEC. CODE §§ 27000-27346 (West 1989 & Supp. 1993). This puts judges at the mercy of factions who disapprove of the outcomes in particular cases and can get the required signatures on a petition. *See, e.g.,* Sheryl Stolberg, *Petitioners Fail in Bid to Recall Karlin*, L.A. TIMES, July 8, 1992, at B3 (describing recall attempt resulting from unpopular sentence imposed by judge). Additionally, California appellate and supreme court justices, after their initial appointment, are subject to mandatory periodic confirmation votes. CAL. CONST. art. VI, § 16; CAL. ELEC. CODE §§ 27000-27346. Thus, if particular judges have rendered unpopular decisions, the electorate can remove them from the bench. *E.g.,* John Balzar, *Justice Bird's Recall Becoming Epic Battle*, L.A. TIMES, Apr. 7, 1985, at A1 (describing multimillion dollar campaign to remove Chief Justice Rose Bird and four other associate justices from California Supreme Court because of their reputations for being soft on convicted criminals). “At stake is the future of the state’s judiciary, *the rule of law*, the safety of the streets and the conscience of California—in short, crime and justice.” *Id.* (emphasis added).

Is a judiciary subject to multimillion dollar recall campaigns ever truly independent? And if not, is the rule of law a nullity in California? Walker would answer that the notion of “independence” is one of degree, and that a lessened independence for the judiciary could be offset by other rule of law values within the system. *See infra* notes 126-31 and accompanying text.

106. WALKER, *supra* note 9, at 36. Thus, during those times when the independence of the judiciary might be compromised, the bar can remind the bench to adhere to the rule of law ideals. *Id.* at 36-37.

9. Tribunals exercise impartiality by the incorporation of "principles of natural justice";<sup>107</sup>
10. Courts remain actually accessible to all whose legal rights have been impinged;<sup>108</sup>
11. Discretionary powers vested in law enforcement and other government agencies are exercised in a way that is honest, impartial, and does not pervert the law;<sup>109</sup> and,
12. The people possess the attitude of legality.<sup>110</sup>

These rule of law elements contain both substantive values and procedural components.<sup>111</sup> The first four elements establish substantive standards for the laws themselves.<sup>112</sup> As broad, overarching standards, they do not burden the theory with the task of enumerating various specific rights, and hence, should avoid most political and philosophical controversies. Indeed, these substantive requirements offer only minimal protection from unjust laws. Presumably, other systems in the social order will exist to shape the specific content of laws. The rule of law elements five through eleven set standards for the "adjective law, or the machinery for the implementation and administration of the law."<sup>113</sup>

Professor Walker admits that his comprehensive model of the rule of law contains what appear to be inherent contradictions.<sup>114</sup>

On the one hand, [the rule of law] speaks of the need for certainty and stability in the law so that people will be able to plan and organize their arrangements in accordance with it; but on the other hand, it stresses the need for the law to retain some flexibility and to be capable of adapting itself to changes in public opinion. It asserts a requirement of generality of application in the law, together with its corollary of equality before the law; on the other hand, it cautions that the principle of equality

107. *Id.* at 37. These principles are: (1) requirement of unbiased tribunals; (2) opportunity for both sides to be heard; (3) courts open to the public, including the media; and, (4) in criminal proceedings, the presumption of innocence for an accused. *Id.*

108. *Id.* at 40. Adequate access to the courts ensures that injured parties have a genuine ability to vindicate their legal grievances. Thus, a system that is prohibitively expensive and encourages undue delay defeats this rule of law value. *See id.* The present civil justice system may be perilously close to violating this rule of law value. *Cf.* WALTER K. OLSON, *THE LITIGATION EXPLOSION* (1991) (detailing expense, delay, and ultimate frustration for parties involved in civil litigation).

109. WALKER, *supra* note 9, at 40.

110. *Id.* at 41; *see infra* part II.E.

111. WALKER, *supra* note 9, at 28.

112. *See id.*

113. *Id.*

114. *Id.* at 42.

should not apply to cases in relation to which valid distinctions may or should be drawn. Again, it is said that an essential condition of the rule of law is the independence of the judiciary, but at the same time we do not want judges to be *too* independent, lest the rule of law degenerate into judicial tyranny.<sup>115</sup>

Walker reconciles these contradictions by adopting what he describes as a "Taoist viewpoint" to the rule of law ideal.<sup>116</sup> For the Taoist, the "universe is engaged in ceaseless motion and activity, in a continual cosmic process . . . called the Tao—The Way."<sup>117</sup> The Tao is manifest in the cyclical "dynamic interplay [between] two archetypal poles, which are associated with many images of opposites taken from nature and from social life."<sup>118</sup> *Yin*<sup>119</sup> and *yang*<sup>120</sup> represent the conceptualization of these dynamic, polar opposites.<sup>121</sup> However, the notion of opposites in Taoist philosophy is quite different from the notion of opposites in traditional Western thought.<sup>122</sup> Opposites are not two separate and adverse things, but are merely different aspects of the same whole.<sup>123</sup> In the ultimate extension of Taoist thought, opposites are the same.<sup>124</sup> Thus, the Tao, or Way, is not the sum of *yin* and *yang*, "but the regulator of their alternation."<sup>125</sup>

Walker believes that the rule of law is not "a pure concept, fully self-consistent" but is a means of achieving a "dynamic equilibrium" between

115. *Id.*

116. *See id.* at 47.

117. FRITJOF CAPRA, *THE TURNING POINT: SCIENCE, SOCIETY, AND THE RISING CULTURE* 37 (1982).

118. *Id.* at 35.

119. "[Y]in corresponds to all that is contractive, responsive and conservative." *Id.* at 36.

120. "[Y]ang implies all that is expansive, aggressive, and demanding." *Id.*

121. *Id.* at 35. The following are examples of *yin* and *yang*:

<u>Yin</u>	<u>Yang</u>
Earth	Heaven
Moon	Sun
Night	Day
Winter	Summer

*Id.* at 36. There is no moral value associated with either *yin* or *yang*. *Id.* The Taoist notion of the good is the "dynamic balance" between *yin* and *yang*; the bad is "imbalance." *Id.*

Symbolically, *yin* and *yang* are represented by a circle made up of two complementary swirling shapes: one white, one black. WALKER, *supra* note 9, at 46. Each swirl has a dot of the opposite color within it. *Id.* "These dots symbolize the notion that even in its pure form, each force already contains the seed of its own opposite." *Id.*

122. *See* CAPRA, *supra* note 117, at 35.

123. *Id.*

124. *See* WALKER, *supra* note 9, at 44-49.

125. *Id.* at 46.

“pure law and pure power.”<sup>126</sup> Thus, a fluid model of the rule of law discovers the Tao between the *yin* of “disorder” and the *yang* of “good government.”<sup>127</sup> If the rule of law does not contain within it “some of its own opposite, it will never enjoy stability.”<sup>128</sup> Therefore, while all the elements in his comprehensive definition must be present in a rule of law system, the degree to which any one element is prominent will be balanced by the degree to which it interacts with other elements.<sup>129</sup> For example, a system that has a judiciary subject to election and recall—less of an independent judiciary (point seven)—may balance itself by providing the public the ability to more readily amend its constitution by ballot initiatives—more of the mechanisms that ensure the law reflects current social values (point four).<sup>130</sup> “Preserving the rule of law thus becomes a function, not of imprisoning power, but of preventing the power element from growing so large as to overwhelm law . . . .”<sup>131</sup>

### E. *The Attitude of Legality*

“[T]he health and strength of the rule of law does not ultimately depend on the efforts of lawyers, judges or police, but on the attitudes of the people.”<sup>132</sup> This notion is embodied in the twelfth point of Walker’s definition: the attitude of legality. No other element in Walker’s definition is as imbued with the *yin* and *yang* of his conception as the attitude of legality. It is both *substantive*—the content of the legal system must somehow “feel” right—and *procedural*—the legal system’s administration is subject to the public’s perceptions of its ability to produce justice. The attitude of legality is simultaneously *outside* the institutional system because it originates and resides in the people subject to the system, and *inside* the institutional system because it evaluates and guides the system itself. Exercise of the attitude of legality is both *cause*—shaping the substance and procedure of the legal order—and *effect*—being shaped by the legal order’s substance and procedure.

The attitude of legality is a slippery concept to grasp. Professor Walker recognizes that it defies precise definition, yet he makes some

---

126. *Id.* at 47.

127. *See id.* at 46-47.

128. *Id.*

129. *Id.*

130. Refer to the discussions of California law *supra* notes 102, 105. The Author offers this example for illustrative purposes only, and reaches no conclusion whether the appropriate balance is in fact struck in California’s legal order.

131. WALKER, *supra* note 9, at 46-47.

132. *Id.* at 41.

attempt to do so.<sup>133</sup> He refers to the attitude of legality as the “spirit” in the legal system, the “ghost in our machine” of formal justice.<sup>134</sup> “The rule of law has a *dimension of feeling* that does not fit into the framework of constitutional and legal concepts. But since feeling is the spring to human action, this dimension is what gives those concepts their practical force.”<sup>135</sup> Accordingly, the other eleven points are in the service of the attitude of legality, thus making it the “essential prerequisite” of the entire legal, constitutional, and social order.<sup>136</sup> Without this attitude, people will not exhibit fidelity to the law, the result of which is a state of anarchy.<sup>137</sup>

Unfortunately, Professor Walker’s explanation does not advance comprehension of the attitude of legality very far. What is the “dimension of feeling” that serves as the content for the attitude of legality? And how does tapping into this dimension fuel the engine of a rule of law legal system? By answering these questions, one may better understand the primacy of the attitude of legality in Walker’s comprehensive conception of the rule of law.

### 1. Content of the attitude of legality

An “attitude” is defined as a

[r]eadiness for attention, or action, of a definite sort. A mental attitude is thus a motor or attentive DISPOSITION which represents a definite, relatively independent, and conscious function.

. . . Mentally, it is a state of the attention primarily, and secondarily an expression for habitual tendencies and interests. . . .<sup>138</sup>

Furthermore, “[a] mental attitude is always directed towards something in mind.”<sup>139</sup>

133. Unfortunately, Walker’s brief discussion is more metaphor than analysis. *See id.* 41-42.

134. *Id.* Perhaps, a similar notion is present in Rawls’s theory of justice in his discussion of civil disobedience. The terms Rawls uses are a “*sentiment* of justice” or “community’s *sense* of justice.” RAWLS, *supra* note 10, at 386-87 (emphasis added); *see infra* note 295 and accompanying text.

135. WALKER, *supra* note 9, at 41 (emphasis added).

136. *Id.*

137. *See id.*

138. 1 DICTIONARY OF PHILOSOPHY AND PSYCHOLOGY 88-89 (James M. Baldwin ed., 1957) [hereinafter PHILOSOPHY DICTIONARY].

139. *Id.* at 89.

The existence of a mental attitude implies that some cognitive activity has taken place within the individual, facilitating a choice of belief or action towards a given object. As applied to Walker's attitude of legality, citizens exercise choice by holding a belief or acting volitionally based upon how they perceive the law. Thus, the dimension of feeling must be capable of providing sufficient information to allow individuals to form a disposition towards the object—in this case, the law—and to manifest that disposition in an act, or tendency to act—namely, adhering to or disregarding the law. The term "feeling," however, is imprecise. Therefore, the following is an attempt to isolate the dimension of feeling that can best provide content to the attitude of legality.

*a. sensation*

One common definition of "feeling" is the faculty by which one perceives sensate impressions, such as feelings of physical pain, heat, or brightness.<sup>140</sup> Using this notion to define feeling, the attitude of legality would spring from the dimension of sensation. This does not fit, however, with Walker's conception of the rule of law. For the law to affect the individual, its content must be understood to some degree; it must be able to promote enlightened public opinion.<sup>141</sup> Generally, understanding is a more complex form of mentation than that which can be acquired through the senses. Human activity grounded in sensate impression is reflexive, not cognitive.<sup>142</sup> Therefore, the sensory definition of feeling should be rejected because comprehension of law and intentional human action in regard to the law are not consistent with sensory information and reflexive action. Thus, smelling the law or tasting the law are absurd ideas, and merely hearing the decision in a case or seeing the words of a statute will not produce comprehension or underlie an informed volitional act.

*b. passion*

Another common understanding of feeling is an "emotional state," or "passion." First, a distinction between emotion and passion must be drawn.<sup>143</sup> "Emotion" is a long term affective state of consciousness "in-

---

140. NEW WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE 359 (deluxe ency. ed. 1981) [hereinafter NEW WEBSTER'S DICTIONARY].

141. See WALKER, *supra* note 9, at 41.

142. See PHILOSOPHY DICTIONARY, *supra* note 138, at 515. "Sensation" is defined as "[t]hat mode of consciousness which can only be accounted for by the present operation of an external stimulus upon the nervous system, or some equivalent condition." *Id.*

143. What constitutes an emotion, and how it is separate from a passion, or emotional state, is a subject discussed in great depth in both psychological and philosophical works. For a

volutioning a distinctive feeling-tone [examples of which are joy, fear, sorrow, love, anger] and a characteristic trend of activity aroused by a certain situation."<sup>144</sup> A "passion" is a compelling, intense, and transient experience of a feeling-tone.<sup>145</sup> The following are offered as illustrations of this distinction: If love is the emotion, ardent affection is the passion; if agitation of the mind is the emotion, violent anger is the passion; if fear is the emotion, sheer terror is the passion.

