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THE FALLACY OF LEGAL PROCEDURE AS PREDOMINANT OVER SUBSTANTIVE JUSTICE: A CRITIQUE OF "THE RULE OF LAW" IN JOHN RAWLS' *A THEORY OF JUSTICE*

*Donald H. J. Hermann**

When John Rawls' A Theory of Justice *appeared in 1971, it was greeted with almost unrestrained praise. Commentators analyzed and applied the views and ideas expressed by Rawls. In his study of* A Theory of Justice, *Professor Hermann takes on Rawls' concept of "the rule of law." Specifically, he reproves Rawls for perceiving procedure as a sufficient condition for law and independent of substantive value in law. Professor Hermann's critique is a serious contribution to the continuing dialogue concerning this work.*

WITH the general acclaim of John Rawls' book, *A Theory of Justice,* by legal academics,[1] it seems worthwhile to consider Rawls' notion of the nature of the rule of law. Rawls defines law in highly positivistic terms: "A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation."[2] From this definition, Rawls derives an account of the

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The author wishes to express his gratitude to the National Endowment for the Humanities and Harvard University which provided him an appointment as a Harvard Fellow in Law and the Humanities during the term of which this Article was written. The appointment permitted the opportunity for discussion with John Rawls, Roberto Unger, and Lon Fuller whose works are commented on in this Article. Special appreciation is expressed to Professor Zeph Stewart, who as Master of Lowell House, was responsible for the author's appointment as a Faculty Associate in Residence at Lowell House where many valuable discussions with faculty and students took place which are reflected in this Article.

1. *A Theory of Justice* was awarded the Order of the Coif Triennial Book Award at the 1973 meeting of the Association of American Law Schools in New Orleans on Dec. 28, 1973.

2. J. RAWLS, A THEORY OF JUSTICE 235 (1971) [hereinafter cited as RAWLS]. *See* J. AUSTIN, LECTURES ON JURISPRUDENCE 215 (1885) where law is defined:

precepts of justice: "These precepts are those that would be followed by any system of rules which perfectly embodied the idea of a legal system."[3] The rule of law then is characterized by notions of procedural justice and the rational exercise of authority. Thus, there is a separation of law from value and substantive concepts of justice; in effect, "the rule of law"[4] is distinguished from "law" in the broader sense of a union of procedure and substance and it is the nature and consequence of this highly dubious distinction that provide the major focus of this Article.

Rawls observes that "other things equal, one legal order is more justly administered than another if it more perfectly fulfills the precepts of the rule of law."[5] Nevertheless, Rawls implicitly recognizes the consequence of the absence of his consideration of substantive notions of justice and value when he concedes that "because these precepts guarantee only the impartial and regular administration of rules, whatever these are, they are compatible with injustice."[6]

"Law is a command from the sovereign person or body in the political society to a member or members of society."

3. RAWLS, *supra* note 2, at 236. Rawls justifies his emphasis on procedures as the essential characteristic of law by the invocation of the concept of legality which he asserts is associated with rules: "The point of thinking of a legal order as a system of public rules is that it enables us to derive the precepts associated with the principle of legality." *Id.* *But see* P. TILLICH, LOVE, POWER, AND JUSTICE 15 (1960), where it is urged that law should not be considered in terms of rules but as the mediator between the needs of justice and the generality of rules:

> Justice is expressed in principles and laws none of which can ever reach the uniqueness of the concrete situation. Every decision which is based on the abstract formulation of justice alone is essentially and inescapably unjust. Justice can be reached only if both the demand of the universal law and the demand of the particular situation are accepted and made effective for the concrete situation.

4. Rawls considers "the rule of law" to be sufficiently characterized by an account of "formal justice" which he states is synonymous with " 'justice as regularity' " by which he means "[t]he regular and impartial, and in this sense fair, administration of law." RAWLS, *supra* note 2, at 235. The rule of law here comes to be the procedures or standard of administration of law itself which combines the aspect of both procedure and substance in a unity. The maintenance of this unity is necessary for the legitimacy of law itself. Rawls himself in a sense acknowledges this when he writes that: "[W]hen these [public] rules are just they establish a basis for legitimate expectations." *Id.* Such justice must be rooted in substantive value; yet, Rawls proceeds to discuss procedure to the exclusion of substantive value and denominates this regularity of procedure as "the rule of law."

5. *Id.* at 236. The "other things equal" according to the view of this critique must be the substantive values realized in law which Rawls himself ignores in his discussion of "the rule of law."

6. *Id.* at 236. *See* text accompanying notes 45-51 *infra.*

This Article will consider the roots of Rawls' theory of "the rule of law" in legal positivism; the nature of Rawls' notion of the priority of procedure to substantive right in a theory of the rule of law; and the alternative possibility of rooting "law" and "the rule of law" in notions of substantive right and value.

I. THE ROOTS OF RAWLS' CONCEPT OF "THE RULE OF LAW" IN CONTEMPORARY LEGAL POSITIVISM

Rawls suggests that his theory finds support in such works as those of Lon Fuller, H.L.A. Hart, and J.R. Lucas.[7] These writers represent post-war positivism which sees in the following of the requirements of legal procedure and in the articulation of the basis for legal decisions the necessary and sufficient basis for "the rule of law." Hart, for instance, asserts that it is impossible to distinguish between a moral and just "legal system" and one that is not moral and just, because inherent in the nature of a legal system is a sufficient guarantee of justice; Hart writes that "a minimum of justice is necessarily realized whenever human behaviour is controlled by general rules publicly announced and judicially applied."[8] For Hart, the idea of justice in its most restricted sense is no more than applying the same general rule uniformly without prejudice or caprice to all persons. While this notion itself admits of the possibility or necessity of criteria of likeness and unlikeliness, none is provided by Hart. Nevertheless, it is asserted that a more developed idea of justice requires a more fully developed system of procedural rules to be properly applied to the various categories of cases: "[T]hey must be intelligible

7. *Id.* at 235 n.20, 238 n.22. The principal works called upon by Rawls include L. FULLER, THE MORALITY OF LAW (1964) [hereinafter cited as FULLER]; H.L.A. HART, THE CONCEPT OF LAW (1961) [hereinafter cited as HART]; J. R. LUCAS, THE PRINCIPLES OF POLITICS (1966) [hereinafter cited as LUCAS].

8. HART, *supra* note 7, at 202. Hart takes a position much like that of Rawls noted in note 4 *supra*. Hart writes of "justice" in "its simplest form" by which he means "justice in the application of law" and he argues that this "consists in no more than taking seriously the notion that what is to be applied to a multiplicity of different persons is the same general rule, undeflected by prejudice, interest, or caprice." *Id.* For Hart, the "impartiality of procedural standards" constitutes "Natural Justice." *Id.* Thus Hart, like Rawls, suffers the fallacy of considering procedure as separate and prior to the substantive value realized in law. If "natural Justice" or "formal justice" are notions that strike at the essence of law which is a unity of procedure and substance, then the positions of Hart and Rawls give rise to the possibility of illegitimate law which is self-contradiction.

and within the capacity of most to obey, and in general they must not be retrospective . . . ."[9] Yet, Hart admits to the danger in such a legal system that lacks any notion of substantive justice or value since he concedes that the principles of legality he articulates are "unfortunately compatible with very great iniquity."[10] Hart's device to avoid dealing with the danger of great iniquity is the development of a distinction between the validity of law which is guaranteed by its procedural propriety and its morality which is nonetheless open to question. For Hart, a law which is oppressive or immoral is subject to the criticism that " '[t]his is law but too iniquitous to obey or apply.' "[11]

Lon Fuller goes beyond Hart in suggesting that conformity to the procedures of the legal order are the necessary and sufficient conditions for law by suggesting that these procedures, if followed, will result in a just rule of law. Fuller sets out eight procedural requirements for just law: (1) the existence of general rules, (2) promulgation, (3) prospectivity, (4) clarity, (5) consistency, (6) the defense of impossibility, (7) constancy through time, and (8) "congruence between official action and declared rules."[12] For Fuller, failure in any of the eight procedural requirements "does not simply result in a bad system of law; it results in something that is not properly called a legal system at all."[13] In fact, Fuller argues that the

9. *Id.* This requirement is viewed necessary if law is to be *effective* as "social control." It certainly does not speak to the *legitimacy* of law.