The dimension of passion would mean a rule of law system creates in citizens a regard for law that is based on compulsion of a feeling-tone. The fact of compulsion negates the idea of choice that is implicit in the formation of an attitude. Additionally, passion's transient and impulsive qualities would undermine ideas of certainty, fairness, and equality—three central tenets of the rule of law. Even substantive law recognizes the limits passion places on comprehension and volition. For example, the law treats a homicide committed in the "heat of passion," manslaughter, differently from murder. The law recognizes that had the individual been given time to reflect, his or her actions might have been different. Absent reflection, which affords choice of belief and action, one cannot truly form attitude. Therefore, passion cannot be the "dimension of feeling" to which Walker refers.

### c. *emotion*

Defining "feeling" as "emotion" offers the best possibility for providing content to the attitude of legality. According to one school of thought, an emotion is a long-term affective state of consciousness, involving a particular feeling-tone, that "occurs at some stage of a motivational process."<sup>146</sup> This process is described "as the process of apprehending something as desirable or undesirable and then taking steps to acquire it or to avoid it, or at least having a tendency to do so."<sup>147</sup> Thus, experiencing an emotion leads or tends to lead to a goal-directed endeavor.<sup>148</sup> This motivational theory of emotion seems to comport best with Walker's conception of the attitude of legality because he

---

quick overview, see 2 THE ENCYCLOPEDIA OF PHILOSOPHY 479-86 (Paul Edwards ed., 1967) [hereinafter ENCYCLOPEDIA]. It is beyond the scope of this Comment to resolve this debate; however, based on the minimal criteria discussed in the text of this Comment, there appear to be some ways to distinguish the two.

144. PHILOSOPHY DICTIONARY, *supra* note 138, at 316.

145. See ENCYCLOPEDIA, *supra* note 143, at 479.

146. See *id.* at 480.

147. *Id.*

148. See *id.* at 481.



believes that "feeling is the spring to human action."<sup>149</sup> Therefore, Walker's dimension of feeling can be identified as the dimension of emotion.

However, this does not completely describe the content of the attitude of legality. In order to further explore its scope, the next inquiry should be what feeling-tone or group of feeling-tones provides the motivational basis of emotion that forms this attitude toward the legal order. Several feeling-tones are offered as possible candidates.

"Fear" has been an oft-mentioned emotional motivator, particularly in positivist theories. Simply stated, fear of the coercive power of the sovereign or state fosters an attitude of legality in the people, and the deterrent effect of enforcement and punishment is considerable.<sup>150</sup> Yet when speaking of a public attitude toward an *entire* legal order, fear is probably inadequate to explain the entire relationship between citizens and a rule of law system.<sup>151</sup>

Modern positivists admit that most legal systems will have laws of command, like the criminal law, and laws of relationship, such as the law of contracts or wills.<sup>152</sup> While fear of disobeying a command and suffering the punishment may explain the attitude toward laws of command, it does not explain the attitude toward laws of relationship. No one fears the efficient breach of a contract. The law will not punish this breach; it merely exacts compensation in order to protect the parties' bargained-for benefit. Some even argue that the law should, and does, reward economically efficient transgressions.<sup>153</sup> Furthermore, obedience to laws of command are not necessarily predicated upon fear of punishment. Many people refrain from murder and robbery because they believe them immoral, regardless of the positive law's command. All things considered, fear alone is an inadequate emotional basis for an attitude of legality.

"Reverence" or "faith"—more refined emotions—may provide the requisite dimension of emotion to form an attitude of legality. Immanuel Kant wrote about the "[r]espect for the law, which in its subjective aspect is called moral feeling."<sup>154</sup> Reverence—respect wearing a moral overcoat—arises from the concept of duty, which is inherent in the law.<sup>155</sup> The observation or transgression of this duty will generate "plea-

---

149. See WALKER, *supra* note 9, at 41.

150. See Hart, *supra* note 47, at 604-05.

151. See *id.*

152. See *id.*

153. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 90-96 (4th ed. 1992).

154. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 256 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797).

155. *Id.*

sure or pain of a distinctive kind" which he called "moral feeling."<sup>156</sup> A similar notion is expressed by Lon L. Fuller as "fidelity to law."<sup>157</sup> Fidelity—"the careful and exact observance of duty"<sup>158</sup>—arises in one who is faithful to the object of one's belief.<sup>159</sup> Faith in the law is grounded on the inherent morality of the law itself.<sup>160</sup> For Fuller, the law's inherent morality is founded upon rightness of order;<sup>161</sup> for Kant, it is based upon rightness of duty.

The primary problem with reverence or faith is that they require a threshold belief that the positive law is necessarily moral. This could prove problematic for positivist lawyers—adherents of separation theory—and natural lawyers—who do not believe that positive law is necessarily moral, or for that matter, necessarily law at all. Reverence or faith may require a theoretical leap too controversial for many legal philosophers on either side of the nature of law debate.

Perhaps "respect" provides the least controversial motivational feeling-tone to describe the attitude of legality. Respect is a related notion to reverence and faith, but as developed here is grounded in political contractarian theory, not moral values. John Rawls's theory of justice provides three reasons for engendering this feeling of respect for the rule of law.

The primary reason is based upon Rawls's political concept of "justice as fairness."<sup>162</sup> Laws and procedures<sup>163</sup> are arrived at by the negotiations of free and rational people.<sup>164</sup> "[T]hose who engage in social cooperation choose together, in one joint act, the principles which are to assign basic rights and duties and to determine the division of social ben-

---

156. *Id.* at 48.

157. Fuller, *supra* note 47.

158. NEW WEBSTER'S DICTIONARY, *supra* note 140, at 362.

159. *See id.*

160. Fuller, *supra* note 47, at 644-48.

161. *Id.*

162. *See supra* notes 73-87 and accompanying text.

163. The words "laws" and "procedures" have been substituted for Professor Rawls's words "institutions," *see* John Rawls, *The Justification for Civil Disobedience*, in CIVIL DISOBEDIENCE: THEORY AND PRACTICE 240, 241 (Hugo Adam Bedau ed., 1969), and "principles," *see* RAWLS, *supra* note 10, at 11. His understanding of institutions and principles would be inclusive of both laws and procedures. Institutions is a more narrow term: "[A]n institution [is] a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like." *Id.* at 55. Principle is much broader: those fundamentals of fairness that people pursuing their own interest, unencumbered by self-knowledge of their specific circumstances, would agree as being fair. *Id.* at 11-12. Hence, substituting "laws" and "procedures" for Professor Rawls's "institutions" or "principles" is consistent with his core thesis, and more accurate for the purposes of this discussion.

164. *See* RAWLS, *supra* note 10, at 12, 236.

efits."<sup>165</sup> Once these principles of justice are agreed to, a legal system is developed to protect and maintain them.<sup>166</sup> Therefore, respect for the law is fostered by the notion of consent: The legal system's intrinsic fairness is the result of mutually agreed principles of justice selected and consented to by those subject to the law. Put another way, citizens respect their own handiwork.<sup>167</sup>

Professor Rawls's contractarian theory offers two additional reasons for engendering respect for the law. He asserts that citizens, as participants in a beneficial and reciprocal agreement, have a natural duty as well as a social obligation to honor the social contract.<sup>168</sup> One's natural duty is to not oppose establishment of just and efficient laws and procedures, and to comply with and uphold them once established.<sup>169</sup> One's social obligation is based on the familiar contract law doctrine of mutuality. Assuming an individual has knowingly benefitted from these laws and procedures and has imposed expectations on others to fulfill their part of the bargain, the individual is then obliged to do what he or she has agreed to do when the time for performance arrives.<sup>170</sup> In this manner, law promotes just and efficient social interaction, and provides equal benefits to all individuals subject to the legal order. Therefore, rational people would feel respect for the law because it is in their best interests—as individuals and as group members.

This Comment neither intends nor desires to identify any one specific motivational feeling-tone as definitive of any individual's or group's attitude of legality. This exercise is merely suggestive of the more probable feeling-tones that can provide sufficient content. In reality, Walker's dimension of emotion likely consists of a combination of these feeling-tones, and others not discussed. How individuals experience and per-

---

165. *Id.* at 11.

166. *See id.* at 236-37; *supra* notes 79-89 and accompanying text.

167. Although this Comment employs Rawlsian theory to explain the feeling of respect for the law, the notion of respect for the law as being founded on political contractarian principles has long been recognized as part of the democratic experience in the United States.

[I]n the United States everyone is personally interested in enforcing obedience of the whole community to the law; for as the minority may shortly rally the majority to its principles, it is interested in professing that respect for the decrees of the legislator which it may soon have occasion to claim for its own. However irksome an enactment may be, the citizen of the United States complies with it, not only because it is the work of the majority, but because it is his own, and he regards it as a contract to which he is himself a party.

ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 256-58 (Phillips Bradley ed. & Henry Reeve trans., Alfred A. Knopf, Inc. 1973) (1840).

168. Rawls, *supra* note 163, at 241.

169. *Id.*

170. *Id.*

ceive the legal order, how these experiences and perceptions translate into particular feeling-tones, and how these feeling-tones interact, take priority, and shape dispositions for certain behavior in the individual or group of individuals are all important inquiries beyond the scope of this Comment.<sup>171</sup> How the attitude of legality functions within a rule of law system, however, should be briefly addressed.

## 2. Function of the attitude of legality

The attitude of legality—the tendency, motivated by a single feeling-tone or a combination of several feeling-tones, to obey the parameters set by the legal order—serves three essential functions. First, it helps form the bond between the “beneficiaries” of a legal system—the public—and the “fiduciaries” of that legal system—police, judges, legislators, and other government officials. This bond helps ensure that the public will affirm and obey unpopular decisions and tough rules: “For unless the law can command obedience, there is no legal system . . . .”<sup>172</sup> The values, expressed in the first eleven elements of Walker’s model,<sup>173</sup> are designed to produce rules and procedures that citizens will perceive as generally promoting justice.

Second, the attitude of legality operates as a feedback mechanism in a legal system. The public is constantly getting information from the “fiduciaries” of a legal system via statutes, regulations, and case law. The attitude of legality, measured by objective manifestation of public sentiment, provides valuable feedback to the “fiduciaries” as to whether the “beneficiaries” perceive the legal order as able to deliver actual justice through the formal justice system. If the “fiduciaries” are sensitive to this feedback, they can maintain the public’s trust in the system by adjusting the legal order to reflect an evolving society’s needs.

Third, the attitude of legality, or more accurately its absence, serves as a warning device that indicates failures in a legal system. This function is especially important when the system is suffering from hard-to-detect, yet serious, defects. In this respect, the attitude of legality operates like a canary in a coal mine. It provides a prophylactic mechanism

---

171. There are many external influences that go into the formation of attitudes. *See, e.g.,* U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (1991) [hereinafter SOURCEBOOK]. One section of this publication is entitled *Public Attitudes Toward Crime and Criminal Justice-related Topics*. *Id.* at iii. Much of this attitudinal information is broken out according to the survey respondent’s race, age, gender, education, religion, income, politics, place of residence, and region of the country. *See id.* at 171-254. There are measurable differences in how members of these subcategories respond to specific questions.

172. WALKER, *supra* note 9, at 41.

173. *See supra* part II.D.

by which a legal order, which “on its face” justifies itself by apparent adherence to rule of law values, can have its hidden injustices exposed. For instance, a large number of citizens may begin to exhibit a “bad” attitude toward the law, or an attitude of lawlessness. This group may perceive the law and its administration negatively because it has experienced the legal system in an adverse way different from other citizens. This can occur when a particular group is routinely subjected to the deterrent or retributive forces of a legal system. Regardless of whether this discrimination is de jure or de facto, it destroys the fundamental rule of law values of equality, fairness, and impartiality. Therefore, the group’s resistance to the legal system, or its “bad” attitude of legality, provides a mechanism that should awaken a sense of injustice in fellow citizens. From this sense of injustice, citizens can explore, and hopefully correct, the disparate adverse impacts to which the affected group objects. Failure to make this inquiry, however, will likely lead to the spread of the loss of respect for the law, as more and more members outside the originally affected group begin to feel the failure of the legal order.

### III. THE RODNEY KING INCIDENT AND THE RULE OF LAW

This Comment suggests that the U.S. legal system is the type of legal system referred to in the preceding section: It is a system that “on its face” appears to embrace the rule of law, yet produces an increasing number of results that are perceived, especially by certain ethnic and racial groups, as unjust. This is particularly true in the criminal justice arena. The Rodney King incident illustrates this problem. The remainder of this Comment details some of the key events surrounding the arrest of Rodney King and the state trial of the police officers charged with overzealous enforcement of the law, and examines whether the rule of law was either advanced or defeated by the legal system’s response to these events. Then, it proposes two alternative practices to the system’s current operations—practices more in tune with rule of law values.

#### A. *The Beating*

*F.D. [Fire Department]: Hold, hold on, give me the address again.*

*P.D. [Police Department]: Foothill & Osborne, he pissed us off, so I guess he needs an ambulance now.*

*F.D.: Oh, Osborne. Little attitude adjustment?*

*P.D.: Yeah, we had to chase him.*

*F.D.: OH!*

*P.D.: CHP and us, I think that kind of irritated us a little.*

*F.D.: Why would you want to do that for?*

*P.D.: (laughter) should know better than run, they are going to pay a price when they do that.*<sup>174</sup>

### 1. The facts

On March 3, 1991, at approximately 12:40 a.m., a call went out over the police band that a high-speed chase was underway on the Foothill Freeway.<sup>175</sup> The California Highway Patrol (CHP) reported that a suspect was erratically driving a Hyundai clocked at 110 to 115 miles per hour.<sup>176</sup> Shortly after this transmission, Los Angeles Police Department (LAPD) Officer Laurence Powell and rookie Officer Timothy Wind joined in the pursuit as the LAPD's primary response car.<sup>177</sup> LAPD Officers Theodore Briseno and Roland Solano, driving toward the scene, were designated the secondary pursuit car.<sup>178</sup> From his post at the Foothill LAPD station, Sergeant Stacey Koon announced over the radio that he too would respond to the felony in progress.<sup>179</sup>

By 12:50 a.m. a LAPD unit transmitted a "Code 6," meaning that the pursuit had ended.<sup>180</sup> It ended at the intersection of Osborne and Foothill Boulevards in Lakeview Terrace.<sup>181</sup> A total of twenty-three officers, consisting of LAPD, CHP, and Los Angeles Unified School District Police,<sup>182</sup> ten patrol cars, and a helicopter were present at the end of the pursuit.<sup>183</sup> Using his loudspeaker, CHP Officer Timothy Singer or-

174. INDEPENDENT COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT, 14-15 (1991) [hereinafter COMMISSION] (quoting transcript of fire and police dispatchers' radio-transmitted conversation concerning request for assistance for Rodney King after his encounter with police).

175. See *id.* at 4; Jim Newton, *Koon Says King Defied Efforts to Subdue Him*, L.A. TIMES, Mar. 24, 1993, at A1, A21.

176. COMMISSION, *supra* note 174, at 4. There is controversy about this fact because some believe Hyundais are incapable of going more than 100 m.p.h. *Id.*

177. *Id.*

178. *Id.* at 5.

179. Newton, *supra* note 175, at A21. Sergeant Koon said that he needed to be on the scene when the pursuit ended so that he could fulfill his duties as field sergeant. *Id.* "I wanted to catch up with the pursuit and involve myself in it and take control." *Id.*

180. COMMISSION, *supra* note 174, at 4.

181. *Id.*

182. Because racial animus is an issue in this incident, it is interesting to note the racial make-up of the officers present at the scene. The group consisted of two African-Americans—a male and female—four Latino males, two caucasian females, and 15 caucasian males. *Id.* at 11.

183. *Id.* at 5. At least twelve of these officers arrived after the "Code 4" was transmitted. *Id.* A Code 4 "notifies all units that 'additional assistance is not needed at the scene' and indicates that all units not at the scene 'shall return to their assigned patrol area.'" *Id.* (quot-

dered all the occupants out of the car.<sup>184</sup> The two passengers immediately exited the car and assumed the "prone-out" position on the pavement.<sup>185</sup> Following "felony stop" procedure, the two men were handcuffed and guarded at gunpoint.<sup>186</sup> At some point after the passengers complied, Rodney King, the driver, exited the Hyundai.<sup>187</sup> An African-American male, standing six feet, three inches tall and weighing roughly 225 pounds, emerged from the tiny import.<sup>188</sup> It was at this time that Sergeant Koon arrived on the scene.<sup>189</sup>

Upon seeing Mr. King, Sergeant Koon reported that he "felt threatened, but felt enough confidence in his officers to take care of the situation."<sup>190</sup> Not only was Mr. King "big and muscular," but Sergeant Koon believed he might be on PCP.<sup>191</sup> Once outside his car, Mr. King seemed "'disoriented and unbalanced.'"<sup>192</sup> Mr. King stared blankly into space, an indication, according to Sergeant Koon, that he was under the influence of PCP.<sup>193</sup> In addition, Mr. King waived at a police helicopter overhead, shook his buttocks at the officers, and did "'a little dance.'"<sup>194</sup> Indeed, Mr. King later admitted to drinking alcohol earlier that evening.<sup>195</sup>

---

ing 4 L.A. POLICE DEP'T, LAPD MANUAL 289). Most of these latecomers did not have a reason to be on the scene other than idle curiosity. *See id.*

184. *Id.* There were three people in the vehicle: Mr. King, the driver, and his passengers, Bryant Allen and Freddie Helms. *Id.* at 7.

185. *Id.* at 7. The "prone-out" position is lying flat, face down on the ground. *See id.*

186. *Id.* at 5.

187. The speed with which Mr. King complied with the police order to exit his car was another contested fact. Sergeant Koon and Officer Powell claimed that Mr. King initially refused. *Id.* at 5-6. Furthermore, once Mr. King did get out of the car, he refused to follow directions and went back inside. *Id.* at 6. Mr. King has always maintained that he tried to follow the police commands, but they were being shouted at him in a manner that confused him. *See id.*; Jim Newton, 'I Was Just Trying to Stay Alive,' *King Tells Federal Jury*, L.A. TIMES, Mar. 10, 1993, at A1, A16. One of the passengers in Mr. King's car, Bryant Allen, told investigators that Mr. King did immediately respond to the police command to exit, but having failed to unbuckle his seatbelt, was pulled back inside his car. COMMISSION, *supra* note 174, at 6.

188. COMMISSION, *supra* note 174, at 6.

189. *See* Newton, *supra* note 175, at A21.

190. COMMISSION, *supra* note 174, at 6 (quoting LAPD Internal Affairs Report).

191. *Id.* PCP is shorthand for a powerful and popular street drug called phencyclidine. PCP is a particularly frightening drug because of its propensity to imbue some of its users with a type of psychosis that can produce violent tempers, hallucinations, and an immunity to pain. *See* JAMES C. WEISSMAN, DRUG ABUSE: THE LAW AND TREATMENT ALTERNATIVES 82-83 (1978).

192. COMMISSION, *supra* note 174, at 6 (quoting LAPD Internal Affairs Report).

193. Newton, *supra* note 175, at A21.

194. *Id.* (quoting Sergeant Koon's testimony during federal trial).

195. Newton, *supra* note 187, at A16.

Mr. King was ordered to lie prone on the ground, but instead, got down on all fours and slapped the ground.<sup>196</sup> Sergeant Koon ordered his officers to handcuff Mr. King.<sup>197</sup> Several officers swarmed Mr. King and pulled his arms out from under him, causing him to slam face first onto the pavement.<sup>198</sup> As they attempted to handcuff him, Mr. King testified that his arm was being twisted, and the resulting pain caused him to yell and flinch.<sup>199</sup> Mr. King said that this startled the officers so that they jumped off of him.<sup>200</sup> As Sergeant Koon saw it, the suspect suddenly threw "800 pounds of officer off his back."<sup>201</sup> Officer Powell reported that Mr. King rose up from the ground, almost knocking him down.<sup>202</sup>

Now "100 percent" convinced that Mr. King was on PCP and dangerous, Sergeant Koon shouted to his officers to stand back and shot Mr. King twice with a Taser.<sup>203</sup> Sergeant Koon reported that the suspect did not respond to either firing of the Taser.<sup>204</sup> Another officer on the scene reported that the Taser had some effect because Mr. King shook and yelled for almost five seconds.<sup>205</sup> Mr. King later testified to his reaction: "When I got shocked, it just felt like my blood was boiling inside me. . . . I just kind of laid down and took it. I was hoping it would go away shortly."<sup>206</sup>

Meanwhile, across the street in a darkened apartment, George Holliday was sleeping, his new video camera recharging in the living room.<sup>207</sup> The commotion of sirens, flashing lights, and helicopter blades thumping the night air woke Mr. Holliday up and drew him to the win-

---

Blood and urine samples taken from King five hours after his arrest showed that his blood-alcohol level was 0.075%, indicating that at the time of his arrest, he was over the level (0.08%) at which one can be presumed intoxicated under California law. The tests also showed "traces" of marijuana (26 mg/ml), but no indication of PCP or any other illegal drug.

COMMISSION, *supra* note 174, at 8.

196. COMMISSION, *supra* note 174, at 6.

197. Newton, *supra* note 175, at A21.

198. *Id.*

199. Newton, *supra* note 187, at A16.

200. *Id.*

201. Newton, *supra* note 175, at A21 (quoting Sergeant Koon's testimony during federal trial).

202. COMMISSION, *supra* note 174, at 6.

203. *Id.* (quoting LAPD Internal Affairs Report). A Taser is a gun-like device that uses an electric shock to temporarily immobilize suspects who are physically resisting arrest. See Newton, *supra* note 187, at A16.

204. COMMISSION, *supra* note 174, at 6.

205. *Id.*

206. Newton, *supra* note 187, at A16 (quoting Mr. King's testimony during federal trial).

207. Steve Padilla et al., *Cameraman's Test Puts Him in the Spotlight*, L.A. TIMES, Mar. 7, 1991, at B1.



dow.<sup>208</sup> He looked out just in time to see Mr. King shot with the Taser.<sup>209</sup> He raised the video camera to his eye and pushed "record."<sup>210</sup>

As Mr. King was shaking off the effects of the Taser,<sup>211</sup> he thought he heard an officer yell, " "We're going to kill you nigger. Run." " "<sup>212</sup> He rose up to run away. As Mr. King moved towards Officer Powell, Officer Powell stuck Mr. King with his baton.<sup>213</sup> Mr. King fell back to the ground immediately; Officer Powell hit him several more times.<sup>214</sup> While Sergeant Koon yelled "that's enough," Officer Briseno moved in to stop his fellow officer.<sup>215</sup> Then Mr. King rose to his knees, and Officers Powell and Wind struck him again.<sup>216</sup>

Despite repeated "power strokes" from the officers' batons, Mr. King "apparently continued to try to get up."<sup>217</sup> The officers continued to strike Mr. King because they interpreted his subsequent movements as either threats of violence or expressions of defiance.<sup>218</sup> Mr. King said any moves he made were to protect his head and body from the barrage of blows and kicks.<sup>219</sup> Finally, after fifty-six baton blows and six kicks, Mr. King was subdued.<sup>220</sup> He was then hog-tied, with handcuffs and cordcuffs, and left on the ground for several minutes before being loaded into an ambulance and driven away.<sup>221</sup>

208. *Id.*

209. *See id.* " 'By the time I got the camera on they were hitting him, and I just happened to get the action,' Holliday said." *Id.*

210. *See id.*

211. *See* Newton, *supra* note 187, at A16.

212. *Id.* (quoting Mr. King's testimony during federal trial). However, upon both direct and cross-examination, Mr. King admitted that he is not "absolutely" sure that these racial epithets were used, and that he made conflicting statements regarding them on a number of occasions. *See* Jim Newton, *King Admits Lies but Insists That He Didn't Hit Officers*, L.A. TIMES, Mar. 11, 1993, at A1, A18. The infamous videotape provides little help.

On May 7, 1991, Los Angeles public television station KCET broadcast an "enhanced audio" version of [the video]. According to KCET, the enhanced video indicates that as King is being beaten, an officer is yelling "nigger, hands behind your back—your back." An audio enhancement done for the Los Angeles County District Attorney's Office, on the other hand, was described as "inconclusive."

COMMISSION, *supra* note 174, at 8.

213. COMMISSION, *supra* note 174, at 7.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *See* Newton, *supra* note 175, at A1, A21.

219. Newton, *supra* note 187, at A1.

220. COMMISSION, *supra* note 174, at 7.

221. *Id.* at 7-8.

Mr. Holliday captured the last eighty-two seconds of Mr. King's encounter with the police in blurry black and white.<sup>222</sup> The next day, March 4, Mr. Holliday called the Foothill LAPD station advising them that he had witnessed a violent encounter involving a motorist and the police.<sup>223</sup> The desk officer expressed his disinterest by failing to ask for the details of the event Mr. Holliday had witnessed.<sup>224</sup> Mr. Holliday did not tell the LAPD he had the videotape.<sup>225</sup> Later that day, Mr. Holliday contacted Los Angeles television station KTLA, which broadcast the video that night.<sup>226</sup> CNN got hold of a copy, and in a matter of days it was replayed over and over again throughout the world.<sup>227</sup>

Condemnation of the event was swift, coming from all sectors of society. The immediate reaction from LAPD Chief Daryl Gates was that the tape was "shocking," but that he would reserve his judgment until the incident was investigated.<sup>228</sup> Mayor Tom Bradley was "outraged" by what he saw, stating that "this is something we cannot, and will not tolerate."<sup>229</sup> President George Bush publicly stated that the conduct depicted in the video was "sickening."<sup>230</sup> Polls taken in the weeks following the incident indicated that Los Angelenos, of all races and ethnicities, believed that this kind of "street justice" was commonly practiced by the LAPD.<sup>231</sup>

## 2. The rule of law violated

Police brutality motivated by racial animus is an egregious violation of point eleven of Walker's rule of law definition. Point eleven states that law enforcement must exercise its discretionary powers in a way that is honest and impartial, and does not pervert the law. The use of reason-

---

222. See Padilla et al., *supra* note 207, at B1.

223. COMMISSION, *supra* note 174, at 11.

224. *Id.*

225. *Id.*

226. *Id.* Mr. Holliday sold the tape to KTLA for \$500. Padilla et al., *supra* note 207, at B1.