10. *Id.* The notion of compatibility with iniquity, as stated by Hart, receives its parallel formulation in Rawls' statement of compatibility with injustice. *See* text accompanying note 6 *supra.*

11. *Id.* at 205. Hart is led to his conclusion that oppressive law remains law even though it may be disobeyed by his fundamental belief in the subjectivity of values which can motivate individual conduct but which cannot provide the objective standard of justice required to satisfy the Thomistic maxim that an unjust law is not law at all. *See* 28 T. AQUINAS, SUMMA THEOLOGIAE 61 (Blackfriars transl. 1963): "A human law has the force of law to the extent that it falls in with right reason: as such it derives from the Eternal Law. To the extent that it falls away from right reason it is called a wicked law: as such it has the quality of an abuse of law, rather than of law." [Question 93, Article 3, Reply 2.]

12. FULLER, *supra* note 7, at 33-94.

13. *Id.* at 39. *See* Dworkin, *Philosophy, Morality, and Law—Observations Prompted by Professor Fuller's Novel Claim*, 113 U. PA. L. REV. 668, 669 (1965): " . . . I accept Fuller's conclusion that some degree of compliance with his eight canons of law is necessary to produce (or equally as important, to apply) any law, even bad law." Fuller, however, has a more significant objective in the establishment of his procedural requirements and this is the establishment of a legal system

system of procedural principles expounded is itself a variety of natural law.[14] Nevertheless, Fuller is quick to distinguish these procedural rules from the substantive aims of legal rules; he maintains that the proper concern should be "with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious."[15] While the procedural criterion "is, over a wide range of issues, indifferent toward the substantive aims of law and is ready to serve a variety of such aims with equal efficacy," Fuller insists that it is in adherence to the procedural requirements of the rule of law that he finds the circumscription of the permissible substantive elements of law.[16] For Fuller, then, there is a deep affinity between legality, as established by adherence to procedural justice, and acceptable substantive content, so that there is, in general, no need to consider directly substantive justice or value; the "internal morality of law" requires rules which are

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which will produce valid and hence legitimate law. In his reply to his critics, Fuller rhetorically writes: "[W]e have to ask, in other words, *to what end* is law so defined that it cannot 'exist' without some minimum respect for the principles of legality?" L. FULLER, THE MORALITY OF LAW 198 (rev. ed. 1969) [hereinafter cited as FULLER (rev. ed.)].

14. FULLER, *supra* note 7, at 96. Again, rhetorically, Fuller asks and answers his critics: "Do the principles expounded in my second chapter represent some variety of natural law? The answer is an emphatic, though qualified, yes." *Id.*

15. *Id.* at 96-97. Fuller urges his notion of procedural natural law as distinguished from substantive law, a bifurcation that Rawls accepts:

> [W]e may speak of a procedural, as distinguished from a substantive natural law. What I have called the internal morality of law is in this sense a procedural version of natural law, though to avoid misunderstanding, the word 'procedural' should be assigned a special and expanded sense so that it would include, for example, a substantive accord between official action and enacted law. The term 'procedural' is, however, broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be.

Id. While Fuller demonstrates that the notion of procedural justice follows in the natural law tradition, he does not demonstrate that the separation of procedure and substance is a proper separation except for analytic purposes. The maintenance unity of law in both substance and procedure seems required for its legitimacy in the natural law tradition.

16. *Id.* at 153. Fuller reiterates this point in his reply to his critics when he faults them for their rejection of the premise that procedural justice will give rise to substantive justice; he critically notes his "critic's rejection of the suggestion that governmental respect for the internal morality of law will generally be conducive toward a respect for what may be called the substantive or external morality of law." FULLER (rev. ed.), *supra* note 13, at 223-24. *See also* Fuller, *A Reply to Professors Cohen and Dworkin*, 10 VILL. L. REV. 655, 661-66 (1965).

made known and "observed in practice" by the adjudicators of disputes arising under them. While these procedural demands may appear "ethically neutral" as regards the substantive ends of law, they are a precondition for "good law" and these procedural preconditions are necessary for a "meaningful appraisal" of the substantive justice of law.[17] It is by the public articulation of rules and their justification that authority is limited and justice occasioned, so that, while the demand that rules of law be intelligible seems "neutral toward the substantive aims" of law, Fuller asserts it limits the permissible aims due to the consequential check of rationality which is satisfied by an acceptable articulation of rule and reason.[18]

For Fuller, articulation of the substantive aims and values of law is not necessary since the procedural requirements of law insure its morality. For J.R. Lucas, the identification of the procedural requirements of law must suffice since it is impossible to gain assent to substantive concepts of justice or value. Lucas argues that the rule of law must be conceived of as procedure since only a procedure can be defined in a way that will produce social agreement, and to be sufficiently clear to everyone so that it is beyond argument that an abuse of power has or has not taken place; alternatively, questions of substance rather than of form do not lead to antecedent agreement nor can they be formulated as general laws which will unambiguously cover all cases.[19] Law, according to Lucas, occurs as a consequence

17. FULLER, *supra* note 7, at 157. Fuller has gone beyond the formulation of procedural justice as a precondition to substantive justice, to urge that the existence of a procedurally just legal system is a precondition of moral action itself:

> Moral principles cannot function in a social vacuum or in a war of all against all. To live the good life requires something more than good intentions, even if they are generally shared; it requires the support of firm base lines for human interaction, something that—in a modern society at least—only a sound legal system can supply.

FULLER (rev. ed.), *supra* note 13, at 205.

18. FULLER, *supra* note 7, at 159. Fuller supposes that the legislator and judge will operate on rational principles; this he admits presupposes a certain view of man in general. "To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults." *Id.* at 162.

19. LUCAS, *supra* note 7, at 106. Lucas' conclusion follows from the writings of Thomas Hobbes whose doctrine of the subjectivity of values has become a major premise of liberal thought. The only resolution of value disputes, according to Hobbes, is subjugation or domination; Hobbes wrote: "Of all *discourse* governed by desire of knowledge there is at last an *end,* either by attaining or by giving

of vesting authority in individuals and as a result of a need to secure effective control of coercive power by creating checks on its exercise. The rule of law becomes "a restriction on how the authorities may reach a decision and what they may authorise."[20] By requiring promulgation of decisions, the authorities are subjected to rational criticism which in turn restricts the ways in which they may reach decisions. The rule of law is meant not to secure absolute justice but to minimize the effectuation of injustice and it does this by "general rules of procedure designed to prevent certain sorts of injustice . . . in individual cases."[21] Lucas sets out a series of procedural requirements which provide the basis of the rule of law; these include the principle that no man shall be judge in his own cause; that both sides of any case shall be considered; that full consideration be given to all cases; that irrelevant considerations shall be excluded from consideration; that like cases shall be decided alike; that cases finally settled shall not be reopened; that justice shall be done and shall appear to be done; that every judgment will be justified by stated reasons.[22]

Nevertheless, for all his broad enumeration of procedural require-

over." T. HOBBES, LEVIATHAN—PARTS ONE AND TWO 61 (H. Schneider ed. 1958).