227. See Padilla et al., *supra* note 207, at B1.

228. COMMISSION, *supra* note 174, at 12.

229. *Id.* at 12-13 (quoting Mayor Tom Bradley).

230. *Id.* at i.

231. *Id.* at 16. According to a *Los Angeles Times* poll conducted March 7-8, 1991—three days after the initial broadcast of the incident—63% of Los Angeles city residents, including a majority of whites, felt that incidents of police brutality were "common." *Id.* Two weeks later, a poll asking the same question received a similar response—68% of Los Angeles residents saying police brutality was "very common" or "fairly common." *Id.* This second poll was broken down by race: Fifty-nine percent of the Caucasian respondents, 87% of the African-American respondents, and 80% of the Latino respondents said police brutality was either "very common" or "fairly common." *Id.*

able force is a discretionary power granted to police in order to prevent imminent harm to themselves and others, or to coerce suspects to submit to arrest.<sup>232</sup> If prejudice towards an individual on account of race or ethnicity, or personal hostility at the suspect's obstinate defiance, is at the root of an officer's use of force, that officer has violated the impartiality and honesty requirements of point eleven. There is no justification *ever* for police to use unreasonable force in a rule of law legal system. Thus, the image of four police officers beating a prone man, while a score of other officers watched, appeared to most viewers as though the police were not only violating the positive law, but were flaunting their disdain for the rule of law.

### 3. The rule of law system responds

Official action was immediate; it served the rule of law value embodied in point six: Government action in accordance with the law is subject to oversight and enforcement. By March 6, three days after the incident, the Federal Bureau of Investigation (FBI), the Los Angeles District Attorney's Office, the LAPD Internal Affairs Department, and the Police Commission had begun investigations of the matter.<sup>233</sup> Soon thereafter, the United States Attorney General's Office began to investigate whether

---

232. The grant of this discretionary power is part of most states' positive law. For example, the California Penal Code provides:

Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance.

A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.

CAL. PENAL CODE § 835a (West 1985).

Additionally, local police authorities in written policies and guidelines define in some detail what constitutes "reasonable force." For example, the LAPD uses the following policy statement:

In a complex urban society, officers are daily confronted with situations where control must be exercised to effect arrests and to protect the public safety. Control may be achieved through advice, warnings, and persuasion, or by the use of physical force. While use of reasonable physical force may be necessary in situations which cannot be otherwise controlled, force may not be resorted to unless other reasonable alternatives have been exhausted or would clearly be ineffective under the particular circumstances. Officers are permitted to use whatever force that is reasonable and necessary to protect others or themselves from bodily harm.

COMMISSION, *supra* note 174, at 26. Officer training teaches that the suspect determines the amount of force that is "reasonable and necessary" under the circumstances. *Id.* "As the suspect escalates or de-escalates his or her level of resistance or aggressiveness, the officer must react accordingly." *Id.*

233. COMMISSION, *supra* note 174, at 13.

any federal criminal civil rights laws were violated.<sup>234</sup> Many of the seventeen LAPD officers at the scene were either transferred from the Foothill Division or subject to disciplinary action, and a shake-up of the Foothill Station command hierarchy occurred.<sup>235</sup> Furthermore, in response to the public outcry that racial bias and police brutality were status quo throughout the LAPD, Mayor Tom Bradley empaneled the Independent Commission on the Los Angeles Police Department.<sup>236</sup> Its mission was to probe the concerns regarding excessive force under color of law, especially in dealing with minority individuals.<sup>237</sup>

While reports were being compiled, the District Attorney's Office brought state criminal charges against four officers. Sergeant Koon and Officers Powell, Briseno, and Wind were charged with multiple violations of the California Penal Code. Count I alleged criminal assault with force likely to produce great bodily injury;<sup>238</sup> Count II alleged criminal assault by a public officer who, under color of authority, beats a person without lawful necessity;<sup>239</sup> Counts III and IV, charges against Powell and Sergeant Koon respectively, dealt with filing false police reports;<sup>240</sup> and, Count V charged Sergeant Koon as an accessory after the fact to the criminal assaults charged in Counts I and II.<sup>241</sup>

These indictments served the rule of law in three substantial ways. First, they supported the point-six value: Government is subject to the coercive power of the law. Although these police officers had discretionary power to use force against Mr. King, they still are subject to judicial scrutiny of their exercise of that power to ensure it did not cross the line into criminal conduct. Second, they supported the point-two value: The

---

234. *See id.* Because the Los Angeles District Attorney's Office quickly brought charges against four officers, the federal investigation was suspended so as not to interfere with local authorities. The federal investigation resumed, however, within hours of the state court not-guilty verdicts. *See Jim Newton, How the Case Was Won, L.A. TIMES MAG.*, June 27, 1993, at 10.

235. COMMISSION, *supra* note 174, at 13.

236. *See id.* at ii.

237. *Id.* "The principal purpose of this Report is to present the results of our efforts to understand why and how often this authority has been abused, and to offer some down-to-earth recommendations for avoiding a repetition of incidents like that involving Rodney King." *Id.* at iii. In order to arrive at this understanding, the Independent Commission interviewed more than 50 experts, 150 community representatives and private citizens, and 500 current and retired LAPD officers, and reviewed more than one million pages of documents. *Id.* A staff of 60-plus lawyers assisted by three data-analysis firms worked 100 days to produce this self-described "blunt report." *Id.* at ii-iii.

238. CAL. PENAL CODE § 245(a)(1) (West 1988).

239. *Id.* § 149 (West 1988).

240. *Id.* § 118.1 (West Supp. 1993).

241. *Id.* § 32 (West 1988).

substantive content of the law delimits government action. Four of the five counts dealt with substantive criminal laws that specifically prohibit intentional acts committed by law enforcement officials. Third, the swift official action taken supported the point-twelve value: the attitude of legality. Heeding the outrage in the African-American community and the shock of citizens at large, this quick and decisive action was intended to restore public confidence in the formal justice system. Furthermore, the tragic event gave rise to heightened public awareness. Minority groups' longstanding problems with the criminal justice system were now dramatically impressed on the majority's sense of justice.<sup>242</sup>

### B. *The Jury*

*[The jury's] chief value is that it applies the "law". . . in an earthy fashion that comports with justice as conceived by the masses, for whom after all the law is mainly meant to serve. The general verdict is the answer from the man on the street.*<sup>243</sup>

#### 1. Change of venue

Shortly after their arraignment, the four officers moved for a change of venue.<sup>244</sup> They argued that the daily coverage of the "resultant events" flowing from the incident—in print and on radio and television—and the palpable prejudice against the LAPD throughout the city made it impossible for them to seat an impartial local jury.<sup>245</sup> The trial court denied the motion, but the state appellate court granted the writ of mandate and remanded the matter to the trial court to choose a new site "where a fair trial can be held."<sup>246</sup> The court of appeal ordered the change of venue because "Los Angeles County is so saturated with knowledge of the incident, so influenced by the political controversy sur-

---

242. Minority group advocates in Los Angeles have long complained of the discriminatory and brutal treatment by the LAPD towards the minority population. See COMMISSION, *supra* note 174, at 70. Furthermore, official recognition of discriminatory treatment of minorities has existed since the report by the Governor's Commission on the Los Angeles Riots of August 1965. *Id.* (quoting report's finding that "'a deep and longstanding schism between a substantial portion of the Negro community and the Police Department'" exists). However, these charges have been largely ignored by the Caucasian population. For example, but for the videotape of Rodney King's encounter with the LAPD, it is unlikely that this incident would have been investigated. See *id.* at 9-11 (detailing Paul King's, Rodney King's brother, and George Holliday's frustrated attempts to report incident to police).

243. 5 JEREMY C. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 49.05, at 2235-36 (2d ed. 1969).

244. See *Powell v. Superior Court*, 232 Cal. App. 3d 785, 283 Cal. Rptr. 777 (1991).

245. *Id.* at 796-97, 283 Cal. Rptr. at 783-84.

246. *Id.* at 803, 283 Cal. Rptr. at 788.

rounding the matter and so permeated with preconceived opinions that potential jurors cannot try the case solely upon the evidence presented in the courtroom.”<sup>247</sup>

The United States Constitution guarantees a criminal defendant the “right to a speedy and public trial, by an impartial jury of the [s]tate and district wherein the crime shall have been committed.”<sup>248</sup> However, due to the notoriety of the accused’s alleged crime, the defendant may believe it would be impossible to receive a fair trial in the constitutionally mandated “district.”<sup>249</sup> Upon a showing of a “reasonable likelihood” of prejudice, the defendant has a constitutional right to a change of venue.<sup>250</sup> Both the right and the ability to waive this right are examples of point nine of the rule of law definition—the incorporation of principles of natural justice into tribunals.

Change of venue is a mechanism designed to keep a system conforming to the rule of law ideal. It recognizes that merely empaneling a jury or holding an open trial is not enough to guarantee an impartial tribunal. In fact, these mechanisms of fairness sometimes produce the opposite result. Justice is hardly served by subjecting a defendant to the wrath of an angry community. However, once the decision to change venue has been reached, what factors, consistent with rule of law values, should be considered to determine the new venue?

Current law gives scant guidance. The Federal Rules of Criminal Procedure state: “For the convenience of the parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding . . . .”<sup>251</sup> Although California also recognizes the defendant’s right to change of venue,<sup>252</sup> the current statutes provide no guidance on how to choose the new venue. Instead, an administrative code sets forth the procedure.<sup>253</sup> Like federal law, institutional and party

---

247. *Id.* at 802, 283 Cal. Rptr. at 788.

248. U.S. CONST. amend. VI.

249. A defendant has the burden of proving prejudice due to media coverage or a hostile courtroom environment in order to prove his or her Sixth Amendment right has been violated. *See* *Murphy v. Florida*, 421 U.S. 794, 800-01 (1975). In making its determination, the court is to apply a totality-of-circumstances standard. *Id.* at 799. In *Powell*, the court considered the following material factors in making its determination: “the size of the potential jury pool, the nature and extent of the publicity, the status of the accused and the victim, the nature and gravity of the offense, and the existing political turmoil arising from the incident.” *Powell*, 232 Cal. App. 3d at 794-95, 283 Cal. Rptr. at 782.

250. *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966).

251. FED. R. CRIM. P. 21(b).

252. CAL. PENAL CODE §§ 1033, 1034 (West 1985 & Supp. 1993).

253. CAL. R. CT. 842.

convenience seem to be the priorities considered in pursuit of the "interest of justice."<sup>254</sup>

The right to a fair trial belongs to the defendant, not the victim or the people.<sup>255</sup> Consequently, if an unprejudiced jury can be obtained in the new community, and the new location is relatively convenient for the parties, witnesses, and the court, then the legal system will find that the interests of justice—that is, the interests of the defendant—have been served.<sup>256</sup> Under current venue law, broader concerns, such as the particular community's social values or sense of injustice, are irrelevant.<sup>257</sup> This is a strange result considering that the jury is supposed to represent the "conscience of the community."

## 2. The conscience of the community

According to Walker's comprehensive definition, trial by jury is not an essential component of a rule of law system.<sup>258</sup> In the United States, however, it holds a prominent and revered position.<sup>259</sup> An impartial jury system supports several rule of law values. It ensures that the laws remain reasonably consistent with public opinion (point four); enhances a tribunal's impartiality (point nine); and is vital to the nurturing of an

---

254. *See id.* Specifically, the California rule provides:

Upon being advised the [Administrative Director of the Courts] shall, in order to expedite judicial business and equalize the work of judges, suggest a court or courts that would not be unduly burdened by the trial of the case. Thereafter, the court in which the case is pending shall transfer the case to a proper court as it determines to be in the interest of justice.

*Id.*

255. Federal Rules of Criminal Procedure rule 21 "provides for a change of venue only on defendant's motion and does not extend the same right to the prosecution, since the defendant has a constitutional right." FED. R. CRIM. P. 21 advisory committee's note 3; *see* Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533, 1540 n.34 (1993) (citing case law examples). However, a recent California ballot initiative that passed in June 1990, the "Victim's Justice Reform Act" (Proposition 115), may give the prosecution a "due process right" to a fair trial in criminal cases, and hence, to a change of venue. *See id.* at 1557-58.

256. Levenson, *supra* note 255, at 1542.

257. *Id.* Professor Levenson states that current change-of-venue law is based on three assumptions: (1) "that the prosecution can obtain justice in *any* venue that provides a fair, untainted trial"; (2) "that the prosecution has no constitutional right to a particular location or jury pool"; and (3) "that trial courts are equipped and inclined to discern what will serve 'the interest of justice' in selecting a new location for trial." *Id.* at 1543 (emphasis added). These assumptions assume away any societal interests in justice being done for the injured community.

258. The requirement of jury trial is absent from Walker's comprehensive definition. *See supra* part II.D.

259. An estimated 80% of "all jury trials worldwide take place in the United States." VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 31 (1986).

attitude of legality (point twelve). The jury serves these values by functioning as the "conscience of the community."<sup>260</sup>

Public participation in the trial process adds legitimacy to the proceedings.<sup>261</sup> This is particularly important in criminal trials where the state exercises its full coercive power against the individual.<sup>262</sup> Additionally, participation of citizens in the jury system legitimizes the government by enhancing the feeling that the "government and the people [are] in touch with each other."<sup>263</sup> Furthermore, as the standard-bearer of community values, the jury acts as a barrier to prosecutorial and judicial excess.<sup>264</sup> This is accomplished by injecting "community standards . . . into the legal system to guard against possible harshness, arbitrariness, or inaccuracy."<sup>265</sup> In light of these factors, the attitude of legality (point twelve) is promoted by the use of the jury.

When a court grants a change of venue, a definitional problem arises. How is community to be defined? Constitutionally, legally, and by historic practice, community is defined geographically as the "district," usually the county, in which the crime occurred.<sup>266</sup> This narrow geographic denotation of community not only has led to "anomalies of

---

260. "[T]he jury, as the conscience of the community, must be permitted to look at more than logic." *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969). Andrew Hamilton, the Philadelphia lawyer who in 1735 defended printer John Peter Zenger on trial for seditious libel, defined the idea in these words: "Jurymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings, in judging of the lives, liberties or estates of their fellow subjects." HANS & VIDMAR, *supra* note 259, at 35. *But see* Levenson, *supra* note 255, at 1551 ("[T]his phrase is frequently used, it is infrequently defined." (footnote omitted)).

Professor Levenson articulates just how the three rule of law values are supported by the proper functioning of the jury as a conscience of the community.

At its essence, the phrase identifies a key role of the jury—to serve as a democratic watchdog in the judicial decision-making process [point four]. It establishes a means for popular participation in the administration of justice [points four and twelve]. . . . In order for a jury verdict to be accepted by the community and serve its role as a symbol of peaceful and satisfactory resolution of the case [point nine], the verdict must comport with community standards [points four and twelve]."

*Id.* at 1551-52 (footnotes omitted).

261. *See* Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 188-201 (1972).

262. *See* Levenson, *supra* note 255, at 1551-52.

263. Schefflin, *supra* note 261, at 190.

264. *See* Levenson, *supra* note 255, at 1557.

265. Harold A. McDougall, III, Note, *The Case for Black Juries*, 79 YALE L.J. 531, 531 (1970).

266. U.S. CONST. amend. VI; *see* HANS & VIDMAR, *supra* note 259, at 28-29.



justice,"<sup>267</sup> but is counter to the common human associational definition.<sup>268</sup>

If community is more a definition of people than places, does it make rational or intuitive sense to believe that any one community in modern America is a mirror image of any other? Perhaps in a homogeneous society "community" can be defined by metes and bounds.<sup>269</sup> Whether characterized as the great "melting pot"—a fusion of many into one—or "salad bowl"—a mixture of the separate but equal—the United States prides itself on being "a nation of immigrants."<sup>270</sup> Yet despite the historic fact of cultural diversity, federal and California law regarding change of venue seems to presume that all communities are alike because they do not require judicial consideration of differences among citizens who comprise the particular "district in which the crime was committed."

### 3. The conscience of Simi Valley

On remand from the appellate court, the trial court was compelled to choose a new venue for the four officers pursuant to California Rule of

267. See HANS & VIDMAR, *supra* note 259, at 28-29. For example, in England, as late as 1536, "[d]ue to quirks of ancient surveying practices," if a crime was committed on "certain roads, bays, creeks and harbors" that were not geographically located in any county, the defendant was not entitled to a jury trial. *Id.* at 29.

268. As an example of the common, everyday understanding, refer to *New Webster's Dictionary of the English Language*, which defines "community" as:

The state of being held in common; common possession, enjoyment, liability, etc.; common character; agreement . . . life in association with others; the social state; a number of individuals associated together by fact of residence in the same locality, or of subjection to the same laws and regulations; a number of persons having common ties or interests and living in the same locality . . .

NEW WEBSTER'S DICTIONARY, *supra* note 140, at 204 (emphasis added). Even in the field of sociology, community is defined in terms of human association.

Originally the term *community* denoted a collectivity of people who occupied a geographical area; people who were together engaged in economic and political activities and who essentially constituted a self-governing social unit with some common values and experiencing feelings of belonging to one another. . . . [Today] [*community*], although less all-inclusive, and slightly more specific in connotation, may be regarded as denoting a community of interests.

A NEW DICTIONARY OF THE SOCIAL SCIENCES 31 (1979).

269. Is it fair to characterize any society as truly homogeneous? Often societies of predominantly one race, such as Finland, Japan, Sweden, or even England, are considered homogeneous. However, economic, educational, or occupational differences can have a fundamental impact on an individual's experience and emotional memory, and hence, his or her perception of things. See *supra* note 171 and accompanying text; see *infra* notes 365-69 and accompanying text. Consider, whether a jury of coal miners from Newcastle would necessarily respond to the case of a poor man stealing a loaf of bread for his sister's child in the same way a jury of financial analysts from Bond Street would.

270. See Andrew R. Cecil, *Introduction to A MELTING POT OR A NATION OF MINORITIES* 11 (W. Lawson Taitte ed., 1986).

Court 842.<sup>271</sup> The Administrative Director suggested that the trial be moved to Alameda, Riverside, or Ventura County.<sup>272</sup> The prosecution argued for Alameda County, which has racial diversity similar to that found in Los Angeles County.<sup>273</sup> Deciding that the move would be too costly and time consuming for the participants, the judge decided to vest the "conscience of the community" in Simi Valley.<sup>274</sup>

Simi Valley, located in Ventura County, is a predominantly Caucasian, middle-class community of 100,000.<sup>275</sup> Ventura County is 66% Caucasian and 2% African-American, compared to Los Angeles County's 41% Caucasian and 11% African-American populations.<sup>276</sup> Ventura County boasts of being one of the safest urban counties in America; Simi Valley is home to the Ronald Reagan Presidential Library and the place to which "many members of the Los Angeles Police Department have fled."<sup>277</sup> From this venire, a nearly all-Anglo jury was eventually selected.<sup>278</sup> Following weeks of televised proceedings, the jury deliberated six days. The verdict: Not Guilty.<sup>279</sup>

### C. *The Disturbance*

*The perpetrators are not the good people of this city, not the law abiding citizens of any community of Los Angeles. They are the hoodlums who are destroying, who are trashing, who are burning, and who are killing.*<sup>280</sup>

---

271. See *supra* note 254.

272. Levenson, *supra* note 255, at 1544.

273. *Id.*

274. *Id.*

275. *Id.* at 1534 n.5.

276. *Id.* at 1537 n.23. Even more disparate are the specific demographic numbers for Simi Valley: 80% Anglo, 13% Hispanic, 1.5% African-American, 5% Asian, and 0.5% American Indian. Daryl Kelley, *The King Case Aftermath*, L.A. TIMES (Ventura County ed.), May 3, 1992, at B1.

277. Levenson, *supra* note 255, at 1537 n.23.

278. The actual racial make-up of the jury was 10 caucasians, one Latina and one Asian. Edward J. Boyer, *Williams Denies Hitting Denny, Urges Gang Peace*, L.A. TIMES, Aug. 17, 1993, at A1, A3.

279. The jury acquitted Sergeant Koon and Officers Powell, Briseno, and Wind of felony assault charges and charges relating to filing false reports. The jury hung on the charge against Powell, who delivered the most blows, for felony assault under color of authority. Richard A. Serrano & Tracy Wilkinson, *All 4 Acquitted in King Beating*, L.A. TIMES, Apr. 30, 1992, at A1.

280. *The Capital Gang: Who Was Rioting in L.A.?* (CNN television broadcast, May 2, 1992) available in LEXIS, Nexis Library, Script File [hereinafter *Capital Gang*] (statement of Los Angeles Mayor Tom Bradley).

*Don't put it all on criminal elements. Some people are just fed up. Across this nation black people are crying out for justice and that must be answered.*<sup>281</sup>

### 1. Legitimate rebellion or poetic injustice

On April 29, 1992, within hours of the verdict, violence erupted.<sup>282</sup> At the intersection of Florence and Normandie Boulevards, angry African-Americans pulled innocent drivers from their cars and beat them mercilessly.<sup>283</sup> The vicious attack by four black men on a lone, white truck driver was televised live to a shocked populace caught in the throes of a nightmarish *déjà vu*.<sup>284</sup> In another part of the city, protesters attacked the federal court building and police headquarters.<sup>285</sup> The LAPD, unprepared for the backlash, retreated, regrouped, and awaited orders from an already fatally wounded leadership.<sup>286</sup> Meanwhile, the city burned.<sup>287</sup>

It burned for three days. More than 5000 buildings were damaged or destroyed; fifty-eight people died and thousands were injured.<sup>288</sup> It was the costliest civil disorder in United States history, totaling nearly one billion dollars.<sup>289</sup> In the aftermath some African-American leaders, such as Congresswoman Maxine Waters, were criticized for justifying the civil unrest.<sup>290</sup> Other public figures, such as Police Chief Daryl Gates,

281. *Id.* (statement of National Executive Director of NAACP Benjamin Hooks).

282. Serrano & Wilkinson, *supra* note 279, at A1.

283. Marc Lacey & Shawn Hubler, *Rioters Set Fire, Loot Stores: 4 Reported Dead*, L.A. TIMES, Apr. 30, 1992, at A1.

284. See Laurie Becklund & Stephanie Chavez, *Beaten Driver a Searing Image of Mob Cruelty*, L.A. TIMES, May 1, 1992, at A1.

285. Lacey & Hubler, *supra* note 283, at A21.

286. David Freed & Ted Rohrlich, *LAPD Slow in Coping with Wave of Unrest*, L.A. TIMES, May 1, 1992, at A1, A11.

287. "Smoke was so thick in South Los Angeles that the Federal Aviation Authority ordered the rerouting of flights into Los Angeles International Airport." Lacey & Hubler, *supra* note 283, at A21.

288. Douglas Jehl & Frederick M. Muir, *Bush Arrives in L.A., Calls for Healing*, L.A. TIMES, May 7, 1992, at A1, A6.

289. Thomas S. Mulligan, *Insurance Claims Will Hit \$775 Million*, L.A. TIMES, May 21, 1992, at D1.

290. See *News: Derelict Police Response to Rioting Hot Topic in L.A.* (CNN television broadcast, May 5, 1992) available in LEXIS, Nexis Library, Script File (statement of Ms. Ezola Foster, spokesperson for Black Americans for Family Values).

Oh, I think Mayor Bradley, certainly, if not half, most of the blame for this should go on him. There's no question about it. Even the church at which he met with the community leaders, all of the elected officials—Congresswoman Maxine Waters, State Assembly Person Diane Watson—publicly stated that America would see the worst riots that we had ever had if those four white police officers were not found guilty.

were quick to condemn the events as the mere criminal opportunism of hooligans.<sup>291</sup>

How should one interpret the disturbance that occurred after the verdict was returned? Was it “private” mass coercion, and thus, contrary to all rule of law ideals? Or was it a genuine act of civil disobedience? And if the latter, is it reconcilable with the rule of law?

## 2. Civil disobedience and the rule of law

The rule of law works only if the citizens maintain an attitude of legality.<sup>292</sup> This attitude manifests itself by fidelity to the law—citizens habitually obeying or having a tendency to habitually obey the law. The twelve points of the rule of law doctrine are the substantive and procedural characteristics that will help ensure public fidelity to the law. If respect for the law is justified, then how can active, intentional disregard for the rule of law ever be tolerated?

Professor Rawls’s answer to this issue is instructive. Professor Rawls defines civil disobedience as a type of political communication: It is “a public, nonviolent, and conscientious act contrary to law usually done with the intent to bring about a change in the policies or laws of the government.”<sup>293</sup> He contends that civil disobedience can play a vital role in a democratic society that is “nearly just.”<sup>294</sup> It “address[es] the *sense* of justice of the majority and . . . serve[s] fair notice that in one’s sincere and considered opinion the conditions of free cooperation are being violated.”<sup>295</sup> In this respect, civil disobedience is a manifestation of the prophylactic function of the attitude of legality.

Professor Rawls proposes three reasonable conditions that would justify resorting to civil disobedience.<sup>296</sup> First, civil disobedience should

---

*Id.*; see *Capital Gang*, *supra* note 280; *Evans & Novak* (CNN television broadcast, May 2, 1992) available in LEXIS, Nexis Library, Script File; *Nightline: Stop the Madness* (ABC television broadcast, May 1, 1992) available in LEXIS, Nexis Library, Script File.

291. Phil Mintz & Jim Mulvaney, *L.A. Nightmare*, NEWSDAY, May 1, 1992, at 5 (quoting Daryl Gates as saying “‘A bunch of hooligans have gone out and looted and burned this city’”); see John L. Mitchell, *NAACP Official Stands by Controversial Remarks*, L.A. TIMES, Sept. 12, 1993, at B1; *Capital Gang*, *supra* note 280.