20. LUCAS, *supra* note 7, at 107. The test of law, according to Lucas, is its ability to withstand rational criticism:

> [D]ecisions are open to rational assessment and criticism, by subjects as well as by themselves, upon the basis of *human rationality* and *shared values* that are the prerequisites of any community's existing. The Rule of Law restricts the way in which the authorities reach decisions and what they actually authorise in order that their decisions shall not be justly liable to unfavourable criticism.

Id. at 107 (emphasis added). It is interesting to note that the standard of criticism itself depends on a common human nature and shared values which Lucas initially concludes cannot be satisfactorily established. *See* text accompanying note 19 *supra*. This contradiction is the crux of the fallacy of analytic legal positivism; it denies the existence of a basis for the establishment of substantive justice and then calls upon these values as a standard of criticism of the legal system.

21. LUCAS, *supra* note 7, at 130. Lucas reflects the liberal bias against the use of power and hence focuses on the limiting of injustice rather than the attainment of justice; he writes that "we adopt a negative approach, and lay down procedures to avoid certain likely forms of injustice, rather than aspire to all forms of Justice." *Id.* This attitude is reflected in the contemporary emphasis on "criminal procedure" rather than the substantive justice of the criminal law itself. We are more comfortable asking whether a defendant was afforded "due process" than with the question of whether his conduct is properly considered an offense.

22. *Id.* at 130.

ments, Lucas hedges more than Fuller with his notions of rationality and man's aspiration. For Lucas notes the importance of value in legal rule or decision-making, yet he stops short of articulating any useful approach to identifying the value system which would give legitimacy to law. Instead, he asserts that some broad humanistic concern operates to limit those exercising legal authority: "[T]he Rule of Law is expressed in certain vague principles—Freedom, Justice, Humanity."[23] While admitting that these principles do not determine exactly what is, or is not, to be decided in particular cases, they are guidelines rather than rigid rules; nevertheless, since those exercising authority are to act rationally, they should obtain guidance from these general principles, and if they fail to, they can be criticized by other rational persons for the failure to do so.[24] In the end, for Lucas, the rule of law is the legal process with the procedural check of promulgation and articulated and reasoned decision-making; Lucas cites the separation of powers,[25] responsible decision-making involving a reasoned explanation for decision,[26] and the generality of rules[27] as the essence of the rule of law.

Hart, Fuller, and Lucas share the view that the essence of the rule of law is the legal process with procedural safeguards with reasoned and articulated decisions by legal authorities. This view of the rule of law is embraced by Rawls who views law as a system of rules conforming to the procedural requirements which give it form and are divorced from substantive content.

II. RAWLS' VIEW OF "THE RULE OF LAW"

The rule of law is treated in Section 38 of *A Theory of Justice* where the conception of formal justice is held to require the regular

23. *Id.* at 110. While Lucas admits to the vagueness of these principles, he argues that they, coupled with his postulate of rationality of authorities, will lead to justice in a limited realm. *Id.* at 111. "[J]ust as in Process of Law, we elaborated stringent controls over the power to coerce, so the Rule of Law fences about the authority to authorise coercion by rigid limitations, as well as many rules of procedure." *Id.* at 111. *See also* E. LEVI, THE CRISIS IN THE NATURE OF LAW 22 (1970): "Law carries the burden, even, or perhaps, particularly in a time of social welfare, of appearing on the whole as a restraining force, thus a negative influence in a world which admires positive action."

24. LUCAS, *supra* note 7, at 111.

25. *Id.* at 112.

26. *Id.* at 118.

27. *Id.* at 124.

and impartial administration of public rules which then is the rule of law which guides and gives form to the system.[28] It is clear from the start that by the rule of law, Rawls means the procedural requirement which is the essence of the idea of law being expounded and that, in turn, the nature and existence of law is considered to be separate from any substantive content. The initial suggestion is that law is the impartial administration of legal rules which requires application of the appropriate legal rule and its correct interpretation.[29] Legal rules themselves are distinguished from other rules by the comprehensiveness of the general rules of law and the regulative or coercive power of the legal authority.[30]

For Rawls, then, the rule of law is based on the adherence to a system of procedural rules and "these maxims follow from an ideal notion which laws are expected to approximate."[31] Rawls then proceeds to identify those procedural precepts which should characterize the enactment of law and which create the rule of law; these are that laws be reasonable, that they be enacted in good faith, that there be public acceptance that laws are properly enacted and that their subject matter is proper, and that there be recognition of a defense of impossibility or of mitigating circumstances.[32] These initial procedural precepts are required in the legislative or enactment activity; a second series of procedural safeguards are set out as limits on judicial or rule application activity. This second set of procedural requirements includes the following prescriptions: that similar cases be treated similarly, that criteria of similarity be set out by the legal

28. RAWLS, *supra* note 2, at 235.

29. *Id.* The regularity of law is important to Rawls as a foundation for social institutions since this "establish[es] a basis for legitimate expectations." *Id.* But clearly justice requires more than regularity and satisfaction of expectations; it requires a regularity which is a pattern of substantive justice and reasonable expectation.

30. *Id.* at 236. Rawls, here, conforms with the views of H.L.A. Hart. Hart writes:

> It is of course true that there are rules of many different types, not only in the obvious sense that besides legal rules there are rules of etiquette and of language, rules of games and clubs, but in the less obvious sense that even within any one of these spheres, what are called rules may originate in different ways and may have very different relationships to the conduct with which they are concerned.

HART, *supra* note 7, at 8.

31. RAWLS, *supra* note 2, at 236.

32. *Id.* at 237.

rules, that distinctions be justified, that there be consistency in decisions, that there be no offense without a previously promulgated law, that criminal laws be strictly construed and have only prospective application.[33] The important thing to note, however, is not the content of the procedural rules but the significance which Rawls places on procedural rules. Rawls comments that: "These requirements are implicit in the notion of regulating behavior by public rules."[34]

While it might appear that Rawls is simply saying that any legal system by its very nature must conform to such procedural requirements, he is, in fact, going beyond this to suggest that the existence of the procedural rules are the necessary and sufficient condition of the rule of law. He proceeds to describe the procedural requirements in the deciding of individual cases and characterizes these as "precepts defining the notion of natural justice" which he maintains are the "guidelines intended to preserve the integrity of the judicial process."[35] It becomes clear that the integrity of the judicial process is not to be evaluated in terms of substantive justice or value, but in terms of adherence to procedural requirements such as provision of orderly trials, rational rules of evidence, an independent and impartial judiciary, and fair and open trials.[36] The importance of the procedural rules is the maintenance of the integrity of the judicial process which promotes the stability of social cooperation.[37] The purpose of law is to overcome social instability and this is done

33. *Id.* at 237-38.

34. *Id.* at 238.

35. *Id.* Rawls writes: "[T]hese precepts guarantee only the impartial and regular administration of rules . . . . They impose rather weak constraints on the basic structure, but ones that are not by any means negligible." *Id.* at 236.

36. *Id.* at 238-39.

37. *Id.* at 239-40. The argument seems to be that procedural integrity produces legal legitimacy which results in social stability. It is quite doubtful that procedural regularity in itself contributes to anything more than the maintenance of the status quo. In itself such regularity confers no legitimacy on the legal system. Moreover, this argument of Rawls completely overlooks the function of the legal system in facilitating social change which may itself require departures from procedural regularity. In the latter instance, standards of judgment for making permissible discriminations are what require elaboration. Rawls admits the need for such departures from procedural regularity but fails to elucidate the basis for such departures. He writes that "we may be forced to allow certain breaches of its precepts if we are to mitigate the loss of freedom from social evils that cannot be removed, and to aim for the least injustice that conditions allow." *Id.* at 243.

through adherence to a system of procedures applying general rules universally and impartially.