292. See WALKER, *supra* note 9, at 41.

293. Rawls, *supra* note 163, at 246.

294. RAWLS, *supra* note 10, at 382. A “nearly just” society “implies that it has some form of democratic government, although serious injustices may nevertheless exist.” *Id.* In a nearly just society, “the principles of justice are for the most part publicly recognized as the fundamental terms of willing cooperation among free and equal persons.” *Id.*

295. *Id.* at 382-83 (emphasis added).

296. *Id.* at 371-74. He admits, however, that these conditions are not exhaustive. *Id.* at 375.

only be directed at serious infringements on the principles of justice.<sup>297</sup> Accordingly, civil disobedience should only be resorted to when the "principle of equal liberty" or "principle of fair equality of opportunity" is blatantly violated.<sup>298</sup> Second, it should be a last resort, engaged after all lawful courses have been explored and proven nonresponsive.<sup>299</sup> Third, it should be undertaken *only* after due consideration is given to the natural duty to justice and the restraint that this duty imposes on all human action.<sup>300</sup> This last condition is meant to limit the scope of the civil disobedience so that it does not lead to the "breakdown in the respect for law and the constitution, thereby setting in motion consequences unfortunate for all."<sup>301</sup> The danger of civil disobedience that goes too far is that the protesting minority risks distorting its appeal to a sense of justice, and thereby losing majority support or engendering harsh retaliation.<sup>302</sup> Thus, the "effectiveness of civil disobedience as a form of protest declines beyond a certain point; and those contemplating it must consider these restraints."<sup>303</sup>

These conditions imply that civil disobedience ends somewhere near where acts of violence begin. Professor Rawls's notion of civil disobedience does not include any acts of violence.<sup>304</sup> He believes that true civil disobedience is inherently nonviolent because "it is a form of speech, an expression of conviction."<sup>305</sup> Although nonviolent civil disobedience has had many revered and successful adherents,<sup>306</sup> some commentators criticize absolute distinctions that preclude all violent acts.<sup>307</sup> It is under-

---

297. *Id.* at 371-72.

298. *Id.* at 372.

299. *Id.* at 373. Note that "[t]his condition is, however, a presumption. Some cases may be so extreme that there may be no duty to use first only legal means of political opposition." *Id.*

300. *Id.* at 373-74.

301. *Id.* at 374. One interesting, but arguably unrealistic, solution to the problem of excessive civil disobedience is Professor Rawls's suggestion that minorities who want to engage in civil disobedience form a "cooperative political alliance" in order to keep the level of civil disruption to a constitutionally tolerable level. *Id.* "They can meet their duty to democratic institutions by coordinating their actions so that while each has an opportunity to exercise its right, the limits on the degree of civil disobedience are not exceeded." *Id.* at 375.

302. *See id.* at 374.

303. *Id.*

304. *See* Rawls, *supra* note 163, at 246.

305. *Id.* at 247.

306. *See, e.g.,* Martin Luther King, Jr., *Letter from Birmingham City Jail*, in *CIVIL DISOBEDIENCE: THEORY AND PRACTICE*, *supra* note 163, at 72; Harris Wofford, Jr., *Non-Violence and the Law: The Law Needs Help*, in *CIVIL DISOBEDIENCE: THEORY AND PRACTICE*, *supra* note 163, at 59.

307. *See generally* ZINN, *supra* note 54, at 39-53 (stating that violence should not be ruled out as means if it leads to nonviolent end).

standable why Professor Rawls would have trouble with violent acts. To take another's life violates the first fundamental principle of justice—equal liberty. Conversely, mere infringement of one's equal liberty by another cannot justify completely extinguishing the equal liberty of another by taking his or her life. Lesser, but still serious, infringements of liberty—such as inflicting bodily harm or destruction of personal property—are also viewed, and rightly so, as criminal acts, not acts of civil disobedience.

Targeted destruction of public property identified as being the source or symbol of injustice, however, may be a politically justified expression of convictions, and hence, an act of civil disobedience. Here an institution is attacked, not another individual's person or property. Within certain extremely narrow limits, then, the rule of law can be served by politically justified acts of civil disobedience, even if those acts lead to destruction of property. These acts, however, can be justified *only if* directed at public property, *and only when* it is conducted in a manner that will not pose a serious threat of harm to an individual's life or other liberty interest. For example, spilling blood on draft records, although destroying public property, could be a legitimate form political protest against a war and hence an act of civil disobedience. Using a car bomb to blow up a court house, however, is not civil disobedience; it is a criminal act. In the first example, no person was likely to be harmed by the violence; however, use of explosives in a public place—even with prior warning—creates too high a risk of human injury to be an acceptable form of protest under a rule of law system that is suppose to protect equal liberty.

Justified civil disobedience does provide a valuable service to the rule of law. As a politically legitimate “bad” attitude of legality, it sends the message that the legal and social order have serious problems. Thus, legitimate civil disobedience provides citizen feedback, advising the system to reconfigure and adjust to the needs of the people.

### 3. An interpretation of events

It is hard to view the civil unrest following the verdicts as anything but a riot. The vast majority of the violence was committed against individuals and private property; much of that violence was specifically directed at nonAfrican-American persons and nonAfrican-American-owned property. Drivers passing through South Central Los Angeles at the wrong time, Korean-owned neighborhood stores, corporate retail and food outlets, and small businesses and manufacturers were all subject to

the mob's rage.<sup>308</sup> Any political motive that may have initially stirred the public's anger was quickly consumed by a passion for revenge.<sup>309</sup>

These acts were acts of criminal anarchy.<sup>310</sup> Anarchy, riot, the lawless rule of the mob—all are antithetical to the rule of law, and thus, cannot function in a rule of law system.<sup>311</sup> Anarchy is the manifestation of an attitude of illegality, a *lex talionis* writ large, a might-makes-right street justice. This attitude cannot work in a rule of law system that must be sensitive to diversity of experience and the fact of pluralism,<sup>312</sup> where the close proximity of reasonable yet incompatible interests and beliefs will regularly produce tension. Individuals expect and rely on the legal order to provide mechanisms that either prevent or remedy harms that result from this social tension in a balanced manner that leads to repose. A jurisprudence of anarchy produces neither protection nor remedy, balance nor repose; it fosters only dominance, manipulation, and terror.

A few isolated incidents occurring during the rioting might at first appear justified as civil disobedience. The property damage done to the federal courts building and police headquarters might arguably be viewed as protests against the legal system itself—symbolic acts of defiance directed at a legal order that no longer produces equal justice under the law. The cry “No Justice, No Peace”<sup>313</sup> might fairly summarize the feeling of social injustice behind these acts.

After applying Rawls's prerequisites to these acts in conjunction with this Comment's strict limits on any acts of violence, however, these destructive protests cannot be justified as civil disobedience. Turning to the Rawlsian criteria, these acts meet only the two of the three requirements. First, the protest was legitimately raised against a very serious infringement of equal liberty—African-Americans were receiving unequal treatment under the law. Second, after more than a year of legal maneuvering and commission reports, it was reasonable for many to think that all the legal avenues had been exhausted. At the time of the

---

308. See, e.g., Tina Griego, *2 Cities—Under Siege and Under Threat*, L.A. TIMES, May 1, 1992, at B1, B6; Lacey & Hubler, *supra* note 283, at A21.

309. Shortly after the verdicts came down, “[a]bout 200 people lined the intersection [of 71st and Normandie], many with raised fists. Chunks of asphalt and concrete were thrown at cars.

Some yelled, ‘It’s a black thing.’ Others shouted, ‘This is for Rodney King.’” Lacey & Hubler, *supra* note 283, at A21.

310. See Mitchell, *supra* note 291, at B3.

311. See WALKER, *supra* note 9, at 24.

312. See *supra* note 94.

313. Jenifer Warren & Martha Groves, *Verdicts Spark Protests, Violence Across California*, L.A. TIMES, May 1, 1992, at A3, A24.

civil unrest, there was no guarantee that a federal trial was still a possibility, or any faith it could result in a just verdict.<sup>314</sup>

Justification of these acts fails, however, on the third prong of the Rawlsian inquiry. Nothing indicates that these acts were undertaken *only after* due consideration of the duty to justice and the restraint that this duty imposes on human action. Had this consideration occurred, the leaders of these protests — assuming there were any—would probably not have engaged in these acts at this time. Since these acts only fueled the criminal violence already occurring at other locations, these additional acts of violence could only lead to the net negative result of which Rawls warned: a distortion of the appeal to justice being made to the majority. Additionally, because of their cumulative violent effect and apparent lack of forethought, these violent acts were undertaken in a manner that serious harm to human life was likely. Hence, the property damage to the federal courts building and police headquarters cannot be justified under the strict limits by which violent acts against public property can sometimes be legitimate civil disobedience.

Although the civil unrest following the verdict is not civil disobedience, a valuable political message can still be found by sifting through the rubble. This kind of intense, widespread violence does not occur in a vacuum. The absence of an attitude of legality in a significant number of citizens puts society on notice that the rule of law ideal is in serious trouble. The moral of the story: Don't kill the message because you don't like the messenger.

#### IV. THE LESSONS LEARNED

*I'm mad. Everybody should be mad. How did this trial ever manage to take place before a jury with no blacks? And, despite this, why were the jurors unable to see right from wrong? Don't white folks believe in God? Don't they believe in justice? After all, they're the ones who created the Constitution and the Bill of Rights.*<sup>315</sup>

The rule of law has been in a state of emergency in Los Angeles since the spring 1992.<sup>316</sup> The failure of the state prosecution gave rise to

---

314. See *Nightline: The Rodney King Verdict* (ABC television broadcast, Apr. 29, 1992) available in LEXIS, Nexis Library, Script File (statement of Congresswoman Maxine Waters).

315. Terry McMillan, *This is America*, N.Y. TIMES, May 1, 1992, at A35.

316. See Mitchell, *supra* note 291, at B3 (quoting head of Los Angeles NAACP, Joseph H. Duff: "There is a tremendous amount of distrust in the community when it comes to criminal justice and the rule of law."); see also Miles Corwin, *Police Officers Find Their Task Increas-*



federal indictments.<sup>317</sup> Some perceived the federal trial of the four officers as finally ensuring justice, while others criticized it as being a politically motivated sacrifice of the officers to an angry mob.<sup>318</sup> Regardless, the city and nation breathed a collective sigh of relief at the baby-splitting of the federal trial jury's verdicts.<sup>319</sup> This split decision may have avoided more rioting, but it does not offer lasting solutions to problems rife in the legal system.

In fact, retrying the officers on substantially the same criminal offense is in itself fraught with rule of law issues. Can a jury in a city ravaged by riots from the first trial be truly impartial fearing that renewed rioting will follow if the "wrong" verdict is reached? This could be a violation of point nine in the rule of law definition: the requirement of impartial tribunals. Is the dual sovereignty doctrine<sup>320</sup> an adequate justification for overriding the fairness concerns of double jeopardy when the prosecution's case may be more politically than legally sound? This might be a violation of point three: the requirement that substantive law have the characteristics of generality, certainty, publicity, and equality.

---

*ingly Perilous*, L.A. TIMES, Mar. 20, 1993, at A1, A24 (reporting on dramatic rise in violent assaults against officers). "The officers on the street have noticed a definite change in atmosphere since the riots . . . The alarming number of officers being fired on at random is something new. And, overall, there's just more confrontation, more challenging the authority of officers on a nightly basis." *Id.* at A24 (quoting LAPD Captain Jim Tatreau).

317. See Newton, *supra* note 234, at 10.

318. See, e.g., Mike Davis, *New King Trial Starts, but Old Troubles Remain*, L.A. TIMES, Feb. 7, 1992, at M1; *Start of New King Trial*, L.A. TIMES, Feb. 14, 1993, at M4 (publishing letters to editor from David Beckman, Francis Megahy, Lillian Spencer, Anthony J. Bradisse, and James Underdown).

319. Sergeant Koon and Officer Powell were found guilty, Officers Briseno and Wind not guilty. Newton, *supra* note 234, at 35. However, in some circles, those sighs of relief turned into shouts of anger after the judge, using his discretion to circumvent a mandatory seven-to-nine year sentence, handed down two-and-one-half-year sentences to both Sergeant Koon and Officer Powell. See Anthony Duignan-Cabrera & Michael Connelly, *Sentencings Reopen L.A.'s Painful Wounds*, L.A. TIMES, Aug. 5, 1993, at A1; Kevin Johnson, *5 King Jurors Criticize Sentences*, L.A. TIMES, Aug. 8, 1993, at A1; Jim Newton, *Koon, Powell Get 2 1/2 Years in Prison*, L.A. TIMES, Aug. 5, 1993, at A1; Jerome H. Skolnick, *Perspective on the King Case*, L.A. TIMES, Aug. 5, 1993, at B7. In "a rare interview," Judge John G. Davies, the federal district court judge who presided over the federal trial, publicly defended his reasons for imposing the sentence he did on the defendants. Jim Newton, *Judge Defends Powell, Koon Sentences as Fair*, L.A. TIMES, Aug. 19, 1993, at A1.