Yet, Rawls must be dissatisfied with such a limited notion of the meaning of the rule of law; in fact, a dissatisfaction is evidenced in his acknowledgement that "a common understanding of justice as fairness makes a constitutional democracy" and "that the basic liberties of a democratic regime are most firmly secured by this conception of justice."[38] This observation suggests that law as a social institution must be firmly rooted in the substantive notion of justice and a commonly understood system of values if it is to be a significant force in the realization of the social community. Adherence to a system of procedural precepts divorced from substantive content becomes a pro forma exercise by social functionaries. Rawls writes that the "subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation."[39] Yet, when Rawls writes of law as one of the major social institutions, he says that "the law defines the basic structure within which the pursuit of all other activities takes place."[40] When we examine the nature of the rule of law, we find a system of procedural precepts divorced from notions of substantive justice or value. As one commentator has suggested, for law to provide the basic structure of society, it must provide fundamental norms and express the positive content of personal liberty.[41] Nevertheless, for Rawls, the rule of law and its system of sanctions represent a loss of liberty and can be justified only by a gain in social stability outweighing the loss of liberty.[42] However, if the legal system provides the basic structure which through refinement can accommodate all of social life, then all activities can be placed under some rule of the system which reflects the particular needs and characteristics

38. *Id.* at 243.

39. *Id.* at 7.

40. *Id.* at 236.

41. Bentley, *John Rawls: A Theory of Justice*, 121 U. PA. L. REV. 1070, 1076-77 (1973) [hereinafter cited as Bentley]. Bentley concludes: "[T]he law comes a bad second in comparison to other factors that necessarily determine this quality of institutions, though there is a whole possible area of study which could trace in given cases just how bad." *Id.* at 1077.

42. RAWLS, *supra* note 2, at 240-41.

of the activity, and liberty is no longer compromised by the presence of rules.[43] And, as has been suggested:

> [A]ny serious account of the basic structure of a society would presumably take that for granted and would be concerned with the actual norms, whether legal or not, according to which activity is in practice directed, and additionally, where the norms are legal, with the function of the norms as distinct from their content.[44]

A complete account of law as an institution providing the fundamental social structure cannot be content with an account of the procedural precepts required of a legal system but must also provide an account of the substantive content of justice and value which is required for a legal system to provide the rule of law. The compelling requirement of the rule of law is the "connection between the legal and the moral" and this connection is absent in Rawls' account of "the rule of law."

III. "THE RULE OF LAW" AND THE NEED FOR A THEORY OF SUBSTANTIVE VALUE

The failure of legal positivism lies in its lack of connection between the basic structure of a legal system and the requirement of substantive justice and morality. The belief of some that a system of procedural safeguards provides a basis for guaranteeing the morality of legal norms is mistaken. The procedural requirements set out by Rawls and his legal positivist antecedents are applicable to any system of official rules regardless of the ultimate values held or objectives sought by the members of the society which exist under it. Wolfgang Friedmann reported that the German Nazi state, at the height of its effectiveness, complied, for instance, with all eight of Fuller's requirements with the possible exception of promulgation.[45]

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43. Bentley, *supra* note 41, at 1077.

44. *Id.* at 1077. *See also* Tribe, *Policy Science: Analysis or Ideology?*, 2 PHILOSOPHY AND PUBLIC AFFAIRS 66, 81 (1972) [hereinafter cited as Tribe]: "Procedural requirements *as such* could not be chosen *for their own sake* by rational, purely self-interested persons (without prior moral conceptions) in Rawls' original position."

45. W. FRIEDMANN, LEGAL THEORY 19 (5th ed. 1967) [hereinafter cited as FRIEDMANN]. Friedmann observed that: "It is difficult to see in what respect these eight requirements do more than spell out the minimum components of an efficiently functioning modern legal system. As such they are applicable to any legal system, regardless of ideology, whether totalitarian or democratic." *Id.* at 18. This criticism equally applies to Rawls' list of procedural requirements of "the rule of law." *See* text accompanying notes 32-34 *supra.*

Friedmann writes that the Nazi extermination decrees are examples of " 'orderly' and systematic brutality" which have led some to conclude that the Nazi legal system was not a valid legal system since it was "incompatible with basic principles of humanity."[46]

Advocates of the legal positivist position shared by Rawls, however, must admit that the Nazi legal system satisfied their requirement for valid rule of law: it was a legal system involving general rules, "insofar as they applied to a . . . large" and "clearly definable class of victims"; "the rules were made known . . . with cynical brutality"; the rules "were prospective, clear, and free from contradictions"; and they were fully placed into practice.[47] Moreover, there was a "congruence between the law and official action, because the exterminations took place within a hierarchic structure derived from the supreme legislative authority of the *Fuehrer*."[48] The only challenge to the Nazi laws that is compelling is that they were not laws because in their essence they contradicted the values implicit in the idea of humanity and civilization; certainly, it is not enough to criticize these laws for abridging "principles of good craftsmanship" as does H.L.A. Hart,[49] nor because they lack a display of "structural constancies" as does Lon Fuller.[50] The late Wolfgang Friedmann indicated the proper concern in the study of the rule of law when he suggested that while procedural requirements are necessary in any legal system, it is, however, only in the relation of the legal system to the basic values of civilization that one can consider the rule of law. Friedmann summarized this view when he wrote that the "structural requirements of a legal system" are of course as central to "natural law philosophy" as they are to analytical positivism, but it also remains the case that "only by a consideration of the related but distinct concepts of 'Justice,' 'Ethics,' and 'Morality'

46. FRIEDMANN, *supra* note 45, at 19.

47. *Id.*

48. *Id.* Friedmann concluded that the only way to avoid the brutality of the decrees of the Nazi state is to conclude that they were not laws: "It is only by means of a *petitio principii*, namely that barbarous 'laws' should not be qualified as such, that we can circumvent this conclusion [of congruence between the law and official action]." *Id.*

49. *Id.* at 19, *citing* Hart, Book Review, 78 HARV. L. REV. 1284 (1965).

50. *Id.* at 19-20, *citing* FULLER, *supra* note 7, at 145-51.

that we can elucidate the relation of the legal order to the values of life."[51]

John Rawls separates the consideration of the basic values and conditions of life from what he considers the rule of law. Placing individuals in the "original position" (the situation of men abstracted from their position in society and their concrete material conditions) where rationality, self-interestedness, and mutual disinterestedness results in the choice of two basic principles which without any elucidation of substantive criteria for choice ultimately ends in the development of criteria for the realization of selfish interests; Rawls sets out the two basic principles of his system as:

> First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.
>
> Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.[52]

Rawls' theory calls for equality without specifying what characteristics of personality of the social order are properly the subject matter of his strictures on distribution. Rawls then has the members of society forming a constitutional convention which results in the establishment of a representative legislature and of administrative offices to apply the general laws that have been agreed upon. The rule of law then is established and it is characterized by the procedural requirements which have been described above. It is important to see that while a theoretical device is opened for the recognition of basic human values and their establishment in law, their content is not specified while, on the other hand, the specific procedural requirements of the legal system are set out in detail. It is, however, only in the specification of the essential substantive content of law that we can establish criteria for the just rule of law and provide criteria for judges to decide cases and for legislatures to choose content of statutes. A system of legal procedure cannot give direction to legal decision-making for it fails to indicate the values that are to realized in that basic social institution: the law.

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51. *Id.* at 20-21.