320. "The 'dual sovereignty doctrine' provides another exception to the double jeopardy bar against retrial. This doctrine allows the federal government and a state government, or two state governments, to bring successive prosecutions for offenses arising from the same criminal act." Project, *Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991-1992*, 81 GEO. L.J. 853, 1249-51 (1993). The Supreme Court established the dual sovereignty doctrine in the context of the federal-state prosecutions in *United States v. Lanza*, 260 U.S. 377 (1922); in the state-state context, the relevant case is *Heath v. Alabama*, 474 U.S. 82 (1985).

Or should concerns for the defendants' fair trial rights be secondary when there is greater social good from reaching the "right" result? The result causes tension between point one—substantive laws must protect against (mass) private coercion—and point four—mechanisms must exist so that content of law is consistent with social values. These concerns are substantial, yet beyond the scope of this Comment's analysis. They do, however, illustrate that once a rule of law system suffers a serious hemorrhage, a patchwork approach to repairing the problem leads to further deterioration.

For any real change to result from the incident, some hard lessons need to be learned. This Comment will briefly discuss three: (1) A rule of law system cannot operate in accordance with the values of equality, impartiality, and fairness if it imposes its coercive force disproportionately on particular groups within the society; (2) the traditional police "professional" or "command and control" model can aggravate feelings of unequal treatment and should be replaced with a community-based police system; and (3) because of the diversity of experience and fact of pluralism in modern American society, any legal definition of "community" for change of venue purposes must be based on human associations, determined, in large part, by demographic statistics.

#### A. *The Damage Done by Discriminatory Effect*

A single verdict did not ignite the explosion of rage that racked Los Angeles, nor can a single verdict extinguish the still smoldering resentment. For the African-American community in Los Angeles, many links in the chain of injustice led to the disturbance.<sup>321</sup> For instance, in March 1991—earlier in the same month that Rodney King encountered the LAPD—a Los Angeles Superior Court judge gave probation, a \$500 fine, and 400 hours of community service to a Korean grocer who shot and killed an African-American teenager over a punch in the face and a bottle of orange juice.<sup>322</sup> The California Supreme Court let stand the sentence, declining to review the case.<sup>323</sup> The seeming injustice of this sentence was further underscored by the sentence in another case, decided five days after the sentencing of the Korean grocer, where a man received a thirty-day jail sentence for beating a dog.<sup>324</sup> Additionally,

---

321. See *Understanding the Riots Part 1: The Path to Fury*, L.A. TIMES, May 11, 1992, at T1 ("exploring the deep roots of the disorder") [hereinafter *The Path to Fury*].

322. See Philip Hager, *Justices Uphold Karlin's Ruling in Slaying of Latasha Harlins*, L.A. TIMES, July 17, 1992, at B1.

323. *Id.*

324. *The Path to Fury*, *supra* note 321, at T11.

critics charge that the local county court system smacks of informal apartheid, where a seemingly "whites-only" bench sentences predominantly minority defendants.<sup>325</sup> Finally, the Independent Commission, empaneled after the Rodney King incident, confirmed what had long been felt by the African-American as well as other minority communities: Pervasive and systemic racism exists in the LAPD.<sup>326</sup> Moreover, strong evidence was uncovered that suggested use of excessive force was directly related to the suspect's race.<sup>327</sup>

Consider also that the rage over the perceived injustice of the verdict was not confined to the Los Angeles city limits, but reverberated throughout the country.<sup>328</sup> The problem of disproportionate impact of the criminal justice system on African-Americans is national in scope. For instance, a 1990 study of the federal and state criminal justice systems reported that twenty-five percent of African-American males between the ages of twenty and twenty-nine were in the custody or control of the criminal justice system.<sup>329</sup> The criminal justice system's coercive power does not fall disproportionately only on African-Americans; generally, people of color are subject to its discriminatory effect. A July 1992 report of the American Bar Association (ABA) Task Force on Minorities in the Justice System, which conducted a national bias study, emphatically stated that

our justice system treats minorities inequitably and . . . past efforts to eliminate bias and promote diversity, although well intentioned, have fallen considerably short of their goals. Much needs to be done . . . to inaugurate a new national effort to better promote "equal justice" in the United States.<sup>330</sup>

Can a legal system that adversely impacts a particular class, or classes, of its citizens truly serve rule of law ideals? Referring to the comprehensive model, one can see that de facto discrimination violates several rule of law values. For example, because the law's coercive effect

---

325. Charles L. Linder, *Judicial L.A.: South Africa Without the Formality*, L.A. TIMES, Mar. 14, 1993, at M1, M6. There are no African-American superior court judges in seven of the 10 Los Angeles County judicial districts. *Id.* In the county's central district, which has a large minority population, there is only one African-American judge out of 34. *Id.*

326. COMMISSION, *supra* note 174, at 69-93 (detailing LAPD's long history of racism, as well as gender and sexual orientation bias).

327. *Id.* at 69-70.

328. See Chris Black & Jolie Solomon, *Voices Raised in Aftermath of Verdict*, BOSTON GLOBE, May 2, 1992, at 1.

329. Jonathan Marshal, *How Our War on Drugs Shattered the Cities*, WASH. POST, May 17, 1992, at C1.

330. ABA TASK FORCE ON MINORITIES & JUSTICE SYS., *ACHIEVING JUSTICE IN A DIVERSE AMERICA* 1-2 (July 1992) [hereinafter ABA].

falls so harshly on particular groups, serious questions are raised about the substantive law's equality and generality—the point-three rule of law value. Is the substantive law implicitly directed at control of minority populations?<sup>331</sup> Or, if the substantive laws are fair, are the enforcement mechanisms of the system being exercised in a way that perverts the equality and generality of the laws?<sup>332</sup> Excessive force and racism by the police force, combined with the racially motivated use of prosecutorial discretion in bringing charges and plea bargaining, violates several rule of law values: Discretionary powers of the government are not exercised in an impartial, honest way (point eleven); the government is acting above the law (point two); and government action is escaping meaningful oversight (point six). Furthermore, minorities' inability to receive justice in the courts violates points nine—impartial tribunals—and ten—equal access to the courts.<sup>333</sup> The discussion below identifies two problems with enforcement mechanisms and suggests alternative approaches.

The most pervasive damage done, however, by the legal system's discriminatory effects concerns the attitude of legality. Even those not directly subject to its adverse impact experience an uncomfortable feeling that something is wrong. It is counterintuitive to believe the rule of law ideal is embodied in a legal system that produces such disproportionately discriminatory consequences. Thus, the legal order is generally suspect, the attitude of legality begins to erode, and an attitude of lawlessness and self-help fills the void.

This corrosive impact is not confined to the affected minority communities. Frustration with the legal system is palpable in the public housing projects of Chicago, Detroit, and Los Angeles, as well as in the

---

331. One of the recommendations of the ABA report on minorities and the justice system calls for a review of "seemingly race-neutral legislation" for "unintended but nevertheless racially biased outcomes" resulting from its enforcement. *Id.* at 14. As an example the report cites a 1992 Minnesota Supreme Court decision that struck down state sentencing provisions because they violated African-Americans' rights to equal protection under the law. *Id.* (citing *State v. Russell*, 477 N.W.2d 886 (Minn. 1992)). The sentencing provisions mandated longer prison terms for individuals convicted of crack cocaine possession—92% of whom were African-American—than individuals possessing cocaine in powder form—85% of whom were Caucasian. *Id.*

332. See COMMISSION, *supra* note 174, at 69-93 (discussing racial, ethnic, and gender bias on LAPD); see also ABA, *supra* note 330, at 10-14 (reporting not only possible bias in police departments, but in district attorneys' offices as well).

333. Both the denial of minorities' entitlement to equal access to the civil courts and the adverse treatment of minority defendants in the criminal courts are major issues addressed in ABA, *supra* note 330, at 14-24.

privately policed enclaves of Lake Forest, Gross Pointe, and Bel Air.<sup>334</sup> Consequently, there is increasing lawlessness manifest in all sectors of society—from “gangbangers” to “S&L” officers.<sup>335</sup> Therefore, in order to benefit all citizens, the legal system should be examined and revised, thereby restoring the attitude of legality.

### B. Community Policing

One way to address the discriminatory effect of the legal system on minorities is to reevaluate one of its enforcement mechanisms, the police force. The traditional form of police operations is known as the “professional” model.<sup>336</sup> The purpose of this model is to develop a paramilitary team of officers able to respond with speed and force to quell criminal disturbances in the community.<sup>337</sup> The philosophy behind this type of policing is simply to put away the bad guys.<sup>338</sup> The popularity of this type of policing stems from its success in reducing police corruption, im-

---

334. This frustration sometimes finds expression in the violence of a riot, see *supra* part III.C., sometimes in the quiet, private armament and barricading of individuals in their homes, see Jill Smolowe, *Danger in the Safety Zone*, TIME, Aug. 23, 1993, at 29, 32.

335. See, e.g., MARTIN MAYER, *THE GREATEST-EVER BANK ROBBERY* (1990); William K. Knoedelseder, Jr., *Better Known for Hollywood and Beaches, Southern California is Also Considered the White Collar Crime Capital of the United States*, L.A. TIMES, Feb. 20, 1989, at D5; Karen Tumulty, *U.S. Crime Rate Dips but Violent Offenses Climb*, L.A. TIMES, Oct. 3, 1993, at A1; Henry Weinstein, *Financial Scams Are on Rise in Region*, L.A. TIMES, June 23, 1993, at D1; see also Smolowe, *supra* note 334, at 29 (reporting on rise in violent crime in small towns and suburbs, and in locations once thought safe havens, such as hospitals and court-houses).

Although anecdotal, this eyewitness report of looting that occurred during the April 1992 disturbance is a microcosm of the wide spread problem of lawlessness in society at large.

The looters who broke the window and went in first were black. The next waves were not what [Silverton Peel] expected. It wasn't just that they were white. It was what they were driving—two or three BMWs, a white Cadillac, a Jeep, a school bus. A school bus? The bus driver stopped, got out, grabbed a few things, loaded them onto the bus and took off.

Just up the street, at La Brea and Beverly, Samy's Camera was broken into about the same time. Six or seven black men shot at the lock with what sounded like an automatic weapon, but the looters who followed were mostly white kids. One guy was driving a Lexus. One kid was wearing a yarmulke. Finally, someone torched the building.

*The Path to Fury*, *supra* note 321, at T12.

336. COMMISSION, *supra* note 174, at 97. This type of policing is also referred to as the command and control model. See George L. Kelling et al., *Police Accountability and Community Policing*, PERSP. ON POLICING, Nov. 1988, at 2-3.

337. COMMISSION, *supra* note 174, at 97. “A ‘professional’ model of policing is primarily concerned with maintaining a well-disciplined, highly trained, and technically sophisticated force insulated from improper political influence.” *Id.*; see Kelling et al., *supra* note 336, at 2.

338. COMMISSION, *supra* note 174, at 97.

proving the qualifications and training of officers, standardizing procedures, and establishing intraforce unity.<sup>339</sup>

Police operations in Los Angeles, at the time of the Rodney King incident, employed the professional model.<sup>340</sup> From a crime-fighting perspective, this manner of policing had been effective.<sup>341</sup> Thus, a relatively small police force—8450 officers policing a city of more than 3.4 million<sup>342</sup>—had been able to confront a rising violent crime rate more than twice the national average.<sup>343</sup> As a result, the LAPD had developed “a reputation as a hard working, car-based mobile strike force that is tough on criminals.”<sup>344</sup> Police techniques pioneered by the LAPD include the use of SWAT teams, helicopters, and a motorized battering ram.<sup>345</sup>

There is a downside to this mode of policing. It tends to inculcate members of the police force with an “us versus them” siege mentality.<sup>346</sup> The professional model emphasizes “crime control over crime prevention and isolate[s] the police from the communities and the people they serve.”<sup>347</sup> Consequently, the police consider residents living in high-crime areas as potential criminals, instead of possible victims; in turn, those people fear, resent, and distrust the police “command presence.”<sup>348</sup> The Independent Commission found that the police culture created by

339. Kelling et al., *supra* note 336, at 2.

340. COMMISSION, *supra* note 174, at 97.

341. Of the police departments in the six largest cities in the United States—New York, Los Angeles, Chicago, Detroit, Houston, and Philadelphia—the LAPD had the highest average number of violent and property crime arrests. *Id.* at 23. In 1986, this worked out to 3.1 violent crime arrests per officer and 4.4 property crime arrests per officer. *Id.*

342. *Id.* at 21-22. In 1986 LAPD officers were the busiest in the nation. *Id.* at 23. During that year, 9.2 violent crimes and 35.2 property crimes were recorded for each sworn officer. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. *See id.* at 98. As one ex-police officer, now a minister, described it: The “‘problem transcends cultural differences. The police department divides everybody into two categories: blue and everyone else.’” *Id.* at 99-100.

347. *Id.* at 98.

348. *See id.* at 99-100.