52. RAWLS, *supra* note 2, at 60. *See also* Tribe, *supra* note 44, at 80:

> [A]lthough Rawls argues that a "distribution cannot be judged in isolation from the system of which it is the outcome," his procedural method of defining a just *system*—by asking what system would be chosen by rational,

IV. PATHS TO A SUBSTANTIVE THEORY OF VALUE IN LAW

John Wild in one of the more important, yet neglected, works for those concerned with substantive justice, *Plato's Modern Enemies and the Theory of Natural Law*, suggested that "there are norms grounded on the inescapable pattern of existence itself."[53] Wild employs a method which he calls "justification" in place of the analytic reasoning of the positivists; his method seeks to develop a framework which will provide for justice and order in the context of a legal system. Wild's thesis is that moral values are based on fact: "value and existence are closely intertwined with one another" and existence itself is to be regarded as valuable and good.[54] This is a manifestation of longing for a unity of form and substance which pervades Western philosophical thought.[55] Wild suggests that the needs of human life are shared by all reflective men so that "a deliberative proc-

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self-interested persons knowing only the most general facts about the world but nothing about their own personal characteristics or values—leads quite naturally to a scheme described by each person wholly in terms of its ultimate distribution of liberties and goods.

53. J. WILD, PLATO'S MODERN ENEMIES AND THE THEORY OF NATURAL LAW 107 (1953). The notion of natural law developed here is not one of immutable principles but characteristics of human nature evolving in history.

> [R]ealistic philosophy has employed the term nature (Φ v δ L s), meaning growth or change, to refer to this normative order which is manifested in the acts of changing things. This order has many distinguishable aspects adapted to one another by the peculiar normative relation of fitness. The good is always ontologically proper or fitting, what is owed to a thing in virtue of its tendential structure.

Id. See also J. WILD, PLATO'S THEORY OF MAN: AN INTRODUCTION TO THE REALISTIC PHILOSOPHY OF CULTURE (1946), an earlier work where the author observes:

> [T]he state must be wisely planned. Such a plan can be formulated only in the light of what is finally valuable and a correct determination of the general aim of life. This involves an understanding of man and the nature of the world in which he lives (philosophy and the sciences), together with a grasp of the peculiar nature and history of the particular people for whom the plan is being devised.

Id. at 101.

54. WILD, PLATO'S MODERN ENEMIES AND THE THEORY OF NATURAL LAW 64 (1953).

55. *See, e.g.*, G. SANTAYANA, DOMINATIONS AND POWERS 10 (1951), where the close connection between form and substance is asserted:

> It is therefore the tightness with which any particular form of hereditary trope has seized upon some nucleus of matter, and the luxuriance with which that form can extend its tentacles into the surrounding multitude of variable influences, that determines the *virtue* of that incarnate spirit and the degree to which its dominion may be extended and its en-

ess must not only express the factual existence of a human need but must also be felt as an active tendency in the reflective agent himself."[56] These values are not individual nor ultimately subjective but are "common to man" so that "the deductions from them are binding on any human being no matter what his special appetites and circumstances may be."[57] Wild is led to the conclusion that we can discover human needs by reflection and that the fulfillment of these tendencies are values which we verify by observing their need and desire in the community: "Human value is the universal apprehension of a dynamic tendency as realized."[58]

Wild argued that anyone reflecting "on the nature of law and its foundations" must be led to conclude that there is a serious inadequacy of "positivistic legal theory which denies any natural foundation for prescriptive principles and reduces all law to the level of subjective, human decree"; this conclusion, in turn, led to a situation which Wild observed, that in "many law schools an interest in moral realism and natural law is being revived" as a result of a search for a grounding of value in law.[59] This search for a basis of value in law is not an effort simply to reinstate the tenets of classical philosophy, but an effort to establish a method of identification and justification of substantive value in the context of contemporary life. The view Wild put forth sought to avoid characterizing "value and dis-

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thusiasm aroused not only for the triumphs of its bearer in society but for the spiritual or poetic affinities which it may have discovered in the ideal world.

56. WILD, PLATO'S MODERN ENEMIES AND THE THEORY OF NATURAL LAW 229 (1953).

57. *Id.* *See also* J. WILD, INTRODUCTION TO REALISTIC PHILOSOPHY 470 (1948), where Wild describes the process of human understanding as one which by its nature can overcome the simple notion of subjectivity of desires which would otherwise obscure any determination of human nature:

> In man there are three cognitive faculties capable of determining our basic natural appetition in three basic modes of elicited desire. First, there are sense, imagination, and the mode of calculation which takes these as its standard. Second, there is the instinctive estimative faculty, and the mode of calculation which takes this as its standard. Finally, there is the rational faculty which alone, as practical reason can properly specify the ultimate good for man, the necessary means to this ultimate good, and finally the contingent means.

Id. at 470.

58. WILD, PLATO'S MODERN ENEMIES AND THE THEORY OF NATURAL LAW 223 (1953).

59. Wild, *Natural Law and Modern Ethical Theory*, 63 ETHICS 1, 12 (1952).

value as determinate *properties*" and to escape the notion that "ethical terms name simple, indefinable, nonnatural properties"; rather, what Wild termed the realistic view identified "value not with existence but rather with the fulfillment of tendencies determined by the structure of the existent entity."[60] In evaluating statements of value, Wild set out a two-step procedure of identification and compulsion: "Obligation is a peculiar datum of human experience which includes a factor of apprehension, together with a subjective feeling of urgent tendency toward what is apprehended."[61] Wild moved on to set out a method of justification of substantive value which requires both subjective and objective validation:

> [J]ustification is in some sense a logical process. If one of my subjective tendencies or acts is to be justified, I must discover some universal evaluational premise based upon facts open to observation, under which I can subsume my tendency or act. Two things about such a premise need to be especially emphasized. In the first place, it must be a universal principle evident to any unbiased observer. Unless I can explain my act to such an observer, I am not justified. In the second place, this principle must be relevant to my own subjective tendencies. Otherwise it could not subsume my act or have any binding power over me.[62]

The functioning of this test requires a common human nature: "The factual needs which underlie the whole procedure are common to man. The values founded on them are universal."[63] The search

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60. *Id.* at 3-4.

61. *Id.* at 5. Wild's assertion is that a valid moral value or judgment gives rise to the obligation to achieve its realization, and the problem with which he seeks to grapple is the validation of this obligation which is the same problem as the legitimization of substantive value and, hence, the legitimization of the rule of law itself; Wild describes his answer to the problem in the following terms:

> Obligation is a peculiar datum of human experience which includes a factor of apprehension, together with a subjective feeling of urgent tendency toward what is apprehended. Both factors are required, each in union with the other. An unconscious compulsion is not an obligation. On the other hand, no judgment as such, even though it is concerned with the most lofty and appealing values, can establish an obligation unless it calls forth a peculiar feeling of oughtness and binds or obliges us to act.

Id.

62. *Id.* at 11.

63. *Id.* at 12. The universal character of the values implicit give rise to the universal values realized in legitimate law. *See* WILD, PLATO'S MODERN ENEMIES AND THE THEORY OF NATURAL LAW 169 (1953):

> Natural Law is abstract and universal. It always requires further positive determinations relative to the particular circumstances. Such positive law is variable. It may, of course, be contrary to natural law. This is always vicious, and punished by natural sanctions.

for conditions under which a common human nature will be manifested, of course, requires the experience of freedom, equality, and integrity which may lead to the objection that this method of "realism" is not functional in the world of actual experience. This is, of course, true if one seeks a complete manifestation of humanity at any historical time; yet we can with some confidence assent to minimal manifestations of the common human experience in the substantive content to which we can obtain general consent. The formulation of intellectual freedoms set out in the limited state's constitution provides one example of value which has become a universal human aspiration. Wild, himself, concluded that "[t]he realistic doctrine of natural law has received its most recent, and in certain ways its most adequate, political formulation in the recent *United Nations Declaration of Human Rights.*"[64] Nevertheless, it is not the enumeration of rights or liberties which is of the most significance to the development of a substantive value theory of law, but it is in the method of inspection and validation, that one can locate the basis for a dynamic theory of substantive value which will serve as a basis for the rule of law.