Routine stops of young African-American and Latino males, seemingly without “probable cause” or “reasonable suspicion,” may be part and parcel of the LAPD’s aggressive style of policing. The practice, however, breeds resentment and hostility among those who are its targets. Moreover, the practice has created a feeling among many in Los Angeles’ minority communities that certain parts of the City are closed to them or that being detained by the police is the price of traveling in those areas. *Id.* at 77.

the professional model was responsible, in part, for the LAPD's systemic racism and rising brutality.<sup>349</sup>

An alternative and growing trend in police operations is the concept of "community policing."<sup>350</sup> This model is based on the premise that the police force's primary purpose is to prevent crime, and the best way to do that is by sharing responsibility with the people in a community.<sup>351</sup> It is an "interactive process between the police and community to mutually identify and resolve community problems."<sup>352</sup> The concept of community policing

envisages a police department striving for an absence of crime and disorder and concerned with, and sensitive to, the quality of life in the community. It perceives the community as an agent and partner in promoting security rather than as a passive audience. This is in contrast to the traditional concept of policing that measures its successes chiefly through response times, the number of calls handled, and detection rates for serious crime.<sup>353</sup>

Community policing is "a *philosophy* of policing that contains several interrelated components."<sup>354</sup> Three key components are: (1) articulation of policing values that incorporate citizen input regarding the quality of life in the neighborhood; (2) police accountability to each community's list of unique concerns, desires, and priorities; and (3) power sharing that encourages active citizen involvement in police efforts to prevent and solve crimes.<sup>355</sup>

Referring to Walker's twelve-point definition, it becomes clear that community policing is a system of law enforcement that incorporates and promotes several rule of law values. First, a mature community policing system will include an extralegal mechanism that subjects police action

349. See generally *id.* at 69-82 (detailing "nexus between racial and ethnic bias and the use of excessive force" by LAPD).

350. On April 16, 1991, the chiefs of 10 major metropolitan police departments issued a position paper endorsing community policing. *Id.* at 104.

351. *Id.* at 100-01. For a practical and detailed discussion of the community policing model, see generally NAT'L INST. JUST. J., Aug. 1992 (entire issue devoted to topic of community policing).

352. Lee P. Brown, *Community Policing: A Practical Guide for Police Officials*, PERSP. ON POLICING, Sept. 1989, at 7 (emphasis omitted).

353. Malcolm K. Sparrow, *Implementing Community Policing*, PERSP. ON POLICING, Nov. 1988, at 1-2.

354. Brown, *supra* note 352, at 5.

355. *Id.* There are thirteen interrelated components outlined in this article, many of which involve the internal departmental reorganization that must occur for community policing to be implemented. *Id.* at 5-7. For the purposes of this Comment, these three have the most bearing on rule of law values.

to oversight by the community (point six). Because police will be accountable to the community, this facet should ensure that the legal system's enforcement mechanism better comports with local social values (point four). Furthermore, because the police must incorporate community values, the discretionary powers of the police will more likely be used in honest and impartial ways (point eleven). It is hard to abuse people with whom one shares a set of beliefs and values; it is easier to abuse people who are perceived as having interests adverse to or different than one's own.<sup>356</sup>

Finally, the power sharing feature of community policing will benefit the attitude of legality (point twelve). From the public's perspective, law enforcement would no longer be something external, imposed by the government upon the community. Instead, the law becomes something internal to the community—controlled and implemented by the community for its own safety and security.<sup>357</sup> Additionally, community policing should improve *the police officers'* attitude of legality. From their perspective, community policing fosters greater citizen support, shared responsibility for crime prevention, and greater job satisfaction.<sup>358</sup> Thus, a police officer in a community-policing system will be less likely to feel frustrated with the legal system, and therefore, unlikely to resort to the type of "street justice" doled out to Rodney King.

### C. *Redefining Community for Change of Venue Law*

For the jury to fulfill its rule of law role as the "conscience of the community," the venue resulting from a change of venue request should be required to approximate the mix of citizens residing in the community in which the crime occurred. As discussed earlier, merely defining a community by geographical boundaries, and not by the individuals, will not fulfill this requirement.<sup>359</sup> In fact, failure to define "community" by its members may conflict with United States Supreme Court decisions that recognize a community's interest in a fair trial. The Court has long held that safeguards must be implemented in order to ensure that all members of a community have an opportunity to be included in the venire.<sup>360</sup> Recent decisions have gone even further, recognizing that the

---

356. See COMMISSION, *supra* note 174, at 105 (stating that community policing "should have the effect of 'humanizing' officers' perceptions of those whom they police.>").

357. See Brown, *supra* note 352, at 7-8.

358. *Id.* at 8.

359. See *supra* part III.B.2.

360. For the decision that required that the venire represent a cross section of the community, see Taylor v. Louisiana, 419 U.S. 522 (1975). See also Holland v. Illinois, 493 U.S. 474 (1990) (reiterating constitutional mandate is for impartial jury and "fair-cross-section" venire



community itself has an interest in how the jury is selected.<sup>361</sup> By ensuring access to the jury selection process to all citizens regardless of race, the Court has expressly noted that “the rule of law will be strengthened.”<sup>362</sup>

Implicit in the rationale of these decisions is the notion that racial diversity has social value—value that should be reflected in the pool of possible jurors. Far from revolutionary, the value of racial diversity has already been expressly recognized in other areas of law.<sup>363</sup> The need to account for diversity is grounded, in part, on an intuitive understanding that, in any given community, individuals of different races will experience and interpret life differently.<sup>364</sup> Empirical statistical analysis, however, strongly suggests that attitudes can be affected by more than just a person’s race.<sup>365</sup> There are other factors—age, income, education, gender, religion—that may have an equally significant impact.<sup>366</sup> Thus, to

---

helps guarantee that mandate); *Alexander v. Louisiana*, 405 U.S. 625 (1972) (holding that exclusion of persons on account of race is prohibited for grand jury selection); *Whitus v. Georgia*, 385 U.S. 545 (1967) (holding that equal protection violation occurs when discriminatory effect of seemingly neutral procedure keeps certain racial groups from being included in venire).

361. “The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.” *Batson v. Kentucky*, 476 U.S. 79, 87 (1986); *see also Georgia v. McCollum*, 112 S. Ct. 2348 (1992):

The public, in general, continues to believe that the make up of juries can matter in certain instances. . . . Major newspapers regularly note the number of whites and blacks that sit on juries in important cases. Their editors and readers apparently recognize that conscious and unconscious prejudice persists in our society and that it may influence some juries. Common experience and common sense confirm this understanding.

*Id.* at 2360 (Thomas, J., concurring) (citations omitted).

362. *Batson*, 476 U.S. at 99.

363. *Levenson*, *supra* note 255, at 1565 (discussing Supreme Court decisions concerning voting rights laws and efforts to expand minority-owned broadcast media).

364. As Justice Marshall wrote in *Peters v. Kiff*, 407 U.S. 493 (1972):

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

*Id.* at 503-04; *see McCollum*, 112 S. Ct. at 2360 (Thomas, J., concurring) (“Common experience and common sense confirm this understanding.”).

365. *See, e.g., SOURCEBOOK*, *supra* note 171, at 125-218.

366. An example of this fact can be found in how groups of individuals responded to the question, “Are there any situations you can imagine in which you would approve of a policeman striking an adult male citizen?” *Id.* at 182-83. In 1991, if the respondent was white, 70% answered yes; if the respondent was black or other (nonwhite), 44% answered yes. *Id.* at 183.

attain true community similarity, the newly selected venue must be likely to produce a venire containing potential jurors with a similar mix of individual characteristics as would have been found in the original community. The question then becomes, what criteria should be employed by courts to meet this objective?

Demographic statistical data provide objective information upon which courts can make a reasoned determination of community similarity. The federal government, via the national census, collects and disseminates information regarding the race, ethnicity, age, income, accumulated wealth, gender, and education of individuals on a county-by-county basis.<sup>367</sup> Thus, communities can be deemed substantially similar if they conform statistically, within a reasonably close range, across a number of census categories.<sup>368</sup> In California, legislators have proposed various bills that would define community for change of venue purposes by using this type of information.<sup>369</sup> In addition, at least one state court has endorsed this approach—albeit in dicta.<sup>370</sup>

Granted, problems arise when attempting to conform to a strict formula that equates demographics with diversity of experience and attitude. Professor Laurie Levenson, in her recent article on change of venue, identifies two major concerns. First, “demographics are not necessarily reliable indicators of the community’s values”; second, relying solely upon demographics risks institutionalizing stereotypes.<sup>371</sup> There is a real danger in treating groups of people—all African-Americans, all women, all college-educated individuals—as a monolith. The same intuitive understanding that calls for an account of diversity cautions against assuming that similar external characteristics mandate unity of thought and feeling. A recent example of this is evident in the acquittal of three white LAPD officers—who were involved in a bungled drug raid that caused serious damage to African-American-owned property—by a Los

---

But even more dramatic was the split between those respondents with annual incomes of \$15,000 and more (72% answered yes) and those with annual incomes of \$5000 to \$6999 (36% answered yes). *Id.* Additionally, educational differences created more of a statistical divide than race: 73% of college-educated respondents answered yes, but only 36% of grade-school educated respondents answered yes. *Id.* Gender, religion, occupation, and political affiliation all made a significant difference, though not as significant as race. *Id.* This exercise underscores the value of taking multiple demographic factors into account in shaping the “conscience of community.”

367. See U.S. DEP’T OF COMMERCE, CURRENT POPULATION REPORTS: SUBJECT INDEX TO CURRENT POPULATION REPORTS (1991).

368. See Levenson, *supra* note 255, at 1561.

369. *Id.* at 1538 n.25, 1544-45 (discussing pending legislation in California).

370. *People v. Goldswey*, 350 N.E.2d 604, 608 (N.Y. 1976).

371. Levenson, *supra* note 255, at 1567.

Angeles jury, half of whom were African-Americans.<sup>372</sup> Moreover, merely finding that a community has similar demographics is not enough to protect the defendant's right to a fair trial because that community may also be unduly prejudiced against that defendant.<sup>373</sup> Therefore, Professor Levenson suggests that demographics should be a factor in, but not determinant of, the selection of a particular new venue.<sup>374</sup>

From a rule of law perspective, the demographic approach is sound and should be a significant factor when considering a change of venue determination. This approach recognizes the fact of pluralism<sup>375</sup> and diversity's impact on experience, which forms, in part, an individual's perceptions. If a jury more closely resembles the mix of experiences encountered by diverse groups in a society, then the jury will serve as a mechanism for ensuring that the substantive law comports with public opinion (point four). Finally, if the legal system ignores the fact of pluralism,<sup>376</sup> as well as diversity of experience, then it risks losing legitimacy, impartiality, and public acceptance, which are all necessary to maintain the rule of law. Hence, the attitude of legality (point twelve) is likely to be absent, and the criminal justice system seriously undermined.

## V. CONCLUSION

*It is difficult to believe that the American people are so naive to believe because you may see an American flag in our courtrooms that we are guaranteed justice. The majority of trial lawyers, with the help of most judges, have made our courts "courts of law" and not "courts of justice." The complacency of the populace has permitted this change.<sup>377</sup>*

The above quotation makes a disturbing implication: To apply the law is to frustrate justice. Law is no longer a conduit but an obstacle to justice; lawyers and judges are in a conspiracy to obfuscate justice through the subterfuge of law. The author of the above quotation might believe that "the rule of law" is really the "tyranny of rules."

In evaluating systems of formal justice, how a system reacts and responds to the public's perception of justice is of great concern. The

---

372. See Terry Pristin & David Ferrell, *3 Officers Acquitted in 39th—Dalton Drug Raid*, L.A. TIMES, June 20, 1991, at A1.

373. *Id.*

374. Levenson, *supra* note 255, at 1567.

375. See *supra* note 94.

376. See *supra* note 94.

377. Tom P. Simovich, *Letters to the Times*, L.A. TIMES, Mar. 11, 1993, at B6. The headline on the letter was simply "Justice."

essential nature of the attitude of legality to a rule of law system should now be apparent. The public's perceptions of a particular decision will be based largely on how it perceives—intuitively, emotionally, and rationally—the system as a whole. If favorably perceived, even a particular decision generally considered to be “wrong” will not dislodge the public's respect for the system. Yet when a particular decision reverberates through the entire social order, causing the type of destruction that followed the verdicts in the first trial, to consider it as nothing more than the reaction of “bad” people is to court disaster. The bond between beneficiary and fiduciary is broken; the feedback is deafening.

This Comment does not claim that by adopting the modest proposals articulated in part IV, the rule of law will be completely rehabilitated. Community policing will not miraculously eradicate decades-old hostility between police and minority communities, nor will it prevent all future incidents of police brutality. Furthermore, even if the jury pool had been composed of a diverse mix of citizens, the jury itself still may have been all white, or, if racially mixed, may still have found the officers not guilty. Moreover, merely changing venue based on demographically driven factors might not have prevented riots from breaking out in response to a “not guilty” verdict. These suggested changes, however, coupled with the other “working” parts of a legal system that embody rule of law values can serve as a beginning to the revisions necessary for a renewal of the society's legal order. Such rebirth may create a rule of law system that the public can intuitively and rationally believe offers equal justice under the law.

*Thomas M. Riordan\**

---

\* I wish to express my deepest gratitude to Professor Lawrence B. Solum and Professor Laurie L. Levenson for their insights and guidance during the writing of this Comment. I also wish to thank my mother, Anastasia Riordan, for a lifetime of encouragement and support. And finally, as a token of my heartfelt appreciation and affection, I dedicate this Comment to my wife, Jean T. Swift-Riordan, whose love and tolerance make life a joy and law school bearable.