Roberto Unger of the Harvard Law School has developed a critical theory of liberal democracy and the positivistic theory of law which leads him to the conclusion that the premise of liberalism and positivism and the political condition under which they are practiced make it impossible to develop a substantive theory of value and hence impossible to justify the rule of law.[65] Unger states that his

64. Wild, *Natural Law and Modern Ethical Theory*, 63 ETHICS 1, 12 (1952). The *United Nations Charter* declares that the purposes of the organization include cooperation "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." ART. I. The *Charter* itself does not define in precise terms the meaning of the phrase "human rights and fundamental freedoms," thus the need for the *Universal Declaration of Human Rights* (adopted by the United Nations General Assembly in Paris, Dec. 10, 1948, by unanimous vote). The *Declaration* includes civil and political right (life, liberty, and the security of person; freedom from arbitrary arrest, detention, or exile; right to fair and public hearing by an impartial tribunal; freedom of thought, conscience, and religion; and freedom of peaceful assembly and association) and economic, social, and cultural right (right to social security; right to work; right to education; right to participate in the cultural life of the community; and the right to enjoy and participate in the arts and scientific achievement). *See generally* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950); P. DROST, HUMAN RIGHTS AS LEGAL RIGHTS (1951); J. GREEN, THE UNITED NATIONS AND HUMAN RIGHTS (1956).

65. R. Unger, Knowledge and Politics, 1973 (unpublished manuscript in Harvard Law School Library) [hereinafter cited as Unger]. Unger states the principal

"thesis is that there can be no coherent, adequate doctrine of legislation or adjudication on liberal premises."[66] For the rule of law to effectively provide a "means of order," it must produce allegiance which requires that it be capable of justification; justification would show that the law was fair by demonstrating that "no man's freedom is set without reason above another's, and each man is allowed the maximum freedom compatible with the prohibition of arbitrary preference."[67] Three theories of freedom in the liberal tradition are set out by Unger and subjected to criticism: a theory of formal freedom, a theory of self-interest, and a substantive theory of freedom.[68] The theory of formal freedom is exemplified by Kant's Categorical Imperative;[69] this proposition in abstract form provides no basis for deriving specific rules; on the other hand, as concrete regulations are formulated one must make subjective value choices which the formal rule was formulated to avoid.[70] The theory of self-interest exemplified by the theories of the utilitarians[71] supports a "procedure for

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element of his argument in the following terms:

> I shall argue that [liberalism] cannot solve the very problems of freedom and public order which it thinks so fundamental. Then, I shall look for the source of this failure in an inability to arrive at a coherent understanding of the relations between rules and values in social life. Without such an understanding, however, no adequate view of society is possible. Finally, I shall discuss the idea of sharing of values as an attempt to solve the problems of liberal political thought . . . .

Id. at 114.

66. *Id.* at 151. Unger begins with the premise that formulation of rules and application of rules are central to liberal theory since its premise is that: "Society, as it appears to the liberal, is held together by rules." *Id.* at 152. To accept rules as legitimate, one must show conformity to acceptable criteria.

> If one knew to what standards the laws would have to conform so as not to prefer arbitrarily one man's advantage to another's (freedom), one would also be able to determine how best to restrain antagonism in society in the interest of collaboration (order).

Id. at 152. But liberalism posits the subjectivity of values which makes the formulation of such a standard impossible.

67. *Id.* at 152-53.

68. *Id.* at 154-61.

69. The Categorical Imperative stated in its most general form provides that one should: "Act only according to that maxim by which you can at the same time will that it should become a universal law." I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 39 (L. Beck transl. 1959). *See* note 92 *infra.*

70. Unger, *supra* note 65, at 155.

71. *See* J.S. MILL, *Utilitarianism* in THE PHILOSOPHY OF JOHN STUART MILL 336 (M. Cohen ed. 1961):

> According to the Greatest-Happiness Principle . . . the ultimate end . . .

law-making" which is combinative of individual interest and which provides a conclusion to which all persons could subscribe on the basis of an "intelligent understanding of what" is required to achieve their individual and subjective goals.[72] Unger maintains that a second formulation of this theory of self-interest in fact provides the basis for the work of John Rawls: "According to the second form, we subscribe in self-interest to procedures for making laws and settling disputes rather than for a concrete plan of social organization."[73] Unger's criticism of the substantive theory of freedom consists chiefly in his assertion of its failure to provide a neutral evaluation of "individual and subjective values"; in the first form, one needs a standard to choose among alternative combinations of values, and the second requires the development of a procedure agreeable to all persons no matter what their value system:

> The more indeterminate the procedure in specifying particular laws, the less would anyone find reason to object to it. But, then, the problem of legislation would simply be postponed. On the other hand, the more specific the procedure, the less would it be likely to benefit equally everyone's wants.[74]

> is an existence exempt as far as possible from pain, and as rich as possible in enjoyments . . . . [T]he end of human action, is necessarily also the standard of morality: which may accordingly be defined, the rules and precepts for human conduct, by the observance of which an existence such as has been described might be, to the greatest extent possible, secured to all mankind; and not them only, but, so far as the nature of things admits, to the whole sentient creation.

72. Unger, *supra* note 65, at 155. Unger presents his central criticism of utilitarianism in the following terms:

> [T]he problem is to find a standpoint outside the subjective values of individuals from which to decide what combination of those values should be favored by the laws. Which of the infinite number of ends will be added up and what weight will be given to each? Such a neutral, Archimedean point, however, would be precisely the objective good whose nonexistence drove us into the attempt to devise a liberal doctrine of legislation.

Id. at 156-57.

73. *Id.* at 156. *See also* Tribe, *supra* note 44, at 82:

> Early notion of law as the objective expression of transcendent reason, successfully attacked by legal realism and sociological jurisprudence, have been re-formed into less mechanical, but no less rationalist, theories of law as process—but as process typically justified either in purely formal, positivist terms or in terms of supposed tendency to maximize aggregate satisfaction in the end, rather in terms intrinsic to the process itself in its constitutive function of defining substantive human roles, right, and relationships and structuring their evolution over time. Paradoxically enough, therefore, proceduralism in legal thought has served largely as an "economic" vehicle of concern for end-result maximization.

74. Unger, *supra* note 65, at 156-57.

The problem here, in Unger's terms, is the "impossibility of reconciling the needs for concreteness and neutrality in the theory of legislation" which is simply a manifestation of the liberal dilemma of the belief in the subjective value and the existence of a continuing need to formulate rules.[75]

A substantive theory of value "appeals to the idea of shared values as the basis for lawmaking,"[76] and this basically describes the theory of John Wild which has been set out above.[77] Unger acknowledges that in a viable society "there is a core of widely shared values on which either lawmaking itself or the choice of procedures for lawmaking can be based."[78] The formulation of legal rules or procedures "with such a foundation are not arbitrary preferences for certain ends; they are the embodiment of the common ends."[79] Unger

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75. *Id.* at 159.

76. *Id.* Unger states the fundamental principle of a theory of shared values in the following terms:

> It appeals to the idea of shared values as the basis for lawmaking. In each well-organized society there is a core of widely shared values on which either lawmaking itself or the choice of procedures for lawmaking can be based. Laws or procedures with such a foundation are not arbitrary preferences for certain ends; they are the embodiment of the common ends. The shared values do more than serve as a source of legislation. They also work beyond the limits of formal rules as a fundamental tie among men.

Id.

77. *See* text accompanying notes 53-63 *supra.*

78. Unger, *supra* note 65, at 159.

79. *Id.* Earlier in his manuscript, Unger describes what he means by the subjectivity of value and its significance for liberal thought:

> Ends are viewed by liberal theory as individual in the sense that they are always the objectives of particular individuals. By contrast, values are called communal when they are understood as the goals of groups, and of individuals only to the extent that the individuals are members of those groups. The political doctrine of liberalism does not acknowledge communal values . . . . The individuality of values is the very basis of personal identity in liberal thought, a basis which the communal conception of values destroys.

Id. at 138-39. It is Rawls' objective, in justice as fairness, to produce a system which would allow for the existence of subjective values expressed in choice but subject to the constraints of the original position of equal liberty. *See* RAWLS, *supra* note 2, at 12-14, where the limitation of his theory in terms of shared procedures with the retention of individualistic values or choices of the good:

> [Those in the original position] are to presume that even their spiritual aims may be opposed . . . . [T]he concept of rationality must be interpreted as far as possible in the narrow sense, standard in economic theory, of taking the most effective means to given ends . . . . [O]ne must try to avoid introducing into it any controversial ethical elements.

notes that such a theory denies the subjectivity of values which in part is at the core of liberal thought; yet his uneasiness with the theory of shared values stems not from any adherence to liberalism but from his conviction that existent forms of social organization preclude the discovery of shared values and inhibit action based on any statement of shared values. Nevertheless, Unger admits that of all the theories of value in liberal political theory, the notion of shared values "surpasses the others in the richness of its implications."[80]

Shared values, it must be acknowledged, could provide a basis for a system of substantive justice in the rule of law: "[E]very decision would be judged according to its capacity to promote the common ends . . . . [T]he shared values would be the neutral source of the policy judgments which purposive theories of adjudication must bring into play."[81] Unger admits to the notion that agreement at a certain general level will have ramifications in more particular and concrete situations; "[r]ules and the acts by which they are applied to particular situations can then be viewed as the working out of a common vision of the world, based on agreed upon values."[82]

Unger's criticism of the theory of shared values arises from his assertion that they must be either "a coincidence of individual preferences" remaining individual and subjective or they must be "group values" neither individual nor subjective.[83] The first formulation leads him to the conclusion that such a sharing is merely a precarious alliance with no expectation of stability and no greater justification than the individual choices which they represent.[84] The alternative of group values requires abandonment of the individuality of liberalism and the formulation of a system of communal values; this would require a conviction that "a man's choices express his nature, that common choices maintained over time and capable of winning even greater adherence reflect a common human nature, and that the flourishing of such a nature is the true basis of moral and

80. Unger, *supra* note 65, at 185.

81. *Id.*

82. *Id.* at 186.

83. *Id.* at 187.

84. *Id.* Unger's point is that "There is no reason in such a system of thought to expect that these convergences of interest will be stable, nor to bestow upon them an authority any greater than that of the individual choices which produced them." *Id.*

political judgment."[85] For such a human nature to achieve expression, Unger concludes, requires a political transformation of society so that "domination" of individuals would be eroded and an "organic group" would develop through which individuals could become complete human beings.[86]

Still, the problem of choice and justification of the content of legal rules in contemporary society remains. One can argue that to await the realization of the "organic group" is to postpone decision until the coming of Utopia. Nevertheless, while distortion due to domination and a certain precariousness follows from the nature of pluralistic consensus, it can be argued that one seeks no final classification of values nor a complete compendium of the elements of human nature. Rather what is sought is a method for the contextual elucidation of substantive value that can provide a basis for the content of rules and for the decisions in individual cases. Three characteristics of the general values to be elucidated should give some direction to choice and decision; these are a commitment to a system of shared values which conform to standards of aspiration, generality, and excellence.

Two main difficulties with a theory of shared values seem evident. One is that they will simply be the articulation of class, economic, or political interests of those situated to make legislative and judicial choices;[87] a second difficulty is that they will constitute an agreement which is no more than a manifestation of the lowest level of social consensus.[88] The criteria of *aspiration, generality,* and *excellence*

85. *Id.* at 188-89.

86. *Id.* at 189. *See generally Id.* at 410-91.

87. *See* B. CARDOZO, THE NATURE AND FUNCTIONS OF THE JUDICIAL PROCESS 167 (1921), where the point is made that the personal values and social interests of a judge must play a role in his decisions even if they are not conscious in his own thought:

> I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.

88. *See, e.g.*, Holmes, *The Path of The Law*, 10 HARV. L. REV. 457, 459 (1897):

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge

seek to avoid these twin dangers. While tolerance and sympathy and love may be the ultimate of human feelings, they do not suffice in a world of conflict and subjectivity as a basis for legal and political decision; one must resort to a more abstract formulation of value and permit it to infuse practical judgments.[89]

One certainly cannot rely simply on social consensus or simply accept means efficient as thus justified. Man is capable of aspiration both for himself and his posterity and this should be the primary standard for our substantive choice. The theologian and political moralist Reinhold Niebuhr reflected on the significance of personal idealism as providing the basis for a politics of aspiration:

> The needs of an adequate political strategy do not obviate the necessity of cultivating the strictest individual moral discipline and the most uncompromising idealism. Individuals, even when involved in their communities, will always have the opportunity of loyalty to the highest canons of personal morality . . . .[90]

The idealism which constitutes the morality of aspiration is to be viewed both as a necessity in social decisions as well as the origin of a quality of life which gives social life meaning. Niebuhr concludes:

> We live in an age in which personal moral idealism is easily accused of hypocrisy and frequently deserves it. It is an age in which honesty is possible only when it skirts the edges of cynicism. All this is rather tragic. For what the individual conscience feels when it lifts itself above the world of nature and the system of collective relationships in which the human

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enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

89. *See generally* E.M. FORSTER, TWO CHEERS FOR DEMOCRACY (1951) [hereinafter cited as FORSTER]. Forster begins his essay *What I Believe* with an invocation to the type of criteria which are being set out in the text above; he writes, at 67:

> I do not believe in Belief. But this is an age of faith, and there are so many militant creeds that, in self-defense, one has to formulate a creed of one's own. Tolerance, good temper and sympathy are no longer enough in a world which is rent by religious and racial persecution, in a world where ignorance rules, and science, who ought to have ruled, plays the subservient pimp. Tolerance, good temper and sympathy—they are what matter really, and if the human race is not to collapse they must come to the front before long. But for the moment they are not enough, their action is no stronger than a flower, battered beneath a military jack-boot. They want stiffening, even if the process coarsens them.

See generally Hermann, *Justice and Order: A Preliminary Examination of the Limits of Law*, 45 WASH. L. REV. 335, 338-39 (1970).

90. R. NIEBUHR, MORAL MAN AND IMMORAL SOCIETY 273 (1932).

> spirit remains under the power of nature, is not a luxury but a necessity of the soul . . . . [T]he most effective agents will be men who have substituted some new illusions for the abandoned ones. The most important of these illusions is that the collective life of mankind can achieve perfect justice. It is a very valuable illusion for the moment; for justice cannot be approximated if the hope of its perfect realization does not generate a sublime madness in the soul.[91]

Aspiration and idealism arising from the individual can provide a suitable basis for community consensus; it can inform the particular judgment of legal decision and it can provide a standard of measure for general enactments and the codes devised to guide conduct. Nothing less will suffice if law itself is to achieve its objective of justice; nothing more can be hoped for as long as man is in history.

Generality in legislation and disinterestedness in adjudication constitute a second category of qualities which are required in the formulation and application of standards of substantive justice. The invocation of these standards further requires that legislator and judge consider the recognition and furtherance of human dignity and personal integrity as the greatest objective of law. This, itself, involves the notion of aspiration which must infuse our understanding and attitude toward other persons whom we are required to view as manifestations of the dignity and integrity to which we ourselves aspire.[92]

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91. *Id.* at 276-77. *See also* P. KURTZ, MORAL PROBLEMS IN CONTEMPORARY SOCIETY: ESSAYS IN HUMANISTIC ETHICS (1969).

92. *See generally* The Golden Rule ("Therefore all things whatsoever ye would that men should do to you, do even so to them: for this is the law and the Prophets."), *Matthew* 7:12 (King James); The Categorical Imperative ("Act only according to that maxim by which you can at the same time will that it should become a universal law."), I. KANT FOUNDATIONS OF METAPHYSICS OF MORALS 39 (L. Beck transl. 1959).

Kant's Categorical Imperative is an attempt to characterize the kind of justification to which a rule must be subjected if it is to be morally justified; it is a test to determine if acting on a principle or value judgment would be morally permissible. Kant provides two formulations of the Categorical Imperative:

> (1) Act only according to that maxim by which you can at the same time will that it should become a universal law.
>
> . . . .
>
> (2) We must be able to will that a maxim of our action become a universal law; this . . . is the canon of the moral estimation of our action generally.

Id. at 39, 41.

The first formulation provides a description of the necessary conditions for a code of conduct to be rational morally. The second formulation is a principle which enables the individual to provide the content or value of the rule; it determines what is rational; an action or belief is moral only if it can consistently be willed to be universal. Moral action must be universal or rationally consistent; universality is

It has been suggested that the willingness to publicly advocate an action or a value will provide some assurance of one's maintenance of generality and disinterestedness:

> Moral judgments containing "ought" or "should" are practical judgments in which a man advocates acting according to the moral rules or moral ideals, i.e., doing morally right and morally good actions. They are practical judgments that a rational man will publicly advocate.[93]

To the extent that we seek a substantive theory of justice, we must elucidate those values which are imperatives to be realized in law; this requires the making of moral judgments. Moral judgments must be universal; in the law this quality is realized in conformity to general rules and disinterested decisions.

A third principle required for the development of a substantive theory of justice is excellence. There is a sense in which this is an elitist notion in a positive sense since it presumes a level of cultivation and discrimination. Justice Cardozo suggested his subscription to the notion of excellence informing judgment when he wrote of the standard to be applied to judicial decisions made in accordance with custom: "It is the customary morality of right-minded men and women which he is to enforce by his decree."[94] Cardozo went on to identify the importance of cultivation and experience for the judge himself; the judge develops his competence and acquires enlightenment "from experience and study and reflection" which requires that "[h]e must learn it for himself as he gains the sense of fitness

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deduced from the concept of rational being. Man and every man is an end in himself. The basis of the Categorical Imperative is that rational nature is an end in itself; every rational being is of absolute worth. Thus every rational being will insure in the pursuit of his own ends that he permits every other rational being the freedom to pursue his own ends.

93. B. GERT, THE MORAL RULES: A NEW RATIONAL FOUNDATION FOR MORALITY 192 (1973). Gert maintains that all moral judgments have a universal quality; he illustrates this quality of moral judgment as opposed to simple judgments or advice, at 192-93:

> [I]n making the moral judgment "You ought to do X," I am implying that I, as a rational man, publicly advocate doing X—i.e., advocate that all rational men in similar circumstances do X. This universal quality distinguishes a moral judgment containing "ought" from most nonmoral judgments containing the same words. When I tell a friend that he ought to do X, I am not committed to telling everyone in similar circumstances, if it can even be determined what similar circumstances are, that he ought to do the same thing. But if I make a moral judgment, then I am committed to making that same judgment to any man in similar circumstances.

94. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 106 (1921).

and proportion that comes with years of habitude in the practice of an art."[95] This notion rests not on the discovery of some common core of humanity which will inform judgment and reveal values to be pursued; rather it is based on the development of human faculties of perception, empathy, discrimination, and aspiration which has already been discussed. E.M. Forster, the English novelist, gave expression to this notion when he wrote:

> I believe in an aristocracy, though—if that is the right word, and if a democrat may use it. Not an aristocracy of power, based upon rank and influence, but an aristocracy of the sensitive, the considerate and the plucky. Its members are to be found in all nations and classes, and all through the ages, and there is a secret understanding between them when they meet. They represent the true human tradition, the one permanent victory of our queer race over cruelty and chaos.[96]

The cultivation and utilization of the human qualities of excellence both in judgment and sympathy provides the greatest promise of the realization of justice in contemporary society. In the exercise of these qualities form and content, substance and procedure appear only as aspects of the integrated human personality and this is the true source of the rule of law, and, hence, of a just legal system.

CONCLUSION

John Rawls has provided in *A Theory of Justice* a description of "the rule of law" which is derived from the general theory of legal positivism and which finds the essence of the rule of law to be a system of procedural justice. Legal positivism finds a minimum of justice to be guaranteed by general public rules which are judicially applied. To some positivists, justice consists in more than general rules evenly applied. For these others, legal procedures give rise to conditions under which justice is most likely to occur. Nevertheless, legal positivists are quite insistent on adherence to the proposition that there is no need, nor any possibility, of articulating substantive elements or principles of law or justice.

Rawls asserts that formal justice requires no more than the regular and impartial administration of public rules. Procedure becomes paramount and prior to the development of any substantive

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95. *Id.* at 113-14.

96. FORSTER, *supra* note 89, at 73.

content to legal rules. The procedural requirements of law according to this theory are that law be: reasonable, enacted in good faith, publicly accepted, constituted of proper subject matter, subject to a defense of mitigation. A second set of procedures for adjudication are set out and include the requirements: that like cases be treated similarly, that a criteria of similarity be set out, that distinctions be justified, that laws be promulgated before enforced, and that there be a criteria of strict construction. These procedural requirements are the necessary and sufficient conditions for law according to this account.

Law is, however, a social institution which, by its nature, must be rooted in a substantive notion of justice if it is to operate as a social force and to be accepted as legitimate. Law must provide the basic structure of society and consist of norms which reflect personal liberty and integrity. The rule of law cannot be described in simply procedural terms. It also requires the explication of substantive content and value which is essential to its existence. The failure of legal positivism and the fallacy of John Rawls' account of "the rule of law" is its failure to maintain the necessary connection between the basic structure of the legal system in its procedural framework and the requirements of substantive justice and morality. Procedural requirements do not necessarily guarantee substantive justice; a postulated law which is not grounded in a sense of humanity with a recognition of the value of the integrity of the individual and the maintenance of the community is not law but is a device of official oppression and is illegitimate.

The values or norms which must be realized in rules for them to constitute the rule of law are norms and values grounded in human existence. All reflective men share in the factual existence of humankind. The need is for a method of reflection and justification of value which should infuse legislation and adjudication. This process is in part achieved by considering subjective attitudes in light of principles open to all unbiased observers. To the extent that this process rests upon the existence of a common human nature it is open to the objection that such a condition does not exist and, even if it does, it is not open to discovery in contemporary society.

A response to the criticism of the process of verification of subjective experience by objective principles is provided in part by the notion of a community of shared values. The objective here is to provide a standard of neutral evaluation for individual and subjective values. The process is one of identifying a core of widely shared values upon which lawmaking can rest. One must ask, however, whether under existing social conditions one can talk of shared values or whether one is merely observing the imposition of class, economic, or political interests of dominant groups. Criticism of shared values follows one of two directions: shared values are either only a precarious balance of individual interest or they represent the domination of a particular social class or group. This criticism leads to the conclusion that a theory of substantive justice can only arise after a transformation of society into one characterized by equality and free expression and argument.

Nonetheless, one must face the situation of contemporary society and ask whether there are conditions under which an appeal to shared values can be made so that substantive justice can be achieved in rules which will give rise to the rule of law which will be considered legitimate. While the distortions due to domination and the precariousness of consensus due to the nature of contemporary pluralistic society plague the search for substantive justice, there exist efforts to appeal to the evolving manifestations of a common humanity and to establish a sense of community. General values can be elucidated and will operate as compelling to the extent that they represent a commitment to standards of aspiration, generality, and excellence. These standards provide a basis for the infusion of practical judgment with shared values which will permit procedure and substance to be joined in a unity which gives rise to the rule of law.